

# On the Waterfront at the Pier's Edge the Longshoremen's and Harbor Workers' Compensation Act

George P. Smith II

Follow this and additional works at: <http://scholarship.law.cornell.edu/clr>

 Part of the [Law Commons](#)

---

### Recommended Citation

George P. Smith II, *On the Waterfront at the Pier's Edge the Longshoremen's and Harbor Workers' Compensation Act*, 56 Cornell L. Rev. 114 (1970)

Available at: <http://scholarship.law.cornell.edu/clr/vol56/iss1/5>

This Article is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Review by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact [jmp8@cornell.edu](mailto:jmp8@cornell.edu).

# ON THE WATERFRONT AT THE PIER'S EDGE: THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT\*

*George P. Smith, II*†

The law relating to longshoremen's remedies abounds with surprising anomalies, hyper-technical distinctions, and bits and pieces of judicial legislation. This situation stems largely from deficiencies in the Longshoremen's and Harbor Workers' Compensation Act of 1927, an inherently inadequate statute greatly distorted by recent judicial interpretation.<sup>1</sup>

A number of vexatious problems arise when one injured in the course of maritime activity attempts to invoke the compensatory device of the Longshoremen's and Harbor Workers' Compensation Act.<sup>2</sup> In many instances the difference of a few feet may mark the dividing line between the realistic recovery afforded by the Act and the rudimentary protection provided by various state compensation statutes.<sup>3</sup> Yet relief has not been forthcoming; the nation's 100,000 longshoremen and harbor workers<sup>4</sup> continue to be the victims of two pernicious forms of neglect—judicial irresponsibility and legislative passivity.

---

\* The author expresses his appreciation to Professor Wylie H. Davis for his valuable suggestions and criticism in the preparation of this article. The author also acknowledges the research assistance of Richard Beard, a student at the University of Arkansas Law School.

† Associate Professor of Law, University of Arkansas. B.S. 1961, J.D. 1964, Indiana University.

<sup>1</sup> Comment, *The Longshoremen's and Harbor Workers' Compensation Act of 1927: Half-Way Protection for the Stevedore and the Longshoreman*, 64 MICH. L. REV. 1553 (1965) (footnote omitted).

<sup>2</sup> 33 U.S.C. §§ 901-50 (1964).

<sup>3</sup> E.g., ARK. STAT. ANN. §§ 81-1301 to -1349 (1947); CAL. LABOR CODE §§ 3201-6002 (West 1955); FLA. STAT. ANN. §§ 440.01-58 (1966); ILL. ANN. STAT., ch. 48, §§ 138.1-28 (Smith-Hurd 1969); LA. REV. STAT. ANN. §§ 23:1021-1351 (1964); N.Y. WORKMEN'S COMP. LAW §§ 1-328 (McKinney 1965). See generally R. LEFLAR, AMERICAN CONFLICTS LAW 389-408 (1968).

The recovery afforded under the Longshoremen's Act is generally more liberal than that provided by the various state workmen's compensation statutes. Significant differences exist as to the amount of benefits payable and the period of disability during which benefits are recoverable. Thus, "picayune fact distinctions can determine whether the same injury is worth fifty-four dollars per month throughout the entire period of disability or only thirty dollars monthly for a maximum of three hundred weeks . . ." Comment, *supra* note 1, at 1563.

For a comparison of the provisions of the Louisiana and federal statutes, see 36 TUL. L. REV. 134, 137 n.16 (1961).

<sup>4</sup> Telephone conversation with Mr. Lawrence Molloy, Public Relations Counsel for the International Longshoremen's Association, New York City, Feb. 13, 1970.

## I

## BACKGROUND: THE NEED FOR FEDERAL COMPENSATION

The genesis of the Longshoremen's and Harbor Workers' Compensation Act is traceable to the efforts of states in the early part of the twentieth century to apply their own compensation acts to workers injured in the course of maritime employment. Under these acts, the worker who was land-based and who sustained an injury arising out of his employment while on land was afforded a legal remedy against his employer. The Supreme Court of the United States, however, found it difficult to apply the laws to an employee injured while on a ship or other object lying in navigable waters or while in the very waters themselves.<sup>5</sup>

The landmark decision that pointed up the need for appropriate federal legislation in the area of maritime workers' compensation was *Southern Pacific Co. v. Jensen*.<sup>6</sup> Christen Jensen was a stevedore employed by Southern Pacific to unload lumber from its ship by using an electric truck. Jensen stood on the rear of the truck and drove it over a gangway leading from the pier into the ship's hold. On one such trip, while leaving the ship with a load of lumber, the load became jammed against the gangway. When Jensen reversed the direction of the truck, his head struck the top of the cargo hold opening and was thrown forward against the lumber, causing his death.

