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Watchout Watchmen! Congress Has Excluded Security Employees from "Maritime Employment" Coverage under the Longshore and Harborworkers' Compensation Act Amendments of 1984

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WATCHOUT WATCHMEN! CONGRESS HAS EXCLUDED SECURITY EMPLOYEES FROM "MARITIME EMPLOYMENT" COVERAGE UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT AMENDMENTS OF 1984

Individuals employed exclusively to perform security work are no longer covered under the Longshore and Harbor Workers' Compensation Act (LHWCA). Watchmen had been traditionally covered, both before and after Congress added a "status" test for coverage in 1972. This Comment argues that because Congress eliminated the jurisdictional dilemma which formerly served as the main justification for extending LHWCA coverage, the 1984 LHWCA amendments are consistent with judicial decisions extending coverage to watchmen.

INTRODUCTION

In 1984, the Longshoremen's and Harbor Workers' Compensation Act¹ (LHWCA) was amended² to exclude from coverage "individuals employed exclusively to perform office clerical, secretarial, security, or data processing work."³ The 1984 LHWCA amendments con-

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¹. The LHWCA is now known as "The Longshore and Harbor Workers' Compensation Act," 33 U.S.C.A. §§ 901-50 (West Supp. 1985). The LHWCA is a remedial statute enacted in 1927 (Act of Mar. 4, 1927, ch. 509, 44 Stat. 1424) which obligates employers to compensate maritime employees for injuries incurred upon the navigable waters of the United States "including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel . . . ." 33 U.S.C. § 903(a) (1982). Prior to its enactment, longshoremen and other maritime employees who were injured on the seaward side of a pier were left without a compensation remedy, while those same employees were protected by state compensation acts if their injuries were sustained on the pier itself. Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917); State Indus. Comm’n v. Nordenholt Corp., 259 U.S. 263 (1922). Although this gap in coverage was eliminated by the LHWCA, the compensation system lacked uniformity because a determination of benefits as state or federal depended on the "fortuitous circumstance of whether the injury [to the longshoreman] occurred on land or over water." (S. Rep. No. 1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. No. 1441, 92nd Cong., 2d Sess. 10-11 (1972). The problem of shifting coverage was eliminated by an expansion of the covered situs area in the 1972 amendments to the LHWCA. For further discussion of the 1972 amendments see infra notes 5-11 and accompanying text.


The term “employee” means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include:

(A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;
(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);
(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;
(E) aquaculture workers;
(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;
(G) a master or member of a crew of any vessel; or
(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers’ compensation law.

5. 33 U.S.C. §§ 901-50 (1972). The purpose of the 1972 amendments was to achieve uniformity and fairness in LHWCA compensation by extending situs coverage shoreward for the benefit of longshoremen, harbor-workers, and other employees engaged in maritime employment. S. REP. No. 1125, 92d Cong., 2d Sess. 13 (1972); H.R. REP. No. 1441, 92d Cong., 2d Sess. 10 (1972). Maritime employees can now move freely from ship to dock under the protective umbrella of the LHWCA. Additionally, Congress was concerned with protecting amphibious workers from a perilous choice between two mutually exclusive compensation schemes. Holcomb v. Robert W. Kirk & Assoc., Inc., 11 BEN. REV. BD. SERV. (MB) 835, 842 (1981) (Miller, J. dissenting).

6. The “situs” requirement was formerly limited to injuries “occurring upon the navigable waters of the United States including any dry dock . . . .” The 1972 amendments substantially broadened the LHWCA as follows:

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 adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel) . . . .

7. The “status” requirement modified the types of employees covered by the LHWCA. See H. BAER, ADMIRALTY LAW OF THE SUPREME COURT 246-47, 250 (1979); Larson, The Conflicts Problem Between The Longshoremen’s Act and the State Workmen’s Act Under the 1972 Amendments, 14 HOUR. L. REV. 287, 291 (1977). Thus, after 1972 the claimant must meet both the place of injury situs test, and the following status test:

The term “employee” means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations,
The status requirement of § 902(3) restricted LHWCA benefits to only those employees “engaged in maritime employment (including any longshoreworker or other person engaged in longshoring operations, and any harborman including a ship repairman, shipbuilder and a shipbreaker . . . ”. Unfortunately, the phrase, “a person engaged in maritime employment,” was not defined in either the original LHWCA nor in the 1972 amendments. Therefore, it was unclear which employees, beyond “longshoremen” or “harbor workers,” were covered as “employees” under the LHWCA. The language of § 902(3), however, suggested that “maritime employment” was broader than the specific occupations listed.

The legislative history of the 1984 LHWCA amendments indicates that Congress intended to exclude individuals employed exclusively as watchmen or security guards from the term “employee,” and thus from coverage under the LHWCA. The exclusion holds even if the individuals are employed by maritime employers, “because the nature of their work does not expose them to traditional maritime hazards.” Conversely, an individual performing exclusively clerical work outside of an office in an area where cargo is handled remains within the LHWCA coverage.

Watchmen or security guards injured upon navigable waters traditionally have been covered as persons “engaged in maritime employ-
ment" under the pre-1972 amendment LHWCA. Moreover, the United States Courts of Appeals for the Second, Fifth, and Ninth Circuits have held that watchmen were engaged in maritime employment as required for coverage under § 902(3) of the post-1972 amendment LHWCA.

For years, the Benefits Review Board (BRB) of the United States Department of Labor, created by the 1972 amendments to hear appeals regarding an employee’s status under the LHWCA, consistently held that watchmen were not involved in an integral part of the longshoring process and, thus, were not engaged in maritime employment. Only with reluctance has the BRB followed recent circuit court decisions extending LHWCA coverage to watchmen.

