No. 01-14656A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

LAURA PATRICIA BIANCO,
Claimant/Petitioner

v.

GEORGIA PACIFIC CORPORATION
and
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
Respondents

On Petition for Review of a Final Order
of the Benefits Review Board

BRIEF FOR THE DIRECTOR, OWCP, RESPONDENT

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Docket No. 01-14656A Bianco v. Georgia Pacific Corp.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for the Federal Respondent, Director, Office of Workers' Compensation Programs, certifies that the following are "interested persons" pursuant to Eleventh Circuit Rule 26.1-1:

Honorable Richard T. Gansell-Stamm

Administrative Law Judge

U.S. Department of Labor

John F. Depenbrock

Associate Solicitor for Employee Benefits

U. S. Department of Labor

Laura Patricia Bianco

Claimant/Petitioner

Georgia Pacific Corporation

Employer

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STATEMENT REGARDING ORAL ARGUMENT

This case involves an interpretation and application of the Fifth Circuit's ruling in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981). The Director, OWCP believes that oral argument would assist the Court in deciding the case.

CERTIFICATE OF TYPE SIZE AND STYLE

This Brief is printed in monospaced Times New Roman 14-point type, twelve characters per inch.

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BRIEF FOR THE FEDERAL RESPONDENT, DIRECTOR, OWCP

UNITED STATES DEPARTMENT OF LABOR

STATEMENT OF JURISDICTION

A. Basis of Jurisdiction Below

Laura Patricia Bianco ("Bianco") filed two claims for benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA" or the "Act"),[1] 33 U.S.C. § 901 et seq. Thus, the statutory basis for the administrative law judge's ("ALJ"'s) subject matter jurisdiction was 33 U.S.C. § 919(d). Bianco appealed the ALJ's Decision and Order Denying Benefits for the earlier, 1993 injury to the Benefits Review Board ("Board") pursuant to LHWCA § 21(b)(3). 33 U.S.C. § 921(b)(3). In a decision issued on June 20, 2001, the Board affirmed the ALJ's denial of benefits.

B. Appealability and Review Jurisdiction

The statutory basis for this Court's jurisdiction over final orders of the Benefits Review Board is 33 U.S.C. § 921(c), which provides for judicial review of LHWCA cases in the circuit in which the injury occurred. On or about August 20, 2001, Bianco filed her Petition for Review of the Board's decision with this Court, within the sixty days allowed by 33 U.S.C. §

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[1] Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, c. 509, 44 Stat. 1424, as amended, 33 U.S.C. §§ 901-950 (1988). The Act's title was rendered gender-neutral (Longshoremen's . . . " changed to "Longshore and Harbor Workers' . . . ") by LHWCA Amendments of 1984, Pub. L. No. 98-426, § 27(d)(1), 98 Stat. 1639, 1654 (Sept. 28, 1984), *amending* LHWCA § 1, *as amended*, 33 U.S.C. § 901 (1988).

921(c). Bianco's injury occurred in Brunswick, Georgia, within the Eleventh Circuit's territorial jurisdiction. Thus, this Court has jurisdiction to hear this case.

ISSUE PRESENTED

Whether Georgia Pacific's Facility -- located adjacent to navigable waters of the United States that are utilized in the unloading of gypsum from vessels (a necessary and systematic part of its business) -- was a covered maritime situs under 33 U.S.C. § 903(a) of the Longshore and Harbor Workers' Compensation Act because it was an "adjoining area customarily used by an employer in . . . unloading . . . a vessel."

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

This case arose upon Bianco's filing of two claims for disability benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1988) for injuries she sustained in the course of her employment with Georgia Pacific Corporation ("GP" or "Georgia Pacific"). On March 3, 1999, a formal hearing was held before ALJ Richard T. Stansell-Gamm in Savannah, Georgia. The District Director filed the ALJ's Decision and Order Denying Benefits on June 15, 2000.

Bianco sought administrative review by the Board of the ALJ's denial of LHWCA coverage for the earlier of her two injuries. In a decision published on July 10, 2001, the Board affirmed the denial of coverage. Bianco then filed a timely appeal of the Board's ruling with the Eleventh Circuit.