Jensen's beneficiaries collected compensation under New York's workmen's compensation law, which at the time specifically covered longshore work on waters within New York's territorial limits. The United States Supreme Court reversed the award by a five-to-four decision and held the New York law unconstitutional as applied to an individual injured aboard a vessel on navigable waters.<sup>7</sup> Justice McReynolds, writing for the majority, stressed the desirability of uniform admiralty rules within the states, noting that uniformity would be jeopardized by state legislative acts similar to New York's.<sup>8</sup> He observed that the deceased was engaged in maritime activities under a maritime contract and that his rights and liabilities were within the admiralty jurisdiction.<sup>9</sup> What disturbed the Court most was New York's requirement that all ships loading or unloading in her ports secure a type of

---

<sup>5</sup> See generally H. BAER, ADMIRALTY LAW OF THE SUPREME COURT 112-91 (2d ed. 1969); D. ROBERTSON, ADMIRALTY AND FEDERALISM 148-221 (1970).

<sup>6</sup> 244 U.S. 205 (1916).

<sup>7</sup> *Id.* at 217-18.

<sup>8</sup> *Id.* at 215-16.

<sup>9</sup> *Id.* at 215, 217.

compensation insurance.<sup>10</sup> The majority believed that this requirement would destroy the uniformity in maritime matters established by the Constitution and that freedom of navigation between the states "would be seriously hampered and impeded."<sup>11</sup>

*Jensen* formulated a "converse *Erie*" thesis which held that the state courts must follow substantive federal law in all maritime cases.<sup>12</sup> As a consequence of *Jensen*, injuries that occurred on shore were recognized as being within the reach of state compensation acts, but injuries that occurred on water were exclusively within the federal domain. Harsh results were inevitable since there was then no federal compensation act.<sup>13</sup>

<sup>10</sup> *Id.* at 217.

<sup>11</sup> *Id.* Justice McReynolds commented further that it was difficult, if indeed not impossible

to define with exactness just how far the general maritime law may be changed, modified, or affected by state legislation. . . . [N]o such legislation is valid if it . . . works material prejudice to the characteristic features of the general maritime law or interferes with the proper harmony and uniformity of that law in its international and interstate relations.

*Id.* at 216. It appears that Justice McReynolds relied heavily on a false interpretation of *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1874), for his position on maritime uniformity. See Dodd, *The New Doctrine of the Supremacy of Admiralty over Common Law*, 21 COLUM. L. REV. 647 (1921).

*Jensen's* rights and those of his survivors were to be recognized in admiralty or in common law courts, but not under state workmen's compensation acts. Justice Holmes, in his dissent, observed: "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi sovereign that can be identified . . . . It always is the law of some State . . ." 244 U.S. at 222.

Justice Pitney, in a lengthy dissent, conceded

the authority of Congress to modify the rules of maritime law so far as they are administered in the federal courts, and to make them binding upon the courts of the states so far as they affect interstate or international relations, or regulate "commerce with foreign nations, and among the several States, and with the Indian tribes."

*Id.* at 250-51. He nonetheless strongly asserted that "the Constitution does not, *proprio vigore*, impose the maritime law upon the States except to the extent that the admiralty jurisdiction was exclusive of the courts of common law before the Constitution . . ." *Id.* at 251. Pitney continued by stating what he believed to be

a curious inconsistency to hold . . . that the rules of the maritime law exclude the operation of a state statute without action by Congress, although the Constitution contains no express grant of authority to establish rules of maritime law, and the authority must be implied from the mere constitutional grant of judicial power over the subject . . . .

*Id.* at 252. He found it remarkable that "this result is reached in the face of the fact that the judicial power in cases of admiralty jurisdiction has been put into effect by Congress subject to an express reservation of the previous concurrent jurisdiction of the courts of law over actions of this character." *Id.*

<sup>12</sup> Baxter, *Choice of Law and the Federal System*, 16 STAN. L. REV. 1, 33-34 (1963).

<sup>13</sup> *Chelentis v. Luckenback S.S. Co.*, 247 U.S. 372 (1917), made even clearer the obligation of state courts to apply federal maritime law.

Following *Jensen*, Congress began to take an interest in the problems of maritime workers injured upon navigable waters. It first sought to remedy the problem by adding to the Judiciary Act's "saving to suitors" clause<sup>14</sup> the phrase, "to claimants the rights and remedies under the workmen's compensation law of any State."<sup>15</sup> The intent of this amendment was to provide coverage to injured maritime workers under the various state compensation acts. This attempt by Congress to delegate its powers to the states was, however, short-lived and soon upset by *Knickerbocker Ice Co. v. Stewart*.<sup>16</sup> By another five-to-four decision, the Supreme Court reversed an award given to a maritime employee under the New York State compensation law. Justice McReynolds declared the 1917 amendment to the Judiciary Act unconstitutional:

[W]e think the enactment is beyond the power of Congress. Its power to legislate concerning rights and liabilities within the maritime jurisdiction and remedies for their enforcement, arises from the Constitution. . . . The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.<sup>17</sup>

Its spirits undaunted, and its responsibility to enact comprehensive legislation unmet, in 1922 Congress amended the "saving to suitors" clause of the Judiciary Act to exclude "the master or members of the crew of a vessel" from those entitled to "rights and remedies under the workmen's compensation law of any State."<sup>18</sup> Two years later, in *Washington v. W.C. Dawson & Co.*,<sup>19</sup> Justice McReynolds held this amendment unconstitutional, but in so doing charted a path for Congress to take in the future:

---

<sup>14</sup> Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73 (corresponds to present 28 U.S.C. § 1331(1) (1964)). This section conferred upon the federal district courts exclusive original cognizance "of all civil causes of admiralty and maritime jurisdiction." It left concurrent jurisdiction over common law actions in maritime cases in state courts by "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it."

