

January 1991

## Admiralty Law - Coloma v. Director, Office of Workers' Compensation Programs: The Battle Over Maritime "Status" Continues

Jill Bennett

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### Recommended Citation

Jill Bennett, *Admiralty Law - Coloma v. Director, Office of Workers' Compensation Programs: The Battle Over Maritime "Status" Continues*, 21 Golden Gate U. L. Rev. (1991).  
<http://digitalcommons.law.ggu.edu/ggulrev/vol21/iss1/5>

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# ADMIRALTY LAW

## *COLOMA v. DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS: THE BATTLE OVER MARITIME "STATUS" CONTINUES*

### I. INTRODUCTION

In *Coloma v. Director, Office of Workers' Compensation Programs*,<sup>1</sup> the Ninth Circuit considered whether a cook who worked in a dining facility located on a longwharf was a "maritime employee" and therefore eligible to qualify for benefits under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA).<sup>2</sup> The Ninth Circuit held that because the cook's duties did not involve loading or unloading a vessel, he was not a "maritime employee"<sup>3</sup> and was ineligible for workers' compensation benefits under the LHWCA.<sup>4</sup>

### II. FACTS

Cerefino Coloma was employed by Chevron USA as a ship's cook.<sup>5</sup> Beginning in January 1975, Coloma worked at the

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1. *Coloma v. Director, Office of Workers' Compensation Programs*, 897 F.2d 394 (9th Cir. 1990) (per Sneed, J.; additional members of the court were Hug, J., and Leavy, J.), *cert. denied*, 59 U.S.L.W. 3244 (1990).

2. *Coloma*, 897 F.2d at 395. The LHWCA is codified at 33 U.S.C. §§ 901-50 (1988).

3. 33 U.S.C. § 902(3) defines "maritime employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, . . ."

4. *Coloma*, 897 F.2d at 400.

5. *Coloma v. Director, Office of Workers' Compensation Programs*, 897 F.2d 394, 395 (9th Cir. 1990). Before going to work for Chevron USA, Coloma spent 20 years in the U.S. Navy as a ship's cook. *Id.*

“Seagull Inn”<sup>6</sup> on the Richmond, California, longwharf.<sup>7</sup> The “Seagull Inn” provided free dining<sup>8</sup> to the officers and seamen of visiting Chevron tankers<sup>9</sup> while shipboard stewards<sup>10</sup> took shore leave.<sup>11</sup>

Chevron closed the Inn in 1982, and transferred most of the cooks to shipboard galleys on tankers.<sup>12</sup> Coloma was transferred to the tanker, HILYER BROWN.<sup>13</sup> Before leaving the “Seagull Inn,” Coloma contracted a skin condition on both hands, resulting from the chemical cleansers he used at the Inn.<sup>14</sup> Two weeks after transferring to the HILYER BROWN, he was medically discharged because of that condition.<sup>15</sup>

Coloma sought permanent disability benefits<sup>16</sup> under the LHWCA.<sup>17</sup> The Administrative Law Judge determined that Coloma was not a “maritime employee” under 33 U.S.C. § 902(3),<sup>18</sup> and was not entitled to LHWCA benefits.<sup>19</sup> Coloma ap-

6. *Id.* The “Seagull Inn” was the “crews’ mess” for Chevron employees. *Id.*

7. *Id.* The Richmond Longwharf extends roughly one mile into San Francisco Bay, and is used to load and unload tankers. Reporter’s Transcript of Trial before Administrative Law Judge at 28-30, *Coloma v. Chevron Shipping Co.*, 18 Ben. Rev. Bd. Serv. (MB) 434 (1986).

8. *Coloma*, 897 F.2d at 395. Free meals were provided in lieu of a meal allowance. *Id.* at 396.

9. 46 C.F.R. § 35.35-1 (1989). The Coast Guard’s regulations require ship’s crew to remain aboard during cargo operations, so the “Seagull Inn” was established to feed the crew dockside while the vessel’s regular galleyhands took shore leave. Reporter’s Transcript of Trial before Administrative Law Judge at 23, *Coloma v. Chevron Shipping Co.*, 18 Ben. Rev. Bd. Serv. (MB) 434 (1986).

10. A shipboard steward is an officer responsible for provisions and dining arrangements. WEBSTER’S II NEW RIVERSIDE DICTIONARY 676 (1984).

11. *Coloma*, 897 F.2d at 395. Occasional visitors (Coast Guard officers, Customs Officials, Harbor Pilots and outside contractors) were allowed to eat at the “Seagull Inn” but were charged for their meals. The general public was not allowed on the wharf. *Id.* at 395-96.

12. *Id.* at 396.

13. *Id.* Coloma transferred to the HILYER BROWN on July 14, 1982. *Id.*

14. *Id.* at 395.

15. Appellant’s Deposition at 4-5, *Coloma v. Chevron Shipping Co.*, 18 Ben. Rev. Bd. Serv. (MB) 434 (1986).

16. *Coloma*, 897 F.2d at 395. Coloma received long-term disability benefits from Chevron for one year (from 1983 to 1984). Letter from CIGNA Insurance Co. to Coloma (Jan. 20, 1984). These benefits were renewable only if Coloma was found unable to perform any job within Chevron or any other company for which he was qualified to perform and if he qualified to receive Social Security Disability benefits. *Id.* Coloma did not meet the requirements and was denied continuation of long-term disability benefits. *Id.*

17. 33 U.S.C. § 902(3) (1988). *See supra* note 3 for statutory language.