This Comment argues that the exclusion of watchmen from LHWCA coverage by Congress is justified because the earlier jurisdictional dilemma, forcing amphibious watchmen to choose between two mutually exclusive state and federal compensation schemes, has


16. Under the 1972 amendments, contested compensation claims are heard by an administrative law judge. 33 U.S.C. § 919(d) (1982). Review is then available before the BRB, a three-member board appointed by the Secretary of Labor. The BRB 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 [the LHWCA]." 33 U.S.C. § 921(b)(1), (3) (1982). The 1984 LHWCA amendments have expanded the size of the BRB from three members to five. Further, to assist the BRB in clearing up the backlog of claims, section 21 is amended to authorize the secretary to appoint three Administrative Law Judges of the Department of Labor to serve as temporary members of the Board for periods of 18 months, whenever the backlog of cases exceeds 1,000. Also, all administrative functions of the BRB are delegated to the chairman of the Board so that members need not spend time on purely administrative functions. 1984 U.S. Code Cong. & Ad. News 2734, 2754-55. See 20 C.F.R. §§ 801-902 (1979) for the rules of practice and procedure governing appeals before the BRB. The decisions of the BRB are subject to review by the federal courts of appeals. 33 U.S.C.A. § 921(c) (West Supp. 1985).


been eliminated by the 1984 LHWCA amendments.\textsuperscript{19} This rationale is consistent with pre-1972 amendment decisions extending coverage to watchmen injured upon navigable waters, and post-1972 amendment decisions extending coverage to amphibious watchmen, although injured on a land-based situs adjoining navigable waters.

This Comment will trace both pre-1972 amendment and post-1972 amendment decisions extending LHWCA coverage to watchmen to demonstrate the soundness of the 1984 LHWCA amendments. It will note that goals of uniformity of coverage and jurisdictional certainty are not abandoned by the exclusion of security personnel from LHWCA coverage. Purely shore-based watchmen never faced the problem of shifting coverage or jurisdictional uncertainty eliminated by the 1984 LHWCA amendments. Therefore, prior to their exclusion, they had to independently satisfy the status requirement of § 902(3) by showing that: (1) their duties bore a realistically significant relationship to navigation and commerce;\textsuperscript{20} (2) they were engaged in an integral part of the longshoring process;\textsuperscript{21} or (3) they were harbor-workers.\textsuperscript{22} Contrary to assertions in recent appellate decisions, land-based watchmen do not satisfy any of the above tests for status coverage, thus justifying their exclusion under the 1984 LHWCA amendments. Finally, this Comment will explore the problems of interpreting which employees are within an excluded category of the amended LHWCA.

\textit{The Pre-1972 Amendment LHWCA and the “status” of Watchmen}

Congress enacted the original 1927 LHWCA in response to judicial decisions holding “that the states were without power, and Congress could not delegate to them power, to provide compensation for

\textsuperscript{19} 33 U.S.C.A. § 902(3) (West Supp. 1985). “[T]hese exceptions are conditioned upon an individual being subject to coverage under a state workers’ compensation law. Thus, if a state law exempts from coverage an individual who otherwise falls within any of the above exceptions of the Longshore Act, the Longshore exemption would not apply.” 1984 U.S. CODE CONG. & AD. NEWS 2772.

\textsuperscript{20} Herb’s Welding v. Gray, 703 F.2d 176 (5th Cir. 1983); Mississippi Coast Marine v. Bosarge, 637 F.2d 994, 998 (5th Cir. 1981); Pippen v. Shell Oil Co., 661 F.2d 378, 382 (5th Cir. 1981); Odom Constr. Co. v. U.S. Dep’t of Labor, 622 F.2d 110, 113 (5th Cir. 1980), cert. denied, 450 U.S. 966 (1981); Weyerhaeuser v. Gilmore, 529 F.2d 957, 961 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976); See also Sealand Service Inc. v. Director OWCP, 540 F.2d 629 (3d Cir. 1976).


\textsuperscript{22} Id.
longshoremen injured on navigable waters.” In extending federal coverage to a worker, Congress was concerned solely with the situs of an employee’s injury. The only mention in the LHWCA to the undefined term “maritime employment” was in the definition of “employer.” It required that the employer have at least one employee partly engaged in maritime employment upon the navigable waters of the United States. Therefore, an employee injured upon navigable waters was not required to be engaged in maritime employment at the time of injury. The terms “injury” and “employee,” as defined by Congress, made no reference to the maritime status of a worker as a coverage prerequisite.

In the pre-1972 amendment judicial decisions construing the maritime employment status of watchmen, the courts distinguished between employment which aided navigation and employment which was related to navigation. Employment which aided navigation was considered employment by crew members who were and continue to be excluded from coverage under the LHWCA. Employment which was related to navigation was deemed maritime in character and included employment activity by essentially all other non-crew members injured upon navigable waters. Under the “maritime but


24. 33 U.S.C. § 902(4) (1982). This section provided as follows: “[t]he term ‘employer’ means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any drydock).” Id.

25. Id.

26. 33 U.S.C. § 902(2) (1982). This section provided as follows: “[t]he term ‘injury’ means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally or unavoidably results from such accidental injury . . . .” Id.

27. 33 U.S.C. § 902(3) (1982). This section provided as follows: “[t]he term ‘employee’ does not include 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.” Id.

28. 33 U.S.C.A. § 902(3) (West Supp. 1985). Seamen, however, are entitled to “maintenance and cure,” a remedy under the general maritime law, for illness or injury incurred in the service of a vessel. See 30 R. Cas. 1171-1216. In the event of injury or death in the course of performing their duties, they or their survivors may also sue for damages based on unseaworthiness, a strict liability remedy for failure to provide a safe workplace under the general maritime law. Seamen may also sue for damages on a negligence theory under the Jones Act., 46 U.S.C. § 688 (1982).

29. Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962) (affirming a lower court award of LHWCA benefits for a welder injured while working on an uncompleted drilling barge); Penn. R.R. Co. v. O’Rourke, 344 U.S. 334 (1953) (allowing LHWCA benefits to a railroad worker injured on navigable waters); Davis v. Dep’t of Labor and Indus., 317 U.S. 249 (1942) (holding that coverage under LHWCA would have been available for a steel construction worker who worked on navigable water, although his job related solely to bridge building); Parker v. Motor Boat Sales, Inc., 314 U.S. 244 (1941) (upholding a finding that a janitor whose only maritime activity was one trip as a lookout on a boat was “engaged in maritime employment”). See also DeBardeleben Coal
local doctrine," however, state compensation acts were allowed to cover certain injuries on navigable waters due to the local nature of the injury.\(^{30}\)

In *Union Oil Co. v. Pillsbury*,\(^{31}\) a former third officer of a ship was paid off and discharged when the ship entered port. He was later rehired as a night watchman. Subsequently, while engaged in the performance of his watchman duties, he was shot by a burglar. Rejecting the argument that the injured employee was a crewman at the time of the shooting, the court stated that his activities were not only maritime in nature, but were also of more than merely local significance.\(^{32}\) Employment was considered maritime in character, and thus *related to* navigation and commerce, based solely on the watchman's presence aboard ship at the time of his injury. The court did not undertake a functional analysis of a watchman's duties and their relationship to navigation and commerce.

The *Union Oil* court distinguished between those local maritime activities having only an incidental relation to navigation and commerce and maritime activities deemed covered under the LHWCA on the basis of the "more or less permanent location" of the vessel.\(^{33}\) Therefore, in *Sunny Point Packing Co. v. Faigh*,\(^{34}\) a case decided the same day, the court refused to apply the LHWCA to a watchman who was lost at sea during a storm while guarding a commercial fish trap anchored in the navigable waters of Alaska. The court upheld the application of the Alaska Workers' Compensation Act, because the fish trap was connected by cable to shore.\(^{35}\) The fixed nature of the floating situs, however, did not resolve the issue of local coverage. An examination of the intent of the ship owner regarding the continued grounding of the vessel was required.\(^{36}\)

In *Hillcone Steamship Co. v. Steffen*,\(^{37}\) a watchman was injured as a result of a fall while guarding a vessel which was "indefinitely

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\(^{31}\) 63 F.2d 925 (9th Cir. 1933).

\(^{32}\) Id. at 926.

\(^{33}\) Id.

\(^{34}\) 63 F.2d 921 (9th Cir. 1933).

\(^{35}\) *Sunny Point Packing*, 63 F.2d at 926.


\(^{37}\) 136 F.2d 965, 966 (9th Cir. 1943).
laid-up," but which its owners intended to eventually return to navigation and commerce. The Ninth Circuit held that the injury occurred in the course of maritime employment. Presumably, if the owners of the vessel had not intended to put it back into service on the high seas, the watchman's activity would have had only an incidental relationship to navigation and commerce. Therefore, his service would have been local in nature and his injury noncompensable under the LHWCA.

Similarly, in *Puget Sound Navigation Co. v. Marshall*, employment as a watchman on a laid-up ferry-boat was found to be related to commerce and navigation and thus maritime in nature. The court, like the court in *Hillcone*, rejected the employer's contention that the ferry was sufficiently divorced from commerce and navigation to meet the "local concern" test. In extending federal coverage, it distinguished between a vessel resting temporarily at a dock which was covered under the LHWCA and an uncompleted ship lying in navigable waters. Additionally, the court quoted the Supreme Court of the State of Washington for the proposition that the primary criterion for determining the type of compensation to be awarded depended on where the injury was sustained. If the workman was injured over navigable waters, federal maritime law governed. If the injury occurred on land, the state compensation system applied, despite the maritime nature of the workman's activity.

This rationale was embraced by the court in *Rex Investigative and Patrol Agency v. Collura*, where a watchman's injury aboard ship was a mere temporary incident of his employment. The court, in granting LHWCA benefits, held that the place of injury and not the nature of the employment was dispositive regarding federal coverage.

These decisions strongly support the conclusion that watchmen injured upon navigable waters were traditionally covered by the LHWCA, and therefore suffered shifting coverage when they left ship. Pre-1972 amendment decisions, however, offered no support for the proposition that maritime employment coverage of a watchman was related to anything but his presence on navigable waters.


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38. 31 F. Supp. 903 (W.D. Wash. 1940).
39. Id. at 907.
40. Id. (citing *Gonsalves*, 266 U.S. at 171).
41. Id. (citing *Grant Smith-Porter*, 257 U.S. at 469).
42. Id. at 906-07 (citing *Puget Sound Bridge Co. v. Dep't of Labor Indus.*, 185 Wash. 349, 352, 52 P.2d 1003, 1005 (1936)).
43. Id.
45. Id. at 698.
the Fifth Circuit cited these pre-1972 amendment decisions47 in reversing the BRB's denial of coverage under the post-1972 amended LHWCA. Claimant Holcomb, a night watchman, was permanently disabled when he fell through an "open hatch" on the vessel he was guarding.48 Yet, as pointed out by the BRB majority, which held that claimant Holcomb did not meet the status requirement of the amended LHWCA, "the pre-[1972] amendment cases which do not contain a functional analysis of the work of an employee, as contemplated by Congress when it added the status test to the Act, are no longer useful."49

A brief examination of the Supreme Court's interpretation of the "status" requirement under § 902(3) of the post-1972 amended LHWCA supports the use of this functional, "occupational" test50 for determining the maritime status of land-based employees and justifies the exclusion of watchmen under the 1984 LHWCA amendments.