<sup>15</sup> Act of Oct. 6, 1917, ch. 97, 40 Stat. 395 (repealed 1948).

<sup>16</sup> 253 U.S. 149 (1920).

<sup>17</sup> *Id.* at 164.

<sup>18</sup> Act of June 10, 1922, ch. 216, 42 Stat. 634 (repealed 1948), which saved "to claimants for compensation for injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State . . . ."

<sup>19</sup> 264 U.S. 219 (1924).

Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several States. The grant of admiralty and maritime jurisdiction looks to uniformity; otherwise wide discretion is left to Congress.<sup>20</sup>

Despite this series of opinions, it should be noted that the Court itself sought to correct the harsh results of *Jensen* by applying the "local concern" doctrine.<sup>21</sup> In *Grant-Smith Porter Ship Co. v. Rohde*,<sup>22</sup> where a carpenter sustained injuries while working on a vessel that was on navigable waters, the Oregon compensation statute was allowed to transcend *Jensen's* jurisdictional line. Under *Rohde*, it was held that regardless of the situs of the injury, if the work being performed was of "local concern," the appropriate state compensation act could be applied. Clearly, then, before 1927 and the passage of the Longshoremen's and Harbor Workers' Act, an employee injured on shore was protected by the applicable state compensation act, but an employee injured on navigable water had no statutory remedy for compensation unless he was engaged in work of local concern.

## II

### THE ACT AND ITS LEGISLATIVE HISTORY

Following Justice McReynold's suggestion in *Dawson*, Congress enacted the Longshoremen's and Harbor Workers' Compensation Act<sup>23</sup> in 1927. The Act was designed to cover any maritime employee killed or injured in an accident that occurred upon navigable waters.<sup>24</sup>

<sup>20</sup> *Id.* at 227.

<sup>21</sup> For a discussion of this doctrine, see Comment, *The Tangled Seine: A Survey of Maritime Personal Injury Remedies*, 57 YALE L.J. 243, 270-71 (1947).

<sup>22</sup> 257 U.S. 469 (1922).

<sup>23</sup> 33 U.S.C. §§ 901-50 (1964).

<sup>24</sup> Section 3 of the Act, entitled "Coverage," reads:

(a) Compensation shall be payable under this chapter 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) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely

The Act's requirement that the accident occur upon navigable waters is a distinction that can play havoc with claims arising on the wrong end of a three-foot gangplank. An examination of the legislative history of the Act reveals why the courts are confused by its jurisdictional requirement. One statement from a Senate report issued just prior to passage of the Act declared:

The purpose of this bill is to provide . . . compensation, in the stead of liability, for a class of employees commonly known as "longshoremen." These men are mainly employed in loading, unloading, refitting, and repairing ships; but it should be remarked that injuries occurring in loading or unloading are not covered unless they occur on the ship or between the wharf and the ship so as to bring them within the maritime jurisdiction of the United States.<sup>25</sup>

It would appear from this language that Congress desired to provide coverage on a *situs* rather than a *status* basis. There is other language, however, in the legislative history which suggests that at least one group—the International Longshoremen's Association—anticipated coverage that was status-oriented. The following exchange between the Chairman of the Senate Subcommittee and the International Longshoremen's Association representative illustrates this point:

The CHAIRMAN. As you understand this bill it would give an employee compensation even if he were injured on the dock.

Mr. DEMPSEY. Yes, sir; it will also give compensation to a man on board ship.

The CHAIRMAN. If he is at work in maritime employment?

Mr. DEMPSEY. Yes, sir; if he is working in maritime employment it is the same whether on the docks or on board ship, because the cargo has to be assembled on the dock and handled there in order to go on board ship. . . . They handle the cargo all the time, going and coming from the deck. There is no difference in the nature of the employment but only in the position they are in when an injury may occur . . . .<sup>26</sup>

After passage in the Senate, the bill was sent to the House where it was amended to its present form. The ambiguous language was not corrected, and it is therefore questionable whether Congress knew exactly what it was passing. Only a few days before passage, Congress-

---

by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

*Id.* § 903 (1964).

<sup>25</sup> S. REP. NO. 973, 69th Cong., 1st Sess. 16 (1926).