18. *See supra* note 3 for definition of maritime employee.

pealed the adverse decision to the United States Department of Labor Benefits Review Board.<sup>20</sup> The Board affirmed the denial of benefits.<sup>21</sup>

Coloma appealed the Review Board's decision to the Ninth Circuit.<sup>22</sup>

### III. BACKGROUND

#### A. THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT

At the turn of the century, Congress and the states<sup>23</sup> at-

19. *Coloma*, 897 F.2d at 396. The Administrative Law Judge stated:  
[Coloma's] tasks of cleaning tables, washing dishes and cooking were neither "inherently maritime" nor were they significantly different from the tasks that are performed in dining halls, cafeterias and restaurants on land . . . . The evidence does not establish that claimant's employment involved any aspect of the process of *loading, unloading, repairing or building vessels*. Because the "Seagull Inn" principally fed seamen and not longshoremen, claimant's work was in aid of Chevron's seafaring and navigational activities and not in aid of any longshoring functions performed on the wharf.

*Id.* (emphasis in original).

20. *Id.*

21. *Id.*

22. *Id.* Under the 1972 Amendments to the LHWCA, contested compensation claims are first heard by an Administrative Law Judge. 33 U.S.C. § 919(d) (1988). Claimant may then appeal this decision to the Benefits Review Board (a five-member board appointed by the Secretary of Labor). 33 U.S.C. § 921(b) (1988). The Benefits Review Board is empowered "to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act . . . ." 33 U.S.C. § 921(b)(3). An adverse decision of the Benefits Review Board may then be reviewed "in the United States court of appeals for the circuit in which the injury occurred . . . ." 33 U.S.C. § 921(c).

23. Congress involved itself with providing state compensation benefits pursuant to the U.S. CONST. art. III, § 2 which confers admiralty jurisdiction upon the federal government. The House Report discusses why Congressional action was necessary:

Congressional action is necessary if these [longshoremen] are to be given the benefits of workmen's compensation owing to the provisions of the Constitution of the United States and the decisions of the Supreme Court thereunder.

Article 3, section 2, of the Constitution provides that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction," and Article I, section 8, confers upon Congress power "to make all laws which may be necessary and proper for carrying into execution the foregoing powers and all other powers vested by this Constitution in

tempted to provide compensation for land-based injured maritime workers through state compensation programs.<sup>24</sup> These attempts were frustrated in 1917 when the United States Supreme Court held that the states were without power to provide a workmen's compensation remedy to longshoremen<sup>25</sup> injured on the gangplank extending from a ship to the pier.<sup>26</sup> Thus, longshoremen injured on a gangplank's seaward<sup>27</sup> side had no remedy while longshoremen injured on the pier were protected by

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the Government of the United States or in any department or officer thereof."

The Supreme Court has held that these provisions of the Constitution grant to Congress "paramount power" to fix and determine the maritime law of the United States.

H.R. REP. NO. 1190, 69th Cong., 1st Sess., 1 (1926) (citations omitted).

The need for Congressional involvement in state compensation programs was also discussed on the floor of the House of Representatives:

Mr. O'CONNOR of New York: It has been the effort of all leaders interested in this question of social justice to find a way out of this jurisdictional dilemma. That way was clearly pointed out by Mr. Justice McReynolds in the recent case of *The State of Washington v. Dawson* (264 U.S. 219). The court there stated that Congress had the power to protect these workmen, and this bill [the LHWCA] carries out the suggestion of our highest court.

In this legislation we are appealing for justice to 300,000 men, 100,000 of whom are employed at the port of New York and along the Great Lakes.

68 CONG. REC. 5413 (1927).

24. See *Employers' Liability Act*, ch. 3073, 34 Stat. 232 (1906) which was Congress' first attempt to provide a federal workmen's compensation system. This Act was found to be "repugnant to the Constitution of the United States," therefore non-enforceable. *Howard v. Illinois Cent. R.R.*, 207 U.S. 463 (1908). In *Howard*, the Court held that while the *Employer's Liability Act* of 1906 embraced subjects within the authority of Congress to regulate, it also included subjects not within its constitutional power and as such were non-enforceable under the Commerce Clause. *Howard*, 207 U.S. at 504.

25. A longshoremen is a dock laborer who loads and unloads cargo. WEBSTER'S II NEW RIVERSIDE DICTIONARY 412 (1984).

26. *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917) (state maritime law which modifies or contravenes federal maritime law is invalid under the Constitution). The Court found:

Exclusive jurisdiction of all civil cases of admiralty and maritime jurisdiction is vested in the Federal district courts, "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." The remedy which the [State] Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction.

*Jensen*, 244 U.S. at 218 (citations omitted).

27. The seaward side is the side at or towards the sea. WEBSTER'S II NEW RIVERSIDE DICTIONARY 624 (1984).

state compensation acts.<sup>28</sup> This line of demarcation between land and water became known as the "Jensen line."<sup>29</sup> Using the geographic demarcation of the "Jensen line," state compensation coverage was extended to the landward side of the water's edge, but no further.<sup>30</sup> Unhappy with this gap in coverage,<sup>31</sup> Congress enacted the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) of 1927.<sup>32</sup>

Congress designed the LHWCA to be a federal workmen's compensation remedy<sup>33</sup> for longshoremen and harbor workers

28. See *Northeast Marine Terminal v. Caputo*, 432 U.S. 249 (1977) (language of the 1972 Amendments to the LHWCA is broad, suggesting that the courts take an expansive view of LHWCA coverage).