THE U.S. SUPREME COURT INTERPRETATION OF THE "STATUS" REQUIREMENT ADOPTED IN THE 1972 LHWCA AMENDMENTS

The "Occupational" Test for Maritime Status

As previously mentioned, the 1972 amendments to the LHWCA broadened the "situs" test by redefining the area incorporated by the term "navigable waters."51 The original LHWCA52 had not provided for compensation to persons injured on land.53 This result seemed unfair, especially in the case of longshoremen who moved back and forth from ship to dock, constantly moving in and out of covered zones.54 Similarly, with the advent of containerization55 of cargo,
many longshoremen worked exclusively on terminals stripping and stuffing containers.\textsuperscript{64}

Concurrent with broadening the “situs” area, Congress created a “status” requirement under § 902(3) to restrict LHWCA benefits to those employees “engaged in maritime employment (including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and a shipbreaker . . . ).\textsuperscript{65}” The statutory ambiguity created by the phrase, “a person engaged in maritime employment”\textsuperscript{66} was described well by the Second Circuit in \textit{Fusco v. Perini North River Association}.\textsuperscript{59} The court observed:

Etymologically, the critical phrase [maritime employment] could have an occupational, or a geographical interpretation or both: That is, it could refer to a person engaged in an occupation characteristically associated with the sea or other navigable waters, and/or to a person engaged in work upon the sea or other navigable waters.\textsuperscript{58}

The Supreme Court, in two decisions,\textsuperscript{61} embraced an “occupational” connotation for “maritime employment” which focused on the maritime character of the worker’s occupation or employment activity. The Court rejected the “geographical” approach\textsuperscript{62} which was based on the “point of rest” doctrine\textsuperscript{63} — that maritime employment includes “only the portion of the unloading process that takes place before the stevedoring gang places cargo onto the dock.”\textsuperscript{64} The “occupational” approach is consistent with the intent of Congress to broaden the situs for coverage while restricting the class of employees covered under § 902(3).

In \textit{Northeast Marine Terminal Co. v. Caputo},\textsuperscript{65} the Supreme Court considered together the separate awards for claimants Blundo boxes which can be lifted off the vessel, thereby permitting the time consuming loading and unloading process to be performed on land. Under traditional break-bulk cargo-handling, each item of cargo had to be handled separately and stored individually in the hold of the ship. \textit{See Caputo}, 432 U.S. at 270.

\textsuperscript{56} Id. at 269-71.
\textsuperscript{57} Id.
\textsuperscript{59} Fusco, 601 F.2d at 659 (2d Cir. 1979), vacated and remanded, 444 U.S. 1028 (1980), rev’d, 622 F.2d 1111 (2d Cir. 1980). Fusco was reversed in light of the Supreme Court’s opinion in P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979), wherein the Supreme Court rejected the “geographical” approach to status originally adopted by the court in \textit{Fusco}.

\textsuperscript{60} Id.
\textsuperscript{61} Id.
\textsuperscript{62} Caputo, 432 U.S. at 249; P.C. Pfeiffer Co., 444 U.S. at 69.

\textsuperscript{63} According to the “point of rest” doctrine, an employee would be covered as a longshoreman (or other person engaged in longshoring operations) only if he was injured while unloading cargo from the ship to what was termed the “first point of rest,” i.e., the first place where cargo was deposited on a pier or terminal area after being unloaded (or while loading cargo on to the ship from the “last point of rest”). \textit{Caputo}, 432 U.S. at 274-75.

\textsuperscript{64} Id.
\textsuperscript{65} 432 U.S. 249 (1977).
and Caputo which had been affirmed by the Second Circuit in *Pitsson Stevedoring Corp. v. Dellaventura.*\(^6\) Claimant Carmelo Blundo was employed as a “checker” at the time of his injury. Responsibilities of a checker included checking and recording cargo as it was loaded on or off “vessels, barges or containers.”\(^6\) Blundo, due to a fall on an icy pier, was injured while checking and marking cargo stripped from a container.\(^6\) Claimant Ralph Caputo, a longshoreman, had been hired on a temporary basis as a terminal worker. He was loading cheese on the truck of a consignee for final transhipment at the time of his injury.\(^6\)

The administrative law judge issued awards to both claimants under the amended LHWCA.\(^7\) The BRB\(^7\) and the Second Circuit affirmed.\(^8\) The Supreme Court, in extending coverage to the claimants, stated that the broad language of the 1972 amendments should be liberally construed to avoid “harsh and incongruous results.”\(^7\) There was no question that both men were injured on a covered “situs.”\(^7\) The sole question for the Court was whether or not they met the “status” provision of § 902(3).

The Court granted claimant Blundo coverage under the amended LHWCA, because the checking of cargo had become integral to longshoring operations due to the advent of containerization.\(^7\) Since the large containers could be lifted from the ship directly onto the pier, the Court concluded that the legislature was concerned with preventing shifting coverage resulting from the shoreward movement of longshoremen.\(^7\)

Although the Court did not determine that claimant Caputo was engaged in maritime activity at the time of his injury, it did focus on his occupation as a longshoreman in affirming coverage.\(^7\) Essen-

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66. 544 F.2d 35 (2d Cir. 1976).
68. Id. at 253.
69. Id. at 255.
70. See *In re Caputo*, 2 BEN. REV. BD. SERV. (MB) 4 (ALJ) (1975); *In re Blundo*, 1 BEN. REV. BD. SERV. (MB) 71 (ALJ) (1975).
73. *Caputo*, 432 U.S. at 268 (citing *Voris v. Eikel*, 346 U.S. 328, 333 (1953)).
74. Id. at 279-80.
75. Id. at 270. See also *supra* note 55.
76. *Caputo*, 432 U.S. at 271.
77. Id. at 252-53.
tially, the Court adopted a dual test of status for coverage under the LHWCA whereby "an employee who is not engaged in an 'integral part of the unloading process' will not fall within the coverage of the [a]ct unless his occupation is of a traditional maritime nature." By focusing on the activities of the employee, the Court extended coverage to Blundo, who was injured while engaged in loading or unloading maritime cargo, and to Caputo, whose employment required him to spend significant time performing traditional longshoring activities.

Unfortunately, the Court declined to identify which activities (other than "checking") and which occupations (other than "longshoring") met the requirements of § 902(3). The reasoning of the Court in Caputo is useful, however, because if land-based workers are, for example, "harbor workers," then they need not be engaged in strictly maritime activity at the time of their injury. Additionally, if at the time of their injury their duties can be characterized as part of "longshoring operations," then the status requirement of § 902(3) will have been met.