<sup>26</sup> *Hearings on S. 3170 Before a Subcomm. of the Senate Comm. on the Judiciary*, 69th Cong., 1st Sess. 26-27 (1926).

man LaGuardia made this statement concerning its anticipated coverage:

Mr. Speaker, it is quite possible to explain the purpose and the necessity of this bill in two minutes. . . . Owing to our dual form of government we find that longshoremen are employed by companies or individuals engaged in foreign or interstate commerce, and therefore there is some question whether or not a State law could be made applicable to them. In order to meet that situation it is necessary to pass a Federal law. This is what they are doing now. This law simply gives the longshoremen the benefit of up-to-date legislation to cover injuries sustained in the course of their employment. That is all there is to it.<sup>27</sup>

These paradigms of the legislative history of the Act show it to be grounded in confusion. As the above passages illustrate there is language to support either a *situs*- or *status*-oriented position. Unfortunately, the courts have reacted with pendulous enthusiasm to the task of ascertaining the precise intent of Congress.

### III

#### JUDICIAL INTERPRETATIONS OF THE ACT

The reason for the courts structuring a "local concern" doctrine seemingly ended with the passage of the Longshoremen's Act. Yet the doctrine was continually applied.<sup>28</sup> The basic effect of its continued application was that an employee injured on navigable water while engaged in work of "local concern" could not proceed under the Act, but was restricted to recovery under state law. The irony of this development is apparent—recovery under the Federal Act was usually more liberal than that afforded under state legislation. Thus, while the "local concern" doctrine was initially structured to provide a remedy for employees who sustained injuries on navigable waters in the course of employment, it eventually became a defense against their claims for federal compensation.<sup>29</sup>

This interpretation of the Act continued until 1942 and the inception of the "twilight zone" doctrine, which was formulated to alleviate the myriad problems created by the extensive application of

<sup>27</sup> 68 CONG. REC. 5414 (1927).

<sup>28</sup> *Carlin Constr. Co. v. Heaney*, 299 U.S. 41 (1936); *Sultan Ry. & Timber Co. v. Department of Labor*, 277 U.S. 135 (1928); *Alaska Packers Ass'n v. Industrial Accident Comm'n*, 276 U.S. 467 (1928).

<sup>29</sup> See *Gainsburgh & Fallon, Galbeck v. Travelers Insurance Company: The Twilight's Last Gleaming?*, 37 TUL. L. REV. 79, 82-83 (1962).

the "local concern" doctrine. In *Davis v. Department of Labor*,<sup>30</sup> a structural steel worker engaged in dismantling a bridge across a navigable river fell into the river and was drowned. The Court, speaking through Justice Black, allowed the dependent's request for relief under the state compensation act, noting that persons such as the deceased occupied "that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation."<sup>31</sup> Justice Black stated that there existed a "twilight zone" where the decision on which compensation act to apply had to be determined on a case-by-case basis.<sup>32</sup> This doctrine was quickly seized by the courts in an effort to effect a balance between federal and state interests, and the resultant expansion of state jurisdiction was consistently affirmed.<sup>33</sup>

It is important to contrast *Davis* with *Parker v. Motor Boat Sales, Inc.*,<sup>34</sup> the first case to squarely decide the extent to which Congress had actually exercised its power in passing the Longshoremen's Act. In *Parker*, a janitor employed exclusively on shore went on a test run of an outboard motor on the James River and was drowned when the boat capsized. Due to a technicality, Virginia's compensation statute was unavailable to the widow. Proceeding, however, under the Longshoremen's Act, she obtained an award. The Fourth Circuit set the award aside by adhering to the statutory interpretation that Congress had occupied only the area excluded from state protection.<sup>35</sup>

The Supreme Court unanimously reversed and reinstated the award of the lower court. Justice Black concluded that, although the extent of federal jurisdiction was unclear, the existence of state com-

<sup>30</sup> 317 U.S. 249 (1942).

<sup>31</sup> *Id.* at 253.

<sup>32</sup> *Id.* at 256. Justice Black observed:

There is . . . clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements . . . .

Faced with this factual problem, we must give great—indeed, presumptive—weight to the conclusions of the appropriate federal authorities and to the state statutes themselves. Where there has been a hearing by the federal administrative agency entrusted with broad powers of investigation, fact finding, determination, and award, our task proves easy . . . .

In the instant case we do not enjoy the benefit of federal administrative findings and must therefore look solely to state sources for guidance. . . . [Here we rely] heavily on the presumption of constitutionality in favor of the state statute.

*Id.* at 256-57.

<sup>33</sup> *E.g.*, *Hahn v. Ross Island Sand & Gravel Co.*, 358 U.S. 272 (1959); *Avondale Marine Ways v. Henderson*, 346 U.S. 366 (1953); see Rodes, *Workmen's Compensation for Maritime Employees: Obscurity in the Twilight Zone*, 68 HARV. L. REV. 637 (1955).

<sup>34</sup> 314 U.S. 244 (1941).