29. See *Director, Office of Workers' Compensation Programs v. Perini N. River Assoc.*, 459 U.S. 307, 307 n.14 (1983) (maritime employee covered prior to the 1972 Amendments was still covered).

30. *Maritime Personal Injury: The Expanding Coverage of the Longshoremen's and Harbor Workers' Compensation Act.*, 43 LA. L. REV. 849, 852 (1983).

31. See S. REP. NO. 973, 69th Cong., 1st Sess. 16 (1926); H.R. REP. NO. 1190, 69th Cong., 1st Sess., 3 (1926) which illustrate Congress' dissatisfaction with the gap in coverage created by the States' inability to remedy injuries on navigable waters:

Nearly every State in the Union has a compensation law through which employees are compensated for injuries occurring in the course of their employment without regard to negligence on the part of the employer or contributory negligence on the part of the employee. If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation; but, unfortunately, they are excluded from these laws by reason of the character of their employment; and they are not only excluded but the Supreme Court has more than once held that Federal legislation can not, constitutionally, be enacted that will apply State laws to this occupation.

It thus appears that there is no way of giving to these hard-working men, engaged in a somewhat hazardous employment, the justice involved in the modern principle of compensation without enacting a uniform compensation statute.

S. REP. NO. 973, 69th Cong., 1st Sess. 16 (1926) (citations omitted).

The committee . . . recommends that this humanitarian legislation [the LHWCA] be speedily enacted into law so that this class of workers, practically the only class without the benefit of workmen's compensation, may be afforded this protection, which has come to be almost universally recognized as necessary in the interest of social justice between employer and employee.

H.R. REP. NO. 1190, 69th Cong., 1st Sess., 3 (1926).

32. Longshoremen's and Harbor Workers' Compensation Act, ch. 509, § 2, 44 Stat. 1424 (1927) (codified as amended at 33 U.S.C. §§ 901-50 (1988)).

33. Congress enunciated that:

The purpose of this bill [the LHWCA] is to provide for com-

injured beyond the pier and thus beyond the jurisdiction of state compensation programs.<sup>34</sup> Initially, the two requirements for coverage were that the maritime worker must be injured on the navigable waters<sup>35</sup> of the United States *and* the worker must not be eligible for state compensation benefits.<sup>36</sup> These two requirements together are commonly known as the “situs” test<sup>37</sup> of the LHWCA.<sup>38</sup>

In 1972 the LHWCA was amended to provide additional protection for longshoremen and harbor workers.<sup>39</sup> The 1972

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pensation, 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.

S. REP. No. 973, 69th Cong., 1st Sess., 16 (1926).

34. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 216 (1969) (LHWCA covers injuries upon the navigable waters but does not cover all injuries occurring on a pier even though the pier extends over navigable waters).

35. The LHWCA did not define the term “navigable waters”; however, the United States Supreme Court found that waters are navigable when they form a continued highway over which commerce is or may be carried on with other states or foreign countries. *The Daniel Ball*, 77 U.S. 557, 563 (1871) (steamer engaged in transporting goods destined for other states was engaged in commerce between the states and thus was subject to legislation by Congress). *But see Reynolds v. Ingalls Shipbuilding Div.*, 788 F.2d 264, 265 (5th Cir. 1986) (LHWCA provides exclusive remedy for shipfitter injured while conducting test sail of new vessel), *cert. denied*, 479 U.S. 885 (1986) in which the Fifth Circuit found that navigable waters do not end at the three-mile limit. A well-known commentary in the field of admiralty law concludes that navigable waters do not include small bodies of water wholly in one state and not navigable in interstate or foreign commerce. G. GILMORE & C. BLACK JR., *THE LAW OF ADMIRALTY* 32-33 (2d ed. 1975) [hereinafter GILMORE & BLACK].

36. GILMORE & BLACK, *supra* note 35, at 281. Coverage was provided for “injury occurring upon the navigable waters of the United States (including dry dock) and if recovery for the disability or death through workmen’s compensation proceedings may not validly be provided by State law.” *Id.*

37. The “situs” requirement looks to the location of the claimant at “the moment of injury.” *See Alford v. MP Indus.*, 16 Ben. Rev. Bd. Serv. (MB) 261 (1984) (shoreside worker injured in motor vehicle accident while running errand for employer does not satisfy situs requirement to qualify for benefits under LHWCA).

38. *See Nacirema*, 396 U.S. at 215, which discusses the two requirements for coverage as the “situs” test.

39. *See Brahm, Longshore Newsletter Procedure Manual*, Ch. 1, p. 3 (1989). Congress perceived several weaknesses in the LHWCA: a substantial jurisdictional problem that allowed maritime workers to step in and out of coverage; an arbitrary demarcation line (the Jensen line) that would allow non-maritime workers to collect benefits simply due to their location on navigable waters at the time of injury; and, a benefit structure that was outdated and out of step with the wages of maritime workers. *Id.*

LHWCA Amendments expanded the “situs” test from covering workers injured *on* navigable waters to covering injuries that occurred on piers, wharves, or any other area used in loading, unloading, repairing, dismantling, or building a vessel.<sup>40</sup> The Amendments also added a “status” requirement which injured workers must satisfy before coverage is allowed.<sup>41</sup>

Status is the occupational component of LHWCA coverage;<sup>42</sup> a worker’s status defines whether the claimant is a “maritime employee.” Due to Congress’ failure to describe “maritime employment” in either the original LHWCA or its legislative history, the 1972 Amendments require an initial determination of status before benefits can be conferred.<sup>43</sup> Congress intended to cover workers involved in the loading, unloading, repairing, or building of a vessel.<sup>44</sup> Thus, an employee covered under the

40. 33 U.S.C. § 903(a) (1988).