In P.C. Pfeiffer Co. v. Ford, the Supreme Court reiterated its adoption of an "occupational" status test by unanimously holding that all workers involved in moving cargo between ship and land transportation were engaged in longshoring operations. Coverage was extended to two land-based workers, Ford and Bryant. Claimant Ford was a member of a warehousemen's union whose members were prohibited from engaging in longshoring tasks such as moving cargo directly to or from a vessel. Ford was injured on a public dock while fastening military vehicles onto railroad flat cars. The vehicles had been delivered by ship to port. The flat cars were to transport the vehicles to their inland destination. Claimant Bryant, a cotton header, was also restricted in his work. Cotton headers were only permitted to load cotton moved within or between warehouses; they were not permitted to move cargo directly to or from ships. Bryant was injured while unloading a bale of cotton from a dray wagon into a pier warehouse. Similar to its treatment of "checker" Blundo in Caputo, the Supreme Court found these land-based workers to be

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80. Id. at 255.
82. Id. at 82. The Supreme Court affirmed the Fifth Circuit's award of compensation in Jacksonville Shipyards, Inc. v. Perdue, 539 F.2d 533 (5th Cir. 1976), vacated and remanded, 433 U.S. 904 (1977), aff'd on remand, 575 F.2d 79 (5th Cir. 1978) (per curiam).
83. Pfeiffer, 444 U.S. at 71-72.
engaged in an integral part of the loading or unloading process. As in Caputo, the focus was upon the nature, not the location, of employment.

An examination of two recent Supreme Court decisions reveals that a different standard for "maritime employment" may be applied to amphibious workers. For land-based workers to be deemed engaged in maritime employment, the weight of authority in the circuit courts is that their employment activities must have a "realistically significant relationship to traditional maritime activities involving navigation and commerce on navigable waters." Conversely, the Supreme Court in Director, OWCP v. Perini North River Associates, held that it was neither necessary nor correct to apply the significant relationship test to workers injured on navigable waters. The fact that the worker was injured on navigable waters in the course of employment is itself sufficient to satisfy the status requirement of § 902(3). The Court reiterated its belief set forth in Caputo, that "[b]oth the text and the history [of the section] demonstrate a desire to provide continuous coverage to these amphibious workers who, without the 1972 amendments, would be covered only for part of their activity." This view was consistent with an earlier decision in Sun Ship Inc.

84. See supra cases cited note 20. As to land-based workers, for example, the Third Circuit in Sea-land Service, Inc. v. Director OWCP, 540 F.2d 629 (3d Cir. 1976), held that the crucial test involved an examination of an employee's activities based upon their functional relationship to maritime transportation at the time of injury, as opposed to their relationship to other land-based activities. Id. at 638. Recently, the Fifth Circuit in Pippen v. Shell Oil Co., 661 F.2d 378 (5th Cir. 1981), adopted a more liberal view of the significant relationship test. The court, in finding that offshore drilling upon navigable waters had a "significant relationship" to traditional maritime activity, stated that the test was met when the purpose of the employee's activity was to "facilitate maritime commerce." Id. at 383-84.


86. Id. at 324.

87. Caputo, 432 U.S. at 273. In Perini, the Court stated: There is nothing in these comments, or anywhere else in the legislative reports, to suggest as Perini claims, that Congress intended the status language to require that an employee injured upon the navigable waters in the course of his employment possessed a direct (or substantial) relation to navigation or commerce in order to be covered. Congress was concerned with injuries on land, and assumed that injuries occurring on the actual navigable waters were covered and would remain covered. Perini, 459 U.S. at 318-19. Other appellate court decisions which have embraced coverage for amphibious workers both before and after its recognition by the Supreme Court in Perini include: Novelties Distribution Corp. v. Molee, 710 F.2d 992 (3d Cir. 1983); Ward v. Director, OWCP, 684 F.2d 1114 (5th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); Boudreaux v. American Workover, Inc. 680 F.2d 1034, 1035-36 (5th Cir. 1982) (en banc), cert. denied, 459 U.S. 1170 (1983).
v. Pennsylvania,88 where the Court held that a state may apply its workers’ compensation scheme to land-based injuries that fall within the coverage of the 1972 amendments.89 The Court was concerned in Sun Ship, as it was in Perini,80 with preventing the resurrection of the jurisdictional monstrosity which left a claimant to choose, at his peril, between two mutually exclusive compensation schemes.91

Prior to the 1972 LHWCA amendments, the Supreme Court clarified this jurisdictional dilemma in Davis v. Department of Labor.92 In Davis, the Court upheld state compensation even though LHWCA coverage was available and the applicability of state law was uncertain. According to the Court, this “twilight zone” of concurrent jurisdiction was designed to prevent a wrong guess on the question of which compensation scheme applied. Likewise, in Calbeck v. Travelers Insurance Co.,93 the Court rejected the state exclusivity of the “maritime but local” doctrine94 and held that LHWCA coverage existed for all injuries incurred by employees on navigable waters.95

Additionally, in amending the LHWCA in 1972, Congress expressly deleted language which precluded federal compensation unless “recovery for disability or death through workmen’s compensation proceedings may not validly be provided by state law.”96 The Court in Perini attributed this action to an acquiescence by Congress to the rationale in Calbeck which sought to prevent a hazardous jurisdictional choice.97

As long as amphibious watchmen, therefore, like the watchman in Holcomb,98 faced the possibility of choosing the wrong compensation scheme, the extension of LHWCA benefits to amphibious guards served an important purpose. This jurisdictional dilemma plaguing amphibious watchmen, however, was eliminated by the 1984

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89. Id.
91. Id. at 323.
92. 317 U.S. 249 (1942).
94. Id. at 120.
95. Id. at 124.
97. Perini, 459 U.S. at 309.
98. 11 BEN. REV. BD. SERV. (MB) 835 (1980), rev’d, 655 F.2d 589 (5th Cir. 1981). The BRB decision produced the anomalous and tragic result of a worker injured upon navigable waters who was without either a state or federal worker’s compensation remedy for his loss of health and wage earning capacity. The BRB denied the claim despite a prior determination denying the claimant workers’ compensation benefits under the Florida State Compensation Act. The Fifth Circuit later reversed the decision of the BRB without addressing the issue. Holcomb, 655 F.2d at 589. For a further discussion of the decision, see supra notes 46-49, and infra notes 137-41 and accompanying text.
LHWCA amendments.\textsuperscript{99} A guard exempt from coverage under a state compensation scheme will remain covered under the LHWCA, despite the exclusive nature of the guard duties performed.\textsuperscript{100} Thus, the rationale of preventing a hazardous jurisdictional choice supports the extension of LHWCA benefits to “exclusively security” personnel denied state coverage.