B. Statement of Facts

On May 10, 1993, Bianco suffered knee and ankle injuries while working as a knife operator at GP's Gypsum Products Plant in Brunswick, Georgia (the "Facility"). Board *Decision & Order* ("Board *D&O*"), at 2. The Facility is located on the banks of the Turtle and East Rivers, although it is separated from these rivers by county and city property. *Id.* at 2 n.2. It receives raw gypsum from its own ship[2] that arrives at a docking area containing the "Lanier" and "East Brunswick" docks. ALJ *Decision & Order Denying Benefits* ("ALJ *D&O*"), at 4. Raw gypsum is the "critical raw ingredient" indispensable to the Facility's function as a manufacturer of sheetrock and other building products. *Id.* at 13. GP's ship unloads the gypsum at the Lanier dock, while other vessels destined for the Port Authority use the East Brunswick dock.

[2] The ALJ's opinion suggests that GP utilizes only one ship to transport its gypsum. ALJ *D&O*, at 4.

i. The ALJ's Decision and Order Denying Benefits.

In attempting to analyze the nature of the vessel unloading process performed at the GP Facility – an inquiry critical to the maritime situs determination -- the ALJ summarized the evidence concerning the path of the gypsum from ship to shore:

> The [GP] vessel is a 'self-unloader' and has its own conveyor belt for unloading the gypsum into a hopper on the [Lanier] dock. After going into the hopper, the gypsum travels along the 'number two' belt to the 'transfer house.' The individuals operating the hopper and the number two-conveyor belt do not work for [GP]. … [GP] employees do work in the transfer house after the gypsum is unloaded to clean up the bottom floor and move the residue gypsum to the stockpile.

ALJ *D&O*, at 4.

> All of the equipment from the conveyor belt coming out of the transfer house to the plant … is located on [GP] property and operated by its employees. The plant boundary starts 'just outside' the number two transfer house and is established by a fence and runs to about thirty feet of a sea wall.

ALJ *D&O*, at 5.

> [GP] owns and uses a different conveyor belt out of the transfer house to move the gypsum to its plant. This belt goes from the transfer house all the way to the 'rock shed.' A [GP] employee, called a belt tender, operates the conveyor belt from [the] transfer house to the plant. At the end of this belt, the gypsum falls off into the company's rock shed…

ALJ *D&O*, at 4.

> The gypsum is stored in the rock shed until it's (sic) needed for manufacturing. ALJ *D&O*, at 6. … From the rock shed, the gypsum

> eventually moves along another belt to the 'crusher' building where the rock is reduced into smaller pieces before moving along a belt to the 'screen house.' At the screen house, rock that is too big to fall through the screen is [fed] by a chute back to the crusher. Gypsum that passed through the screen goes into three separate 'rock bins' in the plant by conveyor belt. …

ALJ *D&O*, at 4-5.

> After the gypsum has been screened, crushed, milled, and cooked in kilns, the finished powder is either used to make wallboard or sent to the Gypcrete Department to be bagged and palletized. The Gypcrete Department is a final stage of the manufacturing process. ALJ *D&O*, at 6. … The completed wallboard is stored in warehouses and both gypcrete and wallboard are eventually shipped out by truck.

ALJ *D&O*, at 5.

> During the manufacturing of wallboard, rejected material is thrown out in the 'reject pile.' The reject area comes in contact with the river. There is also a pile of reject board which is ground in a machine and reused. Both areas belong to the port authority but are used by [GP].

ALJ *D&O*, at 5.

> The ALJ found that in the several months prior to her injury,
>
> Bianco, as a laborer, sandblasted and painted the gypsum conveyors from the transfer house all along the [GP] belt line. This work accounted for about a third of her time during [1992 and the first half of 1993.] In addition, Bianco ran the crusher and cleaned up rock that had fallen off the belts. She also worked as a supply operator in the wallboard production plant, putting up large paper rolls. On one occasion, she operated the conveyor belt from the rock shed. Then she received training as a knife operator.

ALJ *D&O*, at 6.