41. 33 U.S.C. § 902(3) (1988). *See supra* note 3 for statutory language.

42. *See* P.C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69, 80 (1979) (claimants involved in intermediate steps of moving cargo between ship and land transportation were engaged in maritime employment under the LHWCA), which defined status as the occupational component of LHWCA coverage.

43. *Northeast*, 432 U.S. at 265.

44. *Id.* at 267. The House Report to the 1972 Amendments illustrates Congress’ intent to cover all those involved in the loading and unloading process:

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i. e., a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work in whole or in part, on navigable wa-



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LHWCA is required to be “any person engaged in maritime employment”<sup>45</sup> including longshoremen<sup>46</sup> and harbor workers.<sup>47</sup> Because the “status” of the injured party is considered together with the “situs” of the injury, the 1972 Amendments effectively narrowed potential eligibility for coverage.<sup>48</sup>

## B. CASE LAW

The Ninth Circuit in *Weyerhaeuser Co. v. Gilmore*<sup>49</sup> was the first circuit court to interpret the “status” requirement after the LHWCA was amended.<sup>50</sup> In *Weyerhaeuser*, a “pondman”<sup>51</sup> employed at a sawmill<sup>52</sup> was injured when he fell from a walkway into a log pond.<sup>53</sup> Benefits under the LHWCA were denied by the court<sup>54</sup> because he was not engaged in maritime employment.<sup>55</sup>

The Ninth Circuit held that before an injured employee can be compensated under the LHWCA, his actual work must have a realistically significant relationship to traditional maritime ac-

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ters, is not covered even if injured on a pier adjoining navigable waters.

H.R. REP. NO. 1441, 92nd Cong., 2nd Sess. 10-11 (1972), reprinted in 1972 U.S. CODE CONG. & ADMIN. NEWS 4698, 4708.

45. 33 U.S.C. § 902(3) (1988). See *supra* note 3 for statutory language.

46. 33 U.S.C. §902(3) (1988), states that longshoremen includes those persons engaged in longshoring operations. *Id.*

47. *Id.* A harborworker includes ship repairmen, shipbuilders, and shipbreakers. *Id.* Prior to this Amendment, an employee was “entitled to federal compensation if his injuries occurred on navigable waters and his employer had an employee (not necessarily the injured employee) engaged in maritime employment.” *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957, 960 (9th Cir. 1976) (to be eligible for LHWCA benefits, an employee’s work must have a realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters), *cert. denied*, 429 U.S. 868 (1976). See *infra* notes 49-57 and accompanying text for a discussion of *Weyerhaeuser*.

48. *Northeast*, 432 U.S. at 264-65.

49. 528 F.2d 957 (9th Cir. 1976).

50. *Weyerhaeuser*, 528 F.2d at 959.

51. *Id.* at 959. A “pondman” sorts logs to be fed into the sawmill for processing into lumber or plywood. *Id.*

52. *Id.* at 958. The sawmill was located on a salt-water bay of the Pacific Ocean. Parts of the bay adjacent to the plant were enclosed by docks and log booms for the purpose of holding logs being processed and are known as “ponds.” *Id.*

53. *Id.* at 958.

54. *Weyerhaeuser*, 528 F.2d at 959. Claimant did receive state compensation benefits for 21 days. *Id.* The court’s opinion does not clarify the status of those state benefits after the 21 day period.

55. *Id.* at 962.

tivity, and the disabling injury must have occurred on navigable waters or adjoining areas.<sup>56</sup> In *Weyerhaeuser*, the log pond was simply used as a way to transport logs from point to point in the log manufacturing process and had no close relationship to any maritime activity.<sup>57</sup>

The Second Circuit in *Fusco v. Perini North River Associates*,<sup>58</sup> used the *Weyerhaeuser* test to deny LHWCA coverage to two laborers constructing a sewage disposal plant.<sup>59</sup> The laborers claimed they were engaged in maritime employment because they were harbor workers.<sup>60</sup> The court stated that the claimants' activities were insignificant to navigation or commerce on navigable waters because they were engaged exclusively in constructing a sewage disposal plant.<sup>61</sup>

The significant relationship test enunciated in *Weyerhaeuser* was followed by several maritime circuits<sup>62</sup> until the United

56. *Id.* at 961 (quoting *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972) (some relationship required between the tort and traditional maritime activities involving navigation or commerce on navigable waters)).

57. *Id.* at 961. The court found it "illogical to think of a pondman's work and duties at or on an upland sawmill's log pond as 'maritime employment' in the traditional sense." *Id.*

58. 622 F.2d 1111 (2d Cir. 1980) (claimant not covered under LHWCA where employment activities had nothing significant to do with navigation or commerce on navigable waters).

59. *Fusco*, 622 F.2d at 1113. The laborers were injured over navigable waters while engaged in constructing a sewage disposal plant extending over the water. *Id.* at 1111.

60. *Id.* at 1111.

61. *Id.* The Second Circuit noted:

It is not significant that the [sewage] plant was being constructed so that sewage would not cause pollution of navigable waters; nor that the claimants performed part or all of their work while upon floating stages or upon barges. The only sense in which the claimants' activities were maritime was in the sense of their locus.