Since purely land-based watchmen or pier guards never had to face this jurisdictional dilemma or shifting federal coverage, the extension of LHWCA benefits to them could only be justified on the basis of the maritime nature of guard work. To be engaged in maritime employment, land-based watchmen had to satisfy the “significant relationship” to maritime activity test.\textsuperscript{101} An examination of the appellate decisions supporting the maritime status of watchmen reveal that most of those pre-Perini decisions were based on the amphibious nature of the guards’ work and the accompanying dilemma of uncertain jurisdictional choice. To the extent, however, that those decisions supported the inclusion of purely land-based watchmen within the restricted class of maritime employees set forth in § 902(3), they were inconsistent with congressional intent and offer no support for criticizing the exclusion of watchmen under the 1984 LHWCA amendments.

The Position of the Benefits Review Board

The BRB,\textsuperscript{102} in a series of six decisions,\textsuperscript{103} ruled that the activities of watchmen do not constitute an integral part of the loading and unloading process, and that watchmen, therefore, were not engaged

\textsuperscript{100} 33 U.S.C.A. § 902(3) (West Supp. 1985).
\textsuperscript{101} For a general view of the application of the “significant relationship” test see Warren Bros. v. Nelson, 635 F.2d 552, 556 (6th Cir. 1980); Boudloche v. Howard Trucking Co., Inc., 632 F.2d 1346, 1347 (5th Cir. 1980); Trotti & Thompson v. Crawford, 631 F.2d 1214, 1220-21 n.15 (5th Cir. 1980) (act of building pier furthers process of loading and unloading vessels and thus bears a significant relationship to longshoring operations); Alabama Dry Dock & Shipbuilding Co. v. Kininess, 554 F.2d 176, 178 (5th Cir.), cert. denied, 434 U.S. 903 (1977) (shipbuilding company employee’s act of assembling crane to be used in shipbuilding process furthers maritime function of “shipbuilding” and thus constitutes maritime employment). See also cases cited supra note 20.
\textsuperscript{102} See supra note 16.
in maritime employment within the meaning of § 902(3). In each case, Administrative Appeals Judge Miller registered a strong dissent. The factual situations presented and the analysis provided by the BRB were very similar in each of those decisions.

In each case, a watchman, who was subject to assignment aboard ship, was injured on a covered situs, (e.g., a pier) while providing protection against pilferage of cargo or while guarding a ship. A divided BRB denied coverage in these cases on the basis that providing security for cargo is not an integral part of longshore operations (i.e., the loading and unloading process) nor does it have a “realistically significant relationship to maritime activities involving navigation and commerce.” Additionally, according to the BRB, watchmen were not “longshoremen” or “harbor-workers” but merely provided support services incidental to any business

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104. See cases cited supra note 103.

105. In Vaughn v. Lansdell Protective Agency, 13 BEN. REV. BD. SERV. (MB) 677 (1981), the BRB found the distinction between shipguards and pierguards irrelevant to their maritime status under the LHWCA. The BRB stated, “the mere fact that security guards work on a pier or ship alongside longshoremen cannot transform their duties into longshoring or maritime employment.” Id. at 679. Furthermore, “even if [the] claimant had performed work on actual navigable waters, this fact alone would not require coverage . . . .” Id. at 680. Moreover, in Pfeiffer, 444 U.S. at 69, the Supreme Court held that the status requirement in § 902(3) contains occupational and not geographical requirements, and therefore rejected the contention that the LHWCA only covers workers who are working or who may be assigned to work over the water itself. All of the decisions listed supra note 103 involved amphibious watchmen.

106. See Kelly v. Marine Terminals Corp., 13 BEN. REV. BD. SERV. (MB) 609, 610 (1981) (claimant, a waterfront security guard, was injured when he tripped and fell while making his rounds in employer’s container storage yard); Vaughn v. Lansdell Protective Agency, 13 BEN. REV. BD. SERV. (MB) 677, 678 (1981) (claimant was injured while working in a cargo stuffing shed); Conlon v. McRoberts Protective Agency, Inc., 12 BEN. REV. BD. SERV. (MB) 473, 474 (1980) (claimant, whose principal duties involved insuring the security of cargo on piers, was injured when he slipped and fell on an icy pier); Arbeeny v. McRoberts Protective Agency, Inc., 12 BEN. REV. BD. SERV. (MB) 435, 436 (1980) (claimant, whose principal duty was to insure against cargo pilferage mainly in pier areas, was injured when he was struck by a “hi-lo” machine on a covered pier).

107. Conlon, 12 BEN. REV. BD. SERV. (MB) at 473; Arbeeny, 12 BEN. REV. BD. SERV. (MB) 435.

108. See Holcomb, 11 BEN. REV. BD. SERV. (MB) at 836 (claimant Holcomb, whose primary duty was to watch a ship, was injured when he fell through an open hatchway on the vessel’s deck). See supra note 98, and infra notes 136-40 and accompanying text.

109. See cases cited supra in notes 103-08. The BRB’s definition is a modification of that found in Weyerhaeuser Co. v. Gilmore, 528 F.2d 957 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976), which requires that employee work “have a realistically significant relationship to traditional maritime activities involving ‘navigation and commerce on navigable waters.’” Holcomb, 11 BEN. REV. BD. SERV. (MB) at 837 (emphasis added). The BRB stated that the Weyerhaeuser definition “is too restrictive, insofar as it requires a relationship to ‘traditional’ maritime activities and ‘the traditional work and duties of a ship’s service employment.’” Id.