<sup>35</sup> *Motor Boat Sales, Inc. v. Parker*, 116 F.2d 789 (4th Cir.), *rev'd*, 314 U.S. 244 (1941).

pensation did not limit the operation of the federal statute.<sup>36</sup> The Court expressly held that Congress had exercised its power so that the facts of *Parker* were within the coverage of the Act: "While the proviso of § 3(a) appears to be a subtraction from . . . the Act . . . outlined by Congress . . . it is not a large enough subtraction to place this case outside the coverage which Congress intended to provide."<sup>37</sup>

In 1962, in an effort to penetrate the quagmire created by *Parker* and *Davis*, the Court decided *Calbeck v. Travelers Insurance Co.*,<sup>38</sup> which according to one writer ended the "twilight zone" doctrine.<sup>39</sup> In *Calbeck*, injuries were sustained by employees working on new vessels under construction and afloat upon navigable waters.<sup>40</sup> The Fifth Circuit denied recovery<sup>41</sup> on the grounds that state compensation could validly apply to those working on uncompleted vessels<sup>42</sup> and that a person injured while working on such a vessel was neither in the "twilight zone" nor entitled to elect recovery under state or federal law.<sup>43</sup>

The Supreme Court reversed the Fifth Circuit and allowed recovery, deciding that "the Longshoremen's Act was designed to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters, and to avoid uncertainty as to the source, state or federal, of that remedy."<sup>44</sup> Speaking for the majority, Justice Brennan stated that "Congress invoked its constitutional power so as to provide compensation for all injuries sustained by employees on navigable waters whether or not a particular injury might also have been within the constitutional reach of a state workmen's compensation law."<sup>45</sup> In *Calbeck*, then, the Court explicitly recognized the concurrent jurisdiction of the Longshoremen's Act and state acts for injuries sustained on navigable waters. The notable exception is for those cases

<sup>36</sup> 314 U.S. at 248.

<sup>37</sup> *Id.* at 249.

<sup>38</sup> 370 U.S. 114 (1962).

<sup>39</sup> Huttenbrauck, *Maritime Personal Injury Cases—The Twilight Zone*, 32 INS. COUNSEL J. 92, 96 (1965).

<sup>40</sup> This case was decided together with *Donovan v. Avondale Shipyards, Inc.*, 370 U.S. 114 (1962).

<sup>41</sup> *Travelers Ins. Co. v. Calbeck*, 293 F.2d 52 (5th Cir.), *rev'd*, 370 U.S. 114 (1962).

<sup>42</sup> 293 F.2d at 57.

<sup>43</sup> *Id.* at 59.

<sup>44</sup> 370 U.S. at 124.

<sup>45</sup> *Id.* at 117 (footnote omitted).

Justice Stewart, joined by Justice Harlan, vigorously dissented on the ground that the Court totally disregarded the clear words of the Act: "[T]he Court concludes that Congress did not really mean what it said. I cannot join in this exercise in judicial legerdemain. . . . While the result reached today may be a desirable one, it is simply not what the law provides." *Id.* at 132.

where the maritime uniformity doctrine of *Jensen* makes questionable the availability of a state remedy. In effect, *Calbeck* returns us to the jurisdictional line originally drawn by *Jensen*—the water's edge.<sup>46</sup>

Courts have had no difficulty applying the Longshoremen's Act to injuries received in dry docks, since dry dock injuries are specifically covered by the Act.<sup>47</sup> This particular portion of the Act brings into sharp focus the glaring anomalies that exist and are nurtured by court decisions. Although courts are ever zealous in their efforts to restrict the Longshoremen's Act to injuries occurring upon navigable waters, the existence of the phrase "including any dry dock"<sup>48</sup> has extended coverage to persons working great distances from the water line.<sup>49</sup>

Two early decisions indicate the courts' propensity to liberally construe the Act with regard to dry docks. In *Travelers Insurance Co. v. Branham*,<sup>50</sup> the decedent was killed when he slipped from a floating barge that was inside a dry dock then under construction. Although the dry dock was only five percent completed at the time of the accident, the court held that the Act, as a remedial statute, should be liberally construed<sup>51</sup> and allowed recovery.

The decedent in *Travelers Insurance Co. v. McManigal*<sup>52</sup> was killed, oddly enough, while working on the same dry dock as was the decedent in *Branham*. In this case, however, sixty-two percent of the dry dock had been completed and the water had been pumped out of the interior where the decedent was working at the time of the accident. Travelers argued that the accident did not occur upon navigable waters or a dry dock<sup>53</sup> and, therefore, the decedent was not covered by the Longshoremen's Act. The court held that the decedent was con-

---

<sup>46</sup> *Id.* at 126.

<sup>47</sup> 33 U.S.C. § 903(a) (1964).

<sup>48</sup> *Id.*

<sup>49</sup> Three basic types of dry docks are considered in *O'Leary v. Puget Sound Bridge & Dry Dock Co.*, 349 F.2d 571 (9th Cir. 1965). As described by the Department of the Navy, Bureau of Yards and Docks, these three principal types of dry-docking facilities are: (1) a "floating dry dock"—one that may be partially submerged to allow entrance of a vessel (after docking, water is pumped out of the ballast tanks until the dock is clear of water); (2) a "graving dock"—a permanently fixed basin into which a ship is floated (the water is then pumped out, exposing the underwater portion of the hull); and (3) a "marine railway"—a permanently fixed track system that extends from well above the waterline to an offshore point well below the waterline (a cradle that ships float onto is employed to pull them free of the water). *Id.* at 573.