*Id.*

62. See e.g., *Schwabenland v. Sanger Boats*, 683 F.2d 309 (9th Cir. 1982) (claimant's regular performance of maritime operations sufficient to confer status under LHWCA), *cert. denied*, 459 U.S. 1170 (1983); *Duncanson-Harrelson Co. v. Director, Office of Workers' Compensation Programs*, 644 F.2d 827 (9th Cir. 1981) (claimant satisfied status requirement because he was injured over pre-amendment navigable waters); *Miller v. Central Dispatch, Inc.*, 673 F.2d 773 (5th Cir. 1981) (claimant's duties essential for ocean-going vessels engaged in foreign trade thus essential to maritime industry); *Odom Constr. Co. v. United States Dep't of Labor*, 622 F.2d 110 (5th Cir. 1980) (where claimant was performing maritime work and where a significant part of employer's business was maritime, the policies of the LHWCA favored coverage), *cert. denied*, 450 U.S. 966 (1981); *Fusco v. Perini N. River Assoc.*, 622 F.2d 1111 (2d Cir. 1979) (claimant not cov-

States Supreme Court suggested the adoption of a more restrictive standard.<sup>63</sup>

In *Northeast Marine Terminal Co., Inc. v. Caputo*,<sup>64</sup> the United States Supreme Court considered whether an injured worker who loaded and unloaded containers, barges, and trucks at a pier<sup>65</sup> satisfied the "status" requirement.<sup>66</sup> The Court held that the "status" requirement is satisfied when a person spends at least some of his time in indisputably longshoring operations.<sup>67</sup> In *Northeast*, the activities involved the loading of a ship's cargo; therefore, maritime employment was involved and the requirements for LHWCA benefits were satisfied.<sup>68</sup>

The issue of "status" was again addressed by the Supreme Court in *P.C. Pfeiffer Co. v. Ford*.<sup>69</sup> In *Pfeiffer*, two warehousemen were injured and sought benefits under the LHWCA.<sup>70</sup> One employee was injured while fastening military vehicles onto railroad flatcars,<sup>71</sup> and the second was injured while unloading a

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ered under the LHWCA where employment activities had nothing significant to do with navigation or commerce on navigable waters), *cert. denied*, 449 U.S. 1131 (1981). *But see*, *Dorris v. Director, Office of Workers' Compensation Programs*, 808 F.2d 1362 (9th Cir. 1987) (claimant truck driver failed status test of the LHWCA because he was involved in overland transportation and was not engaged in activities integral to longshoring).

63. *See* *Herb's Welding v. Gray*, 470 U.S. 414 (1985) (Under the 1972 Amendments to the LHWCA, Congress intended to limit benefits to those employees specifically involved in the essential elements of loading, unloading, repairing, or building a vessel).

64. 432 U.S. 249 (1977).

65. *Northeast*, 432 U.S. at 255. The injury occurred when ship's cargo was being loaded into a truck. *Id.*

66. *Id.* at 255. *Caputo* was hired by *Northeast* as a terminal laborer. *Id.* This position involved carrying out any number of tasks involved with the transfer of cargo between land and maritime transportation, including stuffing and stripping containers, loading and discharging barges, and loading and unloading trucks. *Id.* at 273.

67. *Id.* at 273. The Court stated:

It seems clear, . . . that when Congress said it wanted to cover "longshoremen," it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity.

*Northeast*, 432 U.S. at 273.

68. *Id.* The Court concluded that, "[t]he language of the 1972 Amendments is broad and suggests that we should take an expansive view of the extended coverage." *Id.* at 268.

69. 444 U.S. 69 (1979).

70. *Pfeiffer*, 444 U.S. at 71.

71. *Id.* The military vehicles had been delivered to the port by ship the day before the accident. *Id.*

bale of cotton from its transport container into a pier warehouse.<sup>72</sup> The Court held that at the time of the injuries, the workers were involved in maritime employment because they were engaged in intermediate steps of moving cargo between ship and land transportation.<sup>73</sup>

The *Weyerhaeuser* significant relationship test may have recently been abandoned by the Supreme Court and replaced with the more restrictive standard articulated in *Herb's Welding v. Gray*.<sup>74</sup>

In *Herb's Welding*, the Court determined that the 1972 Amendments were not meant to cover those employees injured in areas adjoining navigable waters unless they were engaged in loading, unloading, building, or repairing vessels.<sup>75</sup> The claimant in *Herb's Welding* was injured while working on an off-shore fixed oil platform.<sup>76</sup> He was denied LHWCA compensation after the Court determined that he was not engaged in maritime employment<sup>77</sup> because he did not load, unload, build, or repair

72. *Id.* Cotton arriving at the port from inland shippers entered storage in cotton compress-warehouses, then went by dray wagon to pier warehouses, and later were moved by longshoremen from the warehouses onto ships. *Id.*

73. *Id.* at 83. The Court stated:

We believe that [the statute's] explicit use of the terms "longshoreman" and "other person engaged in longshoring operations" to describe persons engaged in maritime employment demonstrates that workers doing tasks traditionally performed by longshoremen are within the purview of the 1972 Act . . . . [T]he crucial factor is the nature of the activity to which a worker may be assigned.

*Pfeiffer*, 444 U.S. at 82.

74. 470 U.S. 414 (1985).