On May 10, 1993, after having worked as a knife operator in GP's wallboard shop for approximately two months, Bianco hurried to correct a malfunction of the knife machine. In doing so, she "stepped on a ramp and twisted her ankle and leg and ended up on the floor." ALJ *D&O*, at 7. Bianco was out of work for three weeks as a result of the injury. *Id.* When she returned to GP, she was assigned to the electric shop, but continuing knee problems forced her to leave work again to have knee surgery.[3] *Id.*

The private parties stipulated that Bianco's May, 1993 knee injury "arose out of, and during the course of" her employment, that her average weekly wage was $535.92 and that she reached maximum medical improvement on October 1, 1993. *Id.* at 8-9. Before the ALJ, Bianco contended that she met the situs requirement for the 1993 injury because the Facility "adjoins and is connected to a waterway." *Id.* at 9. Bianco also averred that GP is a maritime employer because it engages in the "maritime activity of unloading gypsum from ships." *Id*. GP countered that delivery

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[3] The ALJ also entertained Bianco's claim for benefits arising from a July 28, 1995 injury in which she crushed her right arm in a machine while working as a palletizer in GP's Gypcrete Department. ALJ *D&O*, at 15. The ALJ ruled that Bianco did not meet either the situs or status requirements for that injury. *Id.* As Bianco did not challenge that status finding on appeal to the Board, the matter of coverage for the 1995 injury is not before the Eleventh Circuit.

of the gypsum was complete upon its arrival at the transfer house, and the continuing transport of the gypsum along GP's conveyor belts from the rock shed storage house to the wallboard department of the Facility is not maritime activity because it is not part of the unloading process. *Id.* In addition, GP asserted that its Facility "is not contiguous to the river and is separated by a fence from the dock area." *Id.*

The ALJ acknowledged the Board's recent holding that "an employer's entire complex is a maritime site for the purposes of the Act if it is adjacent to navigable waters and [is] customarily used for loading and unloading ship cargo." *Id.* at 10, *citing Gavranovic v. Mobil Mining and Minerals*, 33 BRBS 1, 4 (1999). The ALJ also recognized that the Act's requirement that an injury must occur in an area "adjoining" navigable waters has been broadly construed, such that "physical contact with navigable water is not necessary if the location bears a functional relationship to a maritime activity on navigable waters." ALJ *D&O*, at 11, *citing Motoviloff v. Director, OWCP*, 629 F.2d 87 (9th Cir. 1982). Finally, the ALJ stated that "[s]uch a functional connection may be established when raw material is unloaded from ships and transported by conveyor belt to a location away from the water … as the maritime activity of unloading a vessel continues along [the] conveyor belt system until the [raw] material or

cargo is received for storage." ALJ *D&O*, at 11, *citing Jones v. Aluminum Co. of America,* 31 BRBS 130 (1997) (process of unloading bauxite from vessel via port authority and conveyor belt systems continues until bauxite arrives at manufacturing storage location); *Garmon v. Aluminum Co. of America-Mobile Works*, 28 BRBS 46, 49 n.2 (1994), *aff'd on reconsideration* 29 BRBS 15 (1995).

In the present case, the ALJ held that

> the gypsum remains a 'shipped' cargo until it arrives at the [GP] rock shed. … At that moment, the gypsum leaves the stream of maritime commerce and becomes 'stored' cargo. Because the gypsum continues to be unloaded along the conveyor belt from the transfer house … and into the rock shed, both the [GP] conveyor belt and rock shed are integral parts of the ship unloading process. Consequently, that conveyor belt and the rock shed have maritime functions and each location is a maritime situs. [However,] my designation of the conveyor belt and rock shed as maritime locations does not automatically confer a maritime designation for the entire plant.

ALJ *D&O,* at 11-12.

The ALJ acknowledged that in *Gavranovic,* 33 BRBS 1 (1999), the Board determined that an entire complex was a maritime situs, even the manufacturing components of that facility. *Id.* at 12. However, he distinguished that case on factual grounds. The ALJ concluded that the Facility as a whole was not a maritime situs because "the entire [Facility] is not engaged in maritime activity." *Id*. at 13. To buttress this ruling, the ALJ

found that "[t]he only water *adjoining* the plant is a small inlet which has not been shown to be navigable." *Id*. at 10 (emphasis added).

As a result of her failure to meet the situs test, the ALJ rejected Bianco's claim for benefits.[4]

ii. <u>The Board's affirmation of the ALJ's Order.</u>

Bianco appealed to the Board, arguing that GP's "entire facility qualifies as an 'adjoining area' so as to satisfy the 'situs' test of the Act." Board *D&O*, at 3. Bianco asserted that "since some of the [Facility] is maritime then all of it must be, for to hold otherwise would allow workers to walk in and out of coverage depending on where they are on a certain day." *Id*. The Board acknowledged that in the controlling case, *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981), "the Fifth Circuit took a broad view of 'adjoining area,' refusing to restrict it by fence lines or other boundaries." Board *D&O*, at 4. However, the Board held that the "perimeter of an area is to be defined by function; thus it must be 'customarily used by an employer in loading, unloading, repairing or building a vessel.'" *Id., citing Winchester*, 632 F.2d at 514-15; *see* 33 U.S.C. § 903(a).