<sup>50</sup> 136 F.2d 873 (4th Cir. 1943).

<sup>51</sup> *Id.* at 875.

<sup>52</sup> 139 F.2d 949 (4th Cir. 1944).

<sup>53</sup> *Id.* at 950.

structively standing in navigable waters at the time of his injury and allowed recovery.<sup>54</sup>

Similarly, courts have applied the Act to injuries sustained by employees working on a marine railway. Possibly the most liberal construction was made in *Avondale Marine Ways, Inc. v. Henderson*,<sup>55</sup> when the Fifth Circuit allowed recovery by the dependents of two employees killed in an explosion on a barge that was some 400 feet from water. Again, in *Holland v. Harrison Brothers Dry Dock & Repair Yard, Inc.*,<sup>56</sup> the court granted federal compensation to a shipyard employee injured while working on a barge on a marine railway. The court said that although the employee had both feet on dry land, he was within the "twilight zone" and was properly entitled to relief under the Longshoremen's Act.<sup>57</sup>

The most troublesome situation confronting the courts is that of a longshoreman injured on the dock while employed in loading, unloading, or supervising a vessel lying in navigable waters, when his injuries are the direct and proximate cause of his employment. In *Swanson v. Marra Brothers, Inc.*,<sup>58</sup> a longshoreman working on a pier to load a ship lying alongside was struck and injured by a life raft that fell from the vessel. The Court denied any relief, commenting that even though the petitioner sought relief under the Jones Act, his claim would also have been dismissed if it had been brought under the Longshoremen's Act, "since [that] Act is restricted to compensation for injuries occurring on navigable waters, [and thus] excludes from its own terms and from the Jones Act any remedies against the employer for injuries inflicted on shore."<sup>59</sup>

In 1948, Congress enacted the Admiralty Extension Act<sup>60</sup> which altered somewhat the historical test and became the justification for a more liberal *situs* requirement. In *Interlake Steamship Co. v. Nielsen*,<sup>61</sup> a shipkeeper who had driven his car off a dock and into Lake Erie

<sup>54</sup> *Id.* at 952.

<sup>55</sup> 201 F.2d 437 (5th Cir. 1953).

<sup>56</sup> 306 F.2d 369 (5th Cir. 1962).

<sup>57</sup> *Id.* at 370.

<sup>58</sup> 328 U.S. 1 (1946). Recovery in *Swanson* was sought under § 33 of the Jones Act, 46 U.S.C. § 688 (1964).

<sup>59</sup> 328 U.S. at 7.

<sup>60</sup> The Act provides in part:

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.

<sup>61</sup> 338 U.S. 740 (1964).

<sup>61</sup> 338 F.2d 879 (6th Cir. 1964).

while inspecting a moored vessel was deemed to have been covered by the Longshoremen's Act. The court, relying on the Extension Act and *Calbeck v. Travelers Insurance Co.*,<sup>62</sup> concluded that the trend pointed in the direction of expanding the boundaries of admiralty jurisdiction toward land.<sup>63</sup> However, the *Nielsen* court's reliance upon the Extension Act was misplaced; by its very language, the Extension Act is applicable only to cases in which a vessel has caused damage.<sup>64</sup>

More directly within the intended coverage of the Admiralty Extension Act is *Michigan Mutual Liability Co. v. Arrien*.<sup>65</sup> There, a stevedore was working on a "skid"—a removable wooden platform extending over the water between the vessel and the wharf—when hit and injured by a barrel that fell from the ship he was helping to unload. The insurance company contended that the skid was an extension of land and therefore outside the reach of the Longshoremen's Act. Nevertheless, the court concluded that the Longshoremen's Act was "intended to cover injuries incurred . . . over navigable waters—such as skids or gangplanks."<sup>66</sup> The court continued by observing that a temporary skid should not be analogized to a wharf because once a wharf is completed, the water underneath it is permanently removed from navigation. In contrast, a skid or a gangplank is no more permanent than a ship moored in the same place would be.<sup>67</sup> Additionally, the concession that there was sufficient connection with the land to sustain an award under the state compensation law was held not to preclude the federal remedy.<sup>68</sup>

#### IV

#### *Nacirema*—PHASE ONE

*Nacirema Operating Co. v. Johnson*<sup>69</sup> was decided by the Supreme Court in 1969. With it, the conflict over coverage of dock and pier accidents under the Longshoremen's Act still remains unresolved. A consideration of the court of appeals decision is crucial to a complete understanding and placement of this case in its proper perspective.

*Nacirema* arose from district court actions with similar fact situa-

---

<sup>62</sup> 370 U.S. 114 (1962).

<sup>63</sup> 338 F.2d at 882.

<sup>64</sup> Note 60 *supra*.

<sup>65</sup> 344 F.2d 640 (2d Cir. 1965).

<sup>66</sup> *Id.* at 643.

<sup>67</sup> *Id.* at 644.

<sup>68</sup> *Id.* at 645.