75. *Herb's Welding*, 470 U.S. at 424. The Court reasoned that when Congress amended the LHWCA in 1972 its purpose was to extend coverage to longshoremen, harbor workers, and others who were injured while engaged in "maritime employment" and while working in areas customarily used to load and unload ships or to repair or build ships. *Id.* at 420. Prior to the 1972 Amendments, the LHWCA only extended coverage to those accidents occurring on navigable waters. *Id.* Since Gray had nothing to do with the loading or unloading process he was not considered to be engaged in "maritime employment" as required under the LHWCA. *Id.* at 425.

76. *Id.* at 416, 417. The platform was located in the Gulf of Mexico, off of the Louisiana coast. *Id.* at 416.

77. *Id.* at 427. The Supreme Court held that claimant was not a maritime employee because there is nothing inherently maritime about building and maintaining platforms and pipelines. *Id.* at 425. The Court further noted that although "maritime employment" is not limited to those occupations specifically listed in 33 U.S.C. 902(3), it cannot be read to eliminate the requirement of a connection with the loading, unloading, or con-

vessels.<sup>78</sup>

The *Herb's Welding* standard was utilized by the Fifth Circuit in *Miles v. Delta Well Surveying Corp.*,<sup>79</sup> a case involving a maintenance worker injured on a fixed offshore platform.<sup>80</sup> The court noted that the worker, like the claimant in *Herb's Welding*, was not engaged in maritime employment as defined by the United States Supreme Court.<sup>81</sup> The Fifth Circuit employed the *Herb's Welding* test again in *King v. Universal Electric Construction*.<sup>82</sup> In *King*, a lineman was running electrical lines across a river when he fell out of a boat and drowned.<sup>83</sup> The court affirmed the trial court's conclusion that the lineman did not satisfy the status test as set forth in *Herb's Welding*.<sup>84</sup>

A Texas District Court also cited the *Herb's Welding* test in *Bailey v. Global Marine, Inc.*<sup>85</sup> In *Bailey*, a pressure testing worker was injured while on board an offshore drilling vessel.<sup>86</sup> The court noted that *Herb's Welding* narrowed the prior expansive interpretation of status with its essential elements of loading and unloading test.<sup>87</sup>

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struction of ships. *Id.* at 423-24.

78. *Id.* at 425.

79. 777 F.2d 1069 (5th Cir. 1985) (under Louisiana law, employer is liable only for workmen's compensation payments and not damages in tort).

80. *Miles*, 777 F.2d at 1070. The injury occurred on an offshore compressor station. A compressor station recompresses gas from outlying platforms for later use in production facilities. The worker was employed as a maintenance roustabout whose duties included cleaning the floors surrounding the large compressors on a daily basis and keeping the compressors in proper working order. *Id.*

81. *Id.* at 1071. The court did not discuss the actual test set forth in *Herb's Welding* but stated that "[claimant] was not engaged in 'maritime employment' as it is defined in *Herb's Welding* and is therefore not under the direct coverage of LHWCA." *Id.*

82. 799 F.2d 1073 (5th Cir. 1988) (spouse of lineman drowned in navigable river has remedy for wrongful death under general maritime law).

83. *King*, 799 F.2d at 1073. The lineman fell from the boat while taking a "test ride." *Id.*

84. *Id.* The court did not discuss the actual test as set forth in *Herb's Welding* but noted that the trial court's holding was correct. *Id.*

85. 714 F. Supp. 235 (S.D. Tex. 1989) (employee is not a Jones Act seamen where he performs less than 10% of his work on vessels and is not permanently assigned to a vessel). See also *Clark v. Solomon Navigation Ltd.*, 631 F. Supp. 1275 (S.D. Tex. 1986) (river pilot not included within the revised coverage of the LHWCA under the 1972 Amendments).

86. *Bailey*, 714 F. Supp. at 235.

87. *Id.* at 240. The court stated that "[r]eliance on [an expansive interpretation] to give plaintiff 'status' under the LHWCA . . . is misplaced in light of the Supreme Court's recent decision in *Herb's Welding v. Gray* . . ." *Id.*

Although *Herb's Welding* has been followed by several courts, two maritime circuits have not used the stricter standard for reasons that are not clear. The Eleventh Circuit, in *Sanders v. Alabama Dry Dock and Shipbuilding Co.*,<sup>88</sup> which was decided three years after *Herb's Welding*, used the *Weyerhaeuser* "status" test to decide that a dry dock employee<sup>89</sup> was engaged in maritime employment.<sup>90</sup> The court decided that because the employee's duties significantly related to and directly furthered his employer's ship building and ship repairing activities, the employee was engaged in maritime employment.<sup>91</sup>

The Fifth Circuit in *Union Texas Petroleum v. PLT Engineering, Inc.*<sup>92</sup> also employed the *Weyerhaeuser* "status" test in resolving a contract dispute.<sup>93</sup>

In 1989, the Supreme Court expanded the *Herb's Welding* test in *Chesapeake and Ohio Railway Co. v. Schwalb*.<sup>94</sup> In *Chesapeake*, the Court held that employees<sup>95</sup> injured while maintaining or repairing equipment essential to the loading or unloading of a ship were covered by the LHWCA.<sup>96</sup> The test has thus been

88. 841 F.2d 1085 (11th Cir. 1988) (employee's responsibilities as labor relations assistant satisfied status test under LHWCA).

89. *Sanders*, 841 F.2d at 1086. *Sanders*' duties included boarding vessels under construction or repair to inspect the progress of the work and to help maintain safe working conditions in the shipyard. *Id.*

90. *Id.* at 1088.