110. Arbeeny, 12 BEN. REV. BD. SERV. (MB) at 437.

111. Vaughn, 13 BEN. REV. BD. SERV. (MB) at 679.
Judge Miller, in his dissenting opinions, strongly criticized the denial of coverage by the BRB. Judge Miller presented four substantive arguments for holding that watchmen were covered employees under pre-1984 amendment § 902(3): (1) watchmen activities form an integral part of longshoring operations; (2) watchmen activities have a "significant relationship" to maritime activities; (3) watchmen are "harbor-workers" and (4) watchmen subject to assignment or activity aboard ship are amphibious workers who, due to their amphibious nature, could be denied compensation for their work-related injuries over navigable waters. In evaluating the soundness of the exclusion of "exclusively security" personnel under the 1984 LHWCA amendments, these arguments must be considered in light of their treatment by the Second, Fifth, and Ninth Circuit Courts who reversed the denial of LHWCA benefits by the BRB.

An Integral Part of Longshoring Operations

The argument that watchmen activities form an integral part of the longshoring operation was presented forcefully by the Second Circuit in its opinion reversing the BRB in Arbeeny v. McRoberts Protective Agency. In Arbeeny, the court held that pier guards injured on waterfront piers were "engaged in maritime employment," under § 902(3) of the amended LHWCA. The court reasoned that the protection of cargo on piers, docks, and adjacent areas from pilferage, vandalism, and fire served a maritime interest and was essential to the longshoring operation. According to the court, the fact that "pilferage of cargo is endemic at piers" necessitated security to preserve the safe transit of goods shipped by sea.

The fact that security services support the longshoring process, however, does not make those services integral to the loading and unloading of cargo. Congress, in restricting the class of persons covered under § 902(3), was concerned with protecting those individuals who physically participate in the loading, unloading, repairing,
building or breaking of a vessel.\(^{117}\) As noted by the BRB in *Vaughn v. Lansdell Protective Agency*,\(^{118}\) security guards are hired by all kinds of businesses and provide support services incident to their operation.\(^{119}\) All employees who work on piers, including clerical workers, are indirectly supporting maritime activity. One court has suggested that the LHWCA should be interpreted to cover all waterfront employment.\(^{120}\) This view, however, would nullify the "status" requirement of the LHWCA\(^{121}\) and was rejected in the 1984 amendments.\(^{122}\) Indeed, the Second Circuit had specifically referred to guards as an example of "unlongshoremanlike" positions.\(^{123}\) This characterization, however, did not deter the Ninth Circuit in *Kelly v. Marine Terminals Corp.*\(^{124}\) from adopting the Second Circuit's *Arbeeny* opinion as the basis for reversing BRB denial of coverage to an injured land-based watchman hired to guard empty cargo containers.

Subsequently, the BRB supported the appellate court decisions in *Arbeeny* and *Kelly*, which held that guard activity bore a realistically significant relationship to navigation and commerce.\(^{125}\) These later BRB decisions, however, involved injury to amphibious watchmen. Moreover, Administrative Appeals Judge Kalaris concurred solely because the decisions by the courts of appeals in *Kelly* and *Arbeeny* were controlling.\(^{126}\)

All of these decisions could now be supported by the rationale of eliminating hazardous jurisdictional choice. This dilemma, created by the amphibious nature of the guard's work, was recognized by Congress in promulgating the 1984 LHWCA amendments.\(^{127}\) For example, both claimants in *Arbeeny* were required at times to

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117. As stated by the Committee Reports to the 1972 LHWCA amendments: 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. S. Rep. No. 1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 10-11 (1972)).


119. *Id.* at 679.


123. *Dellaventura*, 544 F.2d at 52.

124. 678 F.2d 830 (9th Cir. 1982).


127. See supra note 19.
"board vessels and position themselves on gangways, decks or in ships, hatches, or holds." Similarly, the claimant in Kelly was subject to assignment aboard ship at the time of his injury.

**Non-Office Clerical Employees**

In promulgating the 1984 LHWCA amendments, Congress made a distinction between exclusively security personnel and non-office clerical employees by including the latter within the LHWCA coverage. As noted in the legislative history of the amendments:

Not all clerical work is intended to be excluded — merely that which is performed exclusively in a business office of the employing enterprise. Workers who may be classified as clerks or cargo checkers for example may be deemed to be engaged, at times, in ‘clerical’ type work, but that work is done in the areas in which cargo is handled, not exclusively in a business office of the stevedore. In such circumstances, the checker or clerk would remain within Longshore Act Jurisdiction.

Presumably, the fact that “clerical work” is being performed “in areas where cargo is handled” should not determine the issue of “status” to receive benefits under the LHWCA. The LHWCA requires a person to be “engaged in maritime employment,” necessitating an analysis of the maritime character of the worker’s occupation or employment activity.

Congress, however, in creating a “status” requirement in the 1972 amendments, contemplated the inclusion of non-office clerical employees within LHWCA coverage. Similarly, the Supreme Court has held that checkers of cargo are engaged in the overall process of loading and unloading vessels as altered by containerization and are, therefore, covered under the LHWCA. Persons working exclusively as security guards are not engaged in the handling of cargo, and therefore do not perform an integral part of longshoring operations.