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[4] The ALJ did find that Bianco met the status test for her May, 1993 injury, as her potential for assignment to the conveyor belts or the rock shed --

The Board rejected Bianco's argument that the manufacturing portion of a plant is automatically a covered situs because maritime activity such as unloading of a vessel takes place elsewhere in the complex.[5] Board *D&O*, at 6. Thus, the Board held that "claimant's contention that the [ALJ] erred by dividing employer's manufacturing facility into maritime and non-maritime manufacturing sites is without merit." Board *D&O*, at 6.

Ultimately, the Board ruled,

> [T]he areas where claimant's injuries occurred in the instant case are within a separate facility and not a part of the Brunswick port itself. Moreover, insofar as the specific buildings where the injuries occurred are concerned, it is clear that they were used solely in the manufacturing process rather than as a step in the chain of unloading raw materials. As the [ALJ] properly found, the maritime activity of unloading the gypsum from the ships continued along employer's conveyor belt until it was received in the rock shed for storage (citations omitted). The gypsum thereafter is used by employer in its manufacturing process either in the wallboard or gypcrete departments… [E]mployer's manufacturing plant herein, consisting of the wallboard and gypcrete departments, is not a covered situs, since…it is not an area used for traditional maritime activity but rather involves the manufacturing of products which are not used for maritime purposes.

"integral parts of the ship unloading system" -- rendered her a maritime employee within the meaning of the Act. ALJ *D&O*, at 14.

[5] The ALJ coined the phrase "knife operation plant" to refer to the department within the wallboard plant where Bianco's 1993 injury occurred. ALJ *D&O*, at 7. The decisions below also refer to GP's entire complex as the "plant." *Id*. at 3, 6; Board *D&O*, at 1, 6. As the Board attached no legal signficance to these designations, to avoid confusion this Brief uses the terms "knife operating department" and "Facility" when discussing, respectively, the place of injury and the entire GP complex.

Id. at 7.

Accordingly, on June 20, 2001, the Board issued a decision[6] affirming the ALJ's denial of benefits as "rational, supported by substantial evidence and in accordance with law."[7] *Id.* On August 20, 2001, the Claimant filed a timely petition for review of the Board's Order with the Eleventh Circuit.

SUMMARY OF THE ARGUMENT

LHWCA claimant Bianco was injured within the employer's Facility, one part of which was found to be used by her employer to unload vessels delivering material essential to the Facility's operation. ALJ *D&O,* at 13. Significantly, it was further found that the employer located its complex near navigable waters in order to facilitate receipt of the employer's critical raw ingredient, gypsum. *Id*. The agency decisions failed to discuss the fact that the Facility is located on a triangle of land whose two longest sides are adjacent to the water. *See Joint Exhibit* ("JX") 1. Instead, the decisions below focused on the facts that GP's finished wallboard product was shipped out of the Facility by truck or rail and not by vessel, and that the wallboard

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[6] On June 20, 2001, the Board issued its decision as "unpublished." On July 10, 2001, it issued an errata sheet labeling the decision "published."

[7] Having denied coverage due to Bianco's failure to satisfy the situs test, the Board declined to address the employer's cross-appeal on the issue of status. Board *D&O*, at 7.

manufacturing plant has no nexus with the waterfront because its overall purpose is not maritime in character. ALJ *D&O,* at 12. The Board concluded that the claimant's injury did not occur on a situs covered under the Act because it accepted an approach that divided the employer's single Facility into different portions, some of which were found to be covered situses and some of which were not. Board *D&O*, at 6.

Thus, this case presents the question whether section 3(a) of the LHWCA, 33 U.S.C. § 903(a), should be construed to permit an analysis of the situs requirement that divides a single waterfront facility into maritime and non-maritime portions. The situs inquiry in this case requires interpretation of the statutory phrase "other adjoining area." 33 U.S.C. § 903(a). The Director and the courts have previously construed this ambiguous phrase. The Board's situs determination in this case is contrary to those constructions and should be overturned.

The Director's longstanding position, formally set forth in a 1977 Program Memorandum, is that under section 3(a), a structure or locale that "adjoins" navigable waters, any part of which is used for maritime purposes, comprises a single covered "area." The Director's Program Memorandum was triggered by the Supreme Court's issuance of its decision in *Northeast*

Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977), interpreting the 1972 amendments to the LHWCA which extended situs coverage landward.