91. *Id.* Why the court did not follow *Herb's Welding* is unclear because the court did not discuss *Herb's Welding* in its decision.

92. 895 F.2d 1043 (5th Cir. 1990) (Outer Continental Shelf Lands Act requires application of Louisiana law to non-maritime contract disputes arising over construction on the Outer Continental Shelf), *cert. denied*, 59 U.S.L.W. 3247 (1990).

93. *Texas Petroleum*, 895 F.2d at 1048. Although *Weyerhaeuser* was not specifically discussed, the court compared *Texas Petroleum* with an earlier Fifth Circuit case which used the "significant relationship to maritime activity" test. *Id.* The court did not clarify why it utilized the "significant relationship" test and not the test set forth in *Herb's Welding*. See *infra* notes 116-18 and accompanying text.

94. 110 S. Ct. 381 (1989) (railroad employees injured while maintaining or repairing equipment essential to loading maritime vessels are covered under the LHWCA).

95. *Chesapeake*, 110 S. Ct. at 383. In *Chesapeake*, laborers engaged in housekeeping, janitorial and repair services were injured while they were cleaning spilled coal from loading equipment to prevent fouling. *Id.*

96. *Id.* at 385. The Court further explained its decision by stating:

Someone who repairs or maintains a piece of loading equipment is just as vital to and an integral part of the loading process as the operator of the equipment. When machinery breaks down or becomes clogged or fouled because of the lack

enlarged to include not only those injured during the loading or unloading process, but those injured while maintaining or repairing equipment essential to the loading and unloading process.<sup>97</sup>

#### IV. THE COURT'S ANALYSIS

In *Coloma v. Director, Office of Workers' Compensation Programs*,<sup>98</sup> the Ninth Circuit held that a cook employed on a longwharf was not a maritime employee when injured because he was not engaged in the loading and unloading of a ship; therefore, the status test as enunciated in section 902(3)<sup>99</sup> of the 1972 Amendments was not met.<sup>100</sup>

The court found that the United States Supreme Court in *Herb's Welding*<sup>101</sup> intended to reject the *Weyerhaeuser*<sup>102</sup> "significant relationship" test<sup>103</sup> and substitute an "essential elements of loading and unloading" test.<sup>104</sup> The Ninth Circuit thus disagreed with plaintiff's argument that the "loading and unloading" test was merely dicta.<sup>105</sup>

The Ninth Circuit rejected plaintiff's argument that a long line of cases applying the "significant relationship" test had been broken.<sup>106</sup> The court explained that when it previously addressed the issue of "status," subsequent to *Herb's Welding*, it deferred to the Supreme Court's interpretation of "maritime employment."<sup>107</sup> However, an apparent conflict between circuits

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of cleaning, the loading process stops until the difficulty is cured.

*Chesapeake*, 110 S. Ct. at 385.

97. *Id.* at 385.

98. *Coloma v. Director, Office of Workers' Compensation Programs*, 897 F.2d 394 (9th Cir. 1990).

99. 33 U.S.C. § 902(3) (1988). See *supra* note 3 for definition of maritime employee.

100. *Coloma*, 897 F.2d at 400.

101. *Herb's Welding v. Gray*, 470 U.S. 414 (1985). See *supra* notes 74-78 and accompanying text for a discussion of *Herb's Welding*.

102. *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1976). See *supra* notes 49-57 and accompanying text for a discussion of *Weyerhaeuser*.

103. *Coloma*, 897 F.2d at 398. The court further noted that "[i]n *Herb's Welding*, the Supreme Court went beyond merely rejecting the Fifth Circuit's application of the 'significant relationship' test; it rejected the test itself." *Id.* at 399.

104. *Id.* at 398-99.

105. *Id.* at 398.

106. *Id.* at 399.

107. *Coloma*, 897 F.2d at 399. The case the court was referring to was *Dorris v.*

was noted by the court.<sup>108</sup>

Finally, the Ninth Circuit reasoned that because the "Seagull Inn" was unrelated to Chevron's loading and unloading functions, the Supreme Court's decision in *Chesapeake*<sup>109</sup> could be distinguished.<sup>110</sup> In *Chesapeake*, the Supreme Court found that benefits under the LHWCA could be granted because the injured worker had maintained equipment used to load and unload a ship.<sup>111</sup> In *Coloma*, Chevron's longshoring activities had continued despite the closure of the Inn.<sup>112</sup> Therefore, the Ninth Circuit concluded that because the Inn's operation was unnecessary to the loading or unloading of a vessel, LHWCA benefits should not be granted to the Inn's cook.<sup>113</sup>

## V. CRITIQUE

In *Coloma*,<sup>114</sup> the Ninth Circuit stated that the *Weyerhaeuser*<sup>115</sup> "significant relationship" test had been rejected and replaced with an "essential elements of loading and unloading" test articulated by the Supreme Court in *Herb's Welding*.<sup>116</sup> By its strict interpretation of *Herb's Welding*, the Ninth Circuit rejected a long line of cases that applied the "significant relationship" test and adopted a position which one circuit has re-

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Director, Office of Workers' Compensation Programs, 808 F.2d 1362 (9th Cir. 1987). In *Dorris*, the Ninth Circuit denied LHWCA benefits to a truck driver who drove trucks between a container dock and berths located in different harbors. *Dorris*, 808 F.2d at 1364. The court held that these functions were not longshoring activities under the LHWCA and thus, not maritime employment. *Id.* at 1365. In *Coloma*, the court noted that in *Dorris* it did not specifically cite *Herb's Welding* but relied on *Northeast Marine and Pfeiffer*. *Coloma*, 897 F.2d at 399 n.8.