<sup>69</sup> 396 U.S. 212 (1969).

tions. In *Johnson v. Traynor*,<sup>70</sup> two longshoremen, Johnson and Klosek, employed as "slingers" or "hook-on men," were stationed on a pier in a gondola car containing steel beams. They were hooking the drafts of the beams onto a ship's crane which in turn lowered the drafts into the vessel's hold. One draft swung back from the hold and struck the men. Klosek was thrown from the gondola car onto the pier and died. Johnson was pinned against the side of the car and sustained disabling injuries. The deputy commissioner rejected both claims under the Longshoremen's Act and the district court affirmed, relying on the traditional view that the dock is an extension of land and injuries sustained thereupon are compensable solely under a state workmen's compensation act. In a second action, *East v. Oosting*,<sup>71</sup> a district court similarly affirmed a denial of recovery by a longshoreman, Avery, who also sustained injuries while working as a "slinger" on a pier. Finally, in *Marine Stevedoring Corp. v. Oosting*,<sup>72</sup> another longshoreman, Vann, in a separate incident, was killed when a cable he was working with suddenly straightened, throwing him off the pier into the Elizabeth River, where he drowned. The deputy commissioner awarded death benefits and the district court affirmed.

On appeal, the Fourth Circuit<sup>73</sup> affirmed the recovery in *Marine Stevedoring Corp. v. Oosting* and reversed the denial of recovery in *Johnson v. Traynor* and *East v. Oosting*.<sup>74</sup> In a thoughtful opinion, Judge Sobeloff first examined the legislative history of the Act, cited excerpts from it, and concluded:

While the definitive answer is not forthcoming from either the Act itself or its history, we find substantial support for the conclusion that Congress designed the Act to be status oriented, reaching all injuries sustained by longshoremen in the course of their employment.<sup>75</sup>

Judge Sobeloff noted further that, according to past Supreme Court decisions, the Act "must be liberally construed in conformance with

<sup>70</sup> 243 F. Supp. 184 (D. Md. 1965), *rev'd sub nom.* *Marine Stevedoring Corp. v. Oosting*, 398 F.2d 900 (4th Cir. 1968), *rev'd sub nom.* *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969).

<sup>71</sup> 245 F. Supp. 51 (E.D. Va. 1965), *rev'd sub nom.* *Marine Stevedoring Corp. v. Oosting*, 398 F.2d 900 (4th Cir. 1968), *rev'd sub nom.* *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969).

<sup>72</sup> 238 F. Supp. 78 (E.D. Va. 1965), *aff'd*, 398 F.2d 900 (4th Cir. 1968).

<sup>73</sup> *Marine Stevedoring Corp. v. Oosting*, 398 F.2d 900 (4th Cir. 1968), *rev'd sub nom.* *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969).

<sup>74</sup> Chief Judge Haynsworth, joined by Judge Boreman, vigorously dissented from the reversal of *Johnson v. Traynor* and *East v. Oosting*. 398 F.2d at 909.

<sup>75</sup> *Id.* at 904 (footnote omitted).

its purpose, and in a way which avoids harsh and incongruous results.' ”<sup>76</sup> The majority felt no compulsion to base a decision on the “twilight zone” doctrine or to rely on the Admiralty Extension Act. Rather, they chose to rely on the idea that the Act itself had been designed to cover longshoremen injured in the course of their maritime employment. The court was emphatic in pointing out that all of the injured men had been members of a “gang” of twenty men, all of whom did approximately the same work and faced the same risks. Those men who worked on the vessel were undoubtedly covered by the Act, and the court concluded that “[i]t would be intolerably harsh and incongruous to deny the same benefits to a longshoreman injured while performing the same task on an adjoining pier.”<sup>77</sup>

Chief Judge Haynsworth’s dissent expressed a desire to eliminate the incongruities of the present status of dock-side injuries.<sup>78</sup> However, in a very pragmatic argument, he concluded that the main objective of the Act was to provide the benefits of some sort of compensation system to longshoremen while working aboard ship.<sup>79</sup> Because the Supreme Court had struck down attempts to extend state compensation actions, Congress was forced to provide the needed protection.<sup>80</sup> In order to prevent any overlap, Congress limited federal coverage to the seaward side of the dock and allowed state compensation to provide the remedy on the landward side.<sup>81</sup> Most important, in the Chief Judge’s opinion, was that the longshoreman “is never without the protection of one statute or the other.”<sup>82</sup>

## V

## Nacirema—PHASE TWO

The Supreme Court reversed the Fourth Circuit’s decision and once again placed the line of demarcation for recovering compensation

---

<sup>76</sup> *Id.* at 906-07, quoting *Voris v. Eikel*, 346 U.S. 328, 333 (1953).

<sup>77</sup> 398 F.2d at 907.

<sup>78</sup> *Id.* at 909, 911.

<sup>79</sup> *Id.* at 909-10.

<sup>80</sup> *Id.* at 910.

<sup>81</sup> *Id.* at 910-11.

<sup>82</sup> *Id.* at 911.