Further, binding authority from the Fifth Circuit supports the Director's broad view of situs coverage. *See Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981). *Winchester*, a pre-split Fifth Circuit decision, found a gear room used to store stevedores' equipment that was located on Avenue N in Houston, five blocks from the gate of the nearest dock, to be a LHWCA covered situs. *Id.* at 507. *Winchester* reasoned that the gear room constituted a maritime situs because it had "some nexus with the waterfront," *id.* at 514, "was as close to the docks as was feasible [and] was in an area customarily used by employers for loading [that] adjoin[ed] a navigable waterway." *Id.* at 515. Applying *Winchester* to GP's Facility mandates the conclusion that it is a covered situs.

In comparison, the Board's approach in the present case erroneously produces the result that maritime employees may be covered under the LHWCA if injured in one part -- but not covered if injured in a different part -- of a single waterfront facility. Such an outcome exacerbates the problem that 1972 legislative amendments to the LHWCA were intended to address – that of maritime employees "walking in and out of coverage." According to

Caputo, a primary reason for the legislative extension of situs was to avoid the anomalies inherent in a system that previously drew the coverage line at the water's edge. 432 U.S. at 262-64, 269-72. The Supreme Court expressly rejected a suggested approach to situs that would have involved dividing a single facility into many parts, thereby producing an irrational system requiring adjudicators to engage in complex and extensive line drawing. 432 U.S. at 274-78. The Board's decision in the present case revives such irrationality. In light of the undesirability of such a result -- as expressed in the Director's Program Memorandum twenty-five years ago, and which the Congressional history counsels against -- coupled with binding legal authority contrary to the Board's decision, the situs requirement should be deemed satisfied in this case.

ARGUMENT

THE BENEFITS REVIEW BOARD ERRED IN FINDING THAT THE EMPLOYER'S FACILITY -- PART OF A SINGLE COMPLEX BORDERED BY NAVIGABLE WATERS THAT THE EMPLOYER REGULARLY UTILIZES TO UNLOAD ITS MOST ESSENTIAL RAW MATERIAL FROM ITS VESSELS -- WAS NOT A COVERED ADJOINING AREA CUSTOMARILY USED IN LOADING AND UNLOADING A VESSEL UNDER LHWCA § 3(a).

A. Scope of Review

This Court reviews decisions of the Benefits Review Board to ensure that the Board adhered to its statutory scope of review, which is to decide whether the ALJ's factual determinations are supported by substantial evidence and are consistent with governing law. 33 U.S.C. § 921(b)(3); *Argonaut Ins. Co. v. Patterson*, 846 F.2d 715, 718 (11th Cir. 1988); *Odom Construction Co. v. United States Department of Labor*, 622 F.2d 110, 115 (5th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981); *Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003, 1005 (5th Cir. 1978).

The issue of coverage under the LHWCA is a mixed question of law and fact. Questions of fact are reviewed under the substantial evidence standard. In this case, the relevant facts are essentially undisputed. Interpretation of the Act's situs requirement is subject to this Court's *de novo* review as a question of law. *Brooker v. Durocher Dock and Dredge*, 133 F.3d 1390, 1392 (11th Cir. 1998).

B. Judicial Deference

In *Alabama Dry Dock and Shipbuilding Corp. v. Sowell,* 933 F.2d 1561, 1563 (11th Cir. 1991), this Court recognized that the statutory interpretations of the Director, the administrator of the LHWCA, are entitled to deference. *See also Morrison-Knudsen Constr. Co. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor*, 461 U.S. 624, 635 (1983) ("the consistent practice[s] of the agencies charged with the enforcement and interpretation of the Act are entitled to deference"); *NLRB v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 189-190 (1981); *E.I. duPont de Nemours & Co. v. Collins*, 432 U.S. 46, 54-55 (1977); *Bradberry v. Director, OWCP,* 117 F.3d 1361, 1366 (11th Cir. 1997).[8]

The Supreme Court further clarified its approach to deference in *United States v. Mead Corp.*, 533 U.S. 218 (2001), affirming that an agency administator's interpretation of the "statutory scheme [he] is entrusted to