128. *Arbeeny*, 642 F.2d at 674.
129. *Kelly*, 13 BEN. REV. BD. SERV. (MB) at 612.
133. Indeed, the Committee Reports explicitly state: “[C]heckers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment.” S. REP. No. 1125 92d Cong., 2d Sess. 13 (1972); H.R. REP. No. 1441 92d Cong., 2d Sess. 11 (1972). See also *Caputo*, 432 U.S. at 271.
135. Id. at 271.
"Significant Relationship" to Maritime Activities

In Holcomb v. Robert W. Kirk & Associates, the Fifth Circuit, in a narrow opinion, held that a watchman of a ship docked in navigable waters was engaged in maritime employment when injured while performing his duties onboard. Claimant Holcomb was injured when he fell through an "open hatch" on the vessel he was guarding. The Fifth Circuit, in extending coverage, cited several pre-1972 amendment decisions involving watchmen. Some of these decisions had been cited by Administrative Appeals Judge Miller in his dissenting BRB opinion in Holcomb as evidence that there was no maritime activity "more traditional than that performed by the ship's watch." As noted earlier, however, pre-1972 amendment decisions were decided affirmatively solely on the basis of the presence of the employee on navigable waters. Whether or not the activities of a particular watchman bore a "significant relationship" to navigation and commerce under the 1972 LHWCA amendments, depended on a functional analysis of his duties. Clearly, such an analysis was lacking in Holcomb.

Subsequent to Holcomb, the Fifth Circuit, in Miller v. Central Dispatch, Inc., held that a claimant's activities had a "realistically significant relationship to maritime activity." Again, the holding focused on the amphibious nature of the work. The court noted that claimant Miller, who was injured while aboard ship, "regularly boarded vessels, generally performed her guard duties onboard vessels, and rendered services not to a ship repair yard but to oceangoing vessels." Hence neither the Holcomb decision nor the Miller decision supports the conclusion that the work of a land-based guard is of a maritime nature.

"Harbor-Workers"

No appellate court has argued that watchmen are "harbor-workers." Administrative Appeals Judge Miller, however, in his dissent in Vaughn v. Lansdell Protective Agency, maintained that a pier guard was a harbor worker as defined by the BRB. The BRB has held that a "harbor worker" includes "at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which includes docks, piers, wharves, and adjacent

136. 655 F.2d 589 (5th Cir. 1981).
137. Id.
138. Id. at 590.
139. See supra note 47.
140. Holcomb, 11 BEN. REV. BD. SERV. (MB) at 842.
141. 673 F.2d 773 (5th Cir. 1982).
142. Id. at 783.
areas used in the loading, unloading, repair or construction of ships).”\textsuperscript{144} Insofar as pier guards maintain security in terminal areas used for loading and unloading, Judge Miller reasoned that security guards are directly involved in the maintenance of a harbor facility; “an activity which is clearly within the definition of harbor worker.”\textsuperscript{145}

In \textit{Brown & Root, Inc. v. Joyner},\textsuperscript{146} the Fourth Circuit affirmed coverage based on the harbor worker status of two claimants engaged in the building of a dry dock. The words, “construction, repair, alteration and maintenance” denote building work by carpenters, plumbers, painters, and laborers. Although a pier guard may indirectly prevent vandalism or fire on a pier or terminal area, it is unreasonable to say that a guard is directly involved with pier maintenance.

\textit{“Amphibious Watchmen”}

As noted previously, the dilemma of mutually exclusive compensation schemes threatening amphibious watchmen has been eliminated by Congress under the 1984 LHWCA amendments. If state law should exempt watchmen from coverage, then the Longshore exemption applicable to “exclusively security” personnel would not apply.\textsuperscript{147} All of the decisions examined in this Comment extending LHWCA benefits dealt with amphibious watchmen injured on a covered situs while in the course of their employment. The appellate courts in attempting to prevent jurisdictional uncertainty, have provided strong dicta suggesting that even purely land-based watchmen are engaged in maritime employment. Such a characterization is inconsistent with the status requirement which seeks to limit the types of employees covered under the LHWCA.

\textit{Exclusivity of Employment}

The 1984 LHWCA amendments only exclude from coverage “individuals employed \textit{exclusively} to perform office clerical, secretarial, security, or data processing work.”\textsuperscript{148} While Congress intended this


\textsuperscript{145} \textit{Vaughn}, 13 \textit{Ben. Rev. Bd. Serv.} (MB) at 681-82.

\textsuperscript{146} 607 F.2d 1087 (4th Cir. 1979), \textit{cert. denied}, 446 U.S. 981 (1980).

\textsuperscript{147} \textit{See supra} note 19.

exclusion to be read very narrowly, the 1984 LHWCA amendments raise questions regarding the effect of the exclusivity language. Will the checking of one container, on one occasion, by a full-time security guard, act to extend LHWCA benefits to him if he later is injured while on patrol? What is the consequence of a non-security task which benefits an employer, although performed without the express permission of the employer? These and other questions of construction remain unanswered.

CONCLUSION

This Comment has considered the propriety of the 1984 Longshore and Harbor Workers' Compensation Act amendments, which serve to exempt from coverage individuals employed exclusively to perform as watchmen or pier guards. Although watchmen have been provided coverage under the LHWCA in the past, the jurisdicational dilemma of mutually exclusive compensation schemes no longer provides a basis for extending federal coverage. The 1984 LHWCA amendments eliminate the jurisdicational dilemma by guaranteeing a remedy to an injured watchman.

This Comment has also examined the case law, which has considered the maritime status of amphibious watchmen. These judicial decisions fail to support the extension of federal coverage on the basis of the role of a watchman in the loading and unloading of cargo. A watchman received coverage under the pre-1972 amendment decisions solely on the basis of his presence on navigable waters. There was no status requirement for coverage under the LHWCA prior to 1972. Similarly, post-1972 amendment decisions can be justified only on the basis of the Supreme Court's concern for amphibious workers exposed to shifting coverage and perilous jurisdictional choice.

Watchmen, like secretaries, office clerks and data processors, are hired by all kinds of businesses and provide support services incident to their operation. Unlike longshoremen or harbor workers, they are not exposed to traditional maritime hazards in the course of their working day. Congressional action in excluding "exclusively security" personnel from LHWCA coverage constitutes an attempt to sharpen the amorphous phrase, "person engaged in maritime employment" under § 902(3). Although Congress has succeeded to some extent in eliminating ambiguity, questions relating to "exclusivity" of employment create new challenges for judicial interpretation.

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