The Chief Judge concluded that while “the Supreme Court’s decision in *Davis v. Department of Labor and Industries* . . . served the very practical purpose of eliminating confusion within the twilight zone . . . ,” the court here was taking “the other road to spread confusion where none existed before and to sow vast thickets of controversy and litigation which no system of workmen’s compensation can afford.” *Id.* at 914.

*John D. Nicos*

under the Longshoremen's and Harbor Workers' Act at the pier's edge.<sup>83</sup>

While conceding that the Act employed language that appeared to provide coverage according to the *situs* of the injury, respondents nonetheless maintained that the Act had a much broader coverage: the *status* of the longshoremen employed in performing a maritime contract.<sup>84</sup> Justice White, speaking for the majority, determined that Congress had restricted the scope of the coverage to the *situs* of the injury alone.<sup>85</sup> Reviewing *Jensen* and the abortive efforts by Congress to legislate in the area in 1917 and 1922,<sup>86</sup> and noting that the hearings prior to Act's passage demonstrated that, as to section 3 of the Act, "a place within the admiralty jurisdiction" did not include a dock or pier,<sup>87</sup> Justice White concluded that Congress did not extend coverage to the respondents who sustained injuries on the landward side of the *Jensen* line, since they were clearly entitled to protection under state compensation acts.<sup>88</sup>

Noting that although in previous decisions the Supreme Court had allowed recovery under state law when the injury sustained was seaward of the pier, and under the Longshoremen's Act when the injury might also have been compensable under state law, Justice White explained that "removing uncertainties as to the Act's coverage of injuries occurring on navigable waters is a far cry from construing the Act to reach injuries on land traditionally within the ambit of state compensation actions."<sup>89</sup> He continued:

Indeed, *Calbeck* freely cited the *Parker* and *Davis* declarations that the Longshoremen's Act adopted the *Jensen* line, and *Calbeck's* holding rejected the notion that the line should advance or recede simply because decisions of this Court had permitted state remedies in narrow areas seaward of that line. Otherwise, the reach of the federal Act would be subject to uncertainty, and its coverage would "expand and recede in harness with developments in constitutional interpretation as to the scope of state power to compensate injuries on navigable waters," with the result "that every litigation raising an issue of federal coverage would raise an issue of constitutional dimension, with all that implies . . ." . . . As in *Calbeck*, we refuse to impute to Congress the intent of burdening

---

<sup>83</sup> *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969). This decision involved only the claims of Klosek, Johnson, and Avery.

<sup>84</sup> *Id.* at 215.

<sup>85</sup> *Id.* at 215-16.

<sup>86</sup> *Id.* at 216; notes 14-20 and accompanying text *supra*.

<sup>87</sup> 396 U.S. at 217; see notes 24-27 and accompanying text *supra*.

<sup>88</sup> 396 U.S. 219-20.

<sup>89</sup> *Id.* at 221.

the administration of compensation by perpetuating such confusion.<sup>90</sup>

The Admiralty Extension Act was also held inapplicable to the facts of the case.<sup>91</sup> Although cognizant that the Act extended admiralty tort jurisdiction to injuries on piers, the Court stated that such injuries could be classified as maritime torts only when caused by a vessel on navigable waters. It found no evidence that Congress had intended the Extension Act to affect the coverage of the Longshoremen's Act.<sup>92</sup> In refusing to judicially legislate here, the majority concluded with a call for congressional action reminiscent of *Washington v. W.C. Dawson & Co.*:<sup>93</sup>

There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act. And construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion which previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court.<sup>94</sup>

### CONCLUSION

While *Calbeck* might be thought of as showing a clear preference for an interest-balancing approach in this area, even a cursory reading of *Nacirema* forces the inescapable conclusion that the dogmatism of

---

<sup>90</sup> *Id.*, quoting *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 126 (1962).

<sup>91</sup> 396 U.S. at 221-22.

<sup>92</sup> *Id.* at 222.

<sup>93</sup> Text accompanying notes 19-20 *supra*.

<sup>94</sup> 396 U.S. at 223-24.

Justice Douglas, joined by Justices Black and Brennan, argued in a succinct but cogent dissent that, as Judge Sobeloff had noted previously, the Longshoremen's and Harbor Workers' Compensation Act is *status-oriented* and reaches "all injuries sustained by longshoremen in the course of their employment." *Id.* at 224, quoting *Marine Stevedoring Corp. v. Oosting*, 398 F.2d 900, 904 (4th Cir. 1968). Justice Douglas stated that the phrase, "upon navigable waters," should be equated with "admiralty jurisdiction." 396 U.S. at 225.

the past is with us again. A uniform system of compensation is now the rule on the seaward side of the pier's edge. On the landward side, the facts of each case and the peculiarities of local law are the rule. Judicial history appears, as viewed in a looking glass of indecisiveness, to be repeating itself.

Although it can be hoped that Congress will heed the call to legislative action made in *Nacirema*, such an initiative appears unlikely at the present time. Until the courts, acting as interpreters of congressional intent, clearly extend the liberal remedies provided by the Longshoremen's Act beyond the pier's edge, the confusion of the past forty years will continue.