108. *Coloma*, 897 F.2d at 399. The court briefly mentioned *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d at 1088, whereby a test similar to the *Weyerhaeuser* test was applied. *Coloma* 897 F.2d at 399.

109. *Chesapeake & Ohio Ry. v. Schwalb*, 110 S. Ct. 381 (1989).

110. *Id.* at 400.

111. *Id.* In *Chesapeake*, the Court concluded that "[t]he determinative consideration is that the ship loading process could not continue unless the [equipment] was operating properly." *Id.* at 385-86.

112. *Coloma*, 897 F.2d at 400.

113. *Id.*

114. *Coloma v. Director, Office of Workers' Compensation Programs*, 897 F.2d 394 (9th Cir. 1990).

115. *Weyerhaeuser Co. v. Gilmore*, 528 F.2d 957 (9th Cir. 1976). See *supra* notes 49-57 and accompanying text for a discussion of *Weyerhaeuser*.

116. *Coloma*, 897 F.2d at 398-99.



jected,<sup>117</sup> one district court has accepted,<sup>118</sup> and one circuit has both accepted and rejected.<sup>119</sup>

When Congress amended the LHWCA in 1972, its intent was to expand coverage to reduce the problems associated with a limitation based on arbitrary lines drawn at the water's edge.<sup>120</sup> Seemingly, the court in *Coloma* did not heed that intent and instead chose to draw its own "bright line," which severely restricts coverage for longshoremen and harbor workers. This interpretation is completely at odds with the language of the 1972 Amendments which suggest that a broad and expansive view be taken of the LHWCA.<sup>121</sup>

Using the *Weyerhaeuser*<sup>122</sup> test, courts have found coverage for a wide array of maritime workers.<sup>123</sup> If *Herb's Welding* is a rejection of the *Weyerhaeuser* test, as the Ninth Circuit suggests, potential coverage will be denied to many categories of maritime workers and limited for an exclusive class of shoreside workers. Limiting coverage to the "essential elements of loading and unloading of a vessel" simply does not conform to the ever-changing environment of life on the waterfront.<sup>124</sup>

The test advanced in *Herb's Welding* suggested that the Act

117. See *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d 1085 (11th Cir. 1988) See *supra* notes 88-91 and accompanying text for a discussion of *Sanders*.

118. See *Bailey v. Global Marine, Inc.*, 714 F. Supp. 235 (S.D. Tex. 1989). See *supra* notes 85-87 and accompanying text for a discussion of *Bailey*.

119. See *King v. Universal Elec. Constr.*, 799 F.2d 1073 (5th Cir. 1988); See *supra* notes 82-84 and accompanying text for a discussion of *King*. See also *Miles v. Delta Well Surveying Corp.*, 777 F.2d 1071 (5th Cir. 1985); See *supra* notes 79-81 and accompanying text for a discussion of *Miles*. But see *Union Texas Petroleum v. PLT Eng'g*, 895 F.2d 1043 (5th Cir. 1990); See *supra* notes 92-93 and accompanying text for a discussion of *Texas Petroleum*.

120. See *Northeast Marine Terminal v. Caputo*, 432 U.S. at 256, 257 (1977). See *supra* notes 64-68 and accompanying text for a discussion of *Northeast*. See *supra* notes 39-48 and accompanying text for a discussion of the 1972 LHWCA Amendments.

121. *Northeast*, 432 U.S. at 268. See *supra* notes 64-68 and accompanying text for a discussion of *Northeast*. See *supra* notes 39-48 and accompanying text for a discussion of the 1972 LHWCA Amendments.

122. *Weyerhaeuser*, 528 F.2d 957.

123. Hillsman, *Through a Glass Darkly: A Curmudgeon's View of Longshore Coverage*, 3 U.S.F. MAR. L. J. \_\_\_\_ (1991).

124. Hillsman, *supra* note 123. Hillsman notes that in 1962, longshoremen numbered in excess of 70,000 men but by 1985 that number had dwindled to only 29,759. This trend will doubtless continue, while potential beneficiaries under the LHWCA could well proliferate. Hillsman, *supra* note 123 at \_\_\_\_ n.106.

should only cover those involved in loading, unloading, repairing, or building a vessel.<sup>125</sup> Because they do not load or unload vessels, shipbreakers<sup>126</sup> would not be covered if this test were literally applied. However shipbreakers are specifically listed as maritime employees in the statute and thus should be covered by the LHWCA.<sup>127</sup> By adopting the narrow test articulated in *Herb's Welding*, the Ninth Circuit has either implicitly or intentionally removed shipbreakers from coverage under the LHWCA.

## VI. CONCLUSION

The Ninth Circuit's decision in *Coloma*<sup>128</sup> illustrates the problems inherent in the current version of the LHWCA. These problems could be solved by either a Congressional amendment to the current version of the LHWCA or by the United States Supreme Court addressing the problems and setting forth a clear standard for the admiralty courts to administer by.

*Jill Bennett\**

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125. *Herb's Welding v. Gray*, 470 U.S. 414, 424 (1985).

126. Shipbreakers break up vessels unfit for further use. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2096 (1976).

127. Hillsman, *supra* note 123.

128. *Coloma v. Director, Office of Workers' Compensation Programs*, 897 F.2d 394 (9th Cir. 1990).

\* Golden Gate University School of Law, Class of 1992.