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[8] Other appellate courts with substantial LHWCA dockets have also expressly acknowledged that the Director's interpretations of the LHWCA are entitled to deference. *See, e.g., Mallot & Peterson and Industrial Indemnity Co. v. Director, OWCP*, 98 F.3d 1170 (9th Cir.1996); *Universal Maritime Service Corp. v. Spitalieri*, 226 F.3d 167, 172 (2nd Cir. 2000); *Pool Company v. Cooper*, 274 F.3d 173, 177 (5th Cir. 2001); *Newport News Shipbuilding & Dry Dock Co. v. Howard,* 904 F.2d 206, 208-9, 210-11 (4th

administer … 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *Id.* at 228, *quoting Skidmore v. Swift & Co*., 323 U.S. 134, 140 (1944). Where, as here, the Director advances an interpretation of the LHWCA in a litigation brief, that interpretation merits *Skidmore* deference, not absolute deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *Pool Company v. Cooper*, 274 F.3d 173, 177 (5th Cir. 2001). Under *Skidmore*, the Director's interpretation of the ambiguous statutory phrase "other adjoining area" should be considered persuasive as it has been thoroughly considered, is well-reasoned in light of the purpose of the Act, and has been consistently advanced.

It is thus apparent that this Court's earlier refusal in *Sowell* to grant deference to an agency's "litigating position" is inconsistent with current Supreme Court authority and should not be followed.[9] In any event, the

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Cir. 1990). *Contra, Sea-Land v. Rock*, 953 F.2d 56 (3d Cir. 1992); *American Ship Building Co. v. Director, OWCP*, 865 F.2d 727 (6th Cir 1989).

[9] *Sowell*'s purported limitation of judicial deference based on the fact that the Director's position was set forth in a legal brief and was therefore no

Director's interpretation of LHWCA section 3(a)'s situs requirement has not only been presented in a litigation brief, but has also been consistently espoused for decades. An expansive interpretation of LHWCA section 3(a) was first expressed by the Director twenty-five years ago in LHWCA Program Memorandum No. 58, *Guidelines for Determination of Coverage of Claims Under Amended Longshoremen's Act* (Aug. 10, 1977). *See* Memorandum attached as Addendum A to this Brief. The Program Memorandum states that the "relevant 'area' is the entire maritime facility," and "it is not necessary that the precise location of an injury be used for loading and unloading operations . . . nor that it immediately adjoin the

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more than the "agency's litigating position," 933 F.2d at 1563, has subsequently been eroded by more recent Supreme Court authority. The Supreme Court specifically rejected the theory that the Secretary's arguments in support of her statutory and regulatory constructions are merely litigating positions and thus not entitled to deference in *Auer v. Robbins*, 519 U.S. 452, 462 (1997). In *Auer*, the Court deferred to the Secretary's regulatory interpretation despite the fact that it came "in the form of a legal brief." The Court held that the fact that the Secretary's interpretation of her regulation was first articulated in an appellate brief,

> **. . .** does not, in the circumstances of this case, make it unworthy of deference. The Secretary's position is in no sense a 'post hoc rationalization' advanced by an agency seeking to defend past agency action against attack. There is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question. 519 U.S. at 462.

water; it suffices that the overall area which includes the location is part of a terminal adjoining the water." Addendum A at 10-11.

Thus, although the courts remain the final authorities on questions of statutory construction, where the terms are susceptible to more than one interpretation, the Director's reasonable constructions of the LHWCA -- and articulations of administrative policy -- should be considered highly influential under *Mead*.

The Director contends that the LHWCA section 3(a) term "adjoining area" encompasses GP's entire Facility, including the knife operating department where the Claimant was injured, and that the Board improperly held that the Facility may be divided into maritime and non-maritime sections. The Board did not take into account the Director's position or the Program Memorandum's pronouncement in finding that Bianco was not injured on a covered situs. That omission – coupled with the Board's disregard of *Winchester* -- mandates that the decision be reversed.

C. The Statutory Terms

The LHWCA provides compensation to covered maritime employees for work-related disabilities, or to certain of their survivors where the injury causes death. 33 U.S.C. §§ 908 and 909. Section 2(3), which defines an "employee," establishes an occupational or "status" requirement.[10] 33 U.S.C. § 902(3). LHWCA section 3(a), at issue in this case, establishes a geographical or "situs" test for coverage under the Act. Accordingly, an injured worker must satisfy both the maritime situs and status requirements to qualify for benefits under the Act.

> Section 3(a) states that disability or death is only compensable if it:
>
> > Results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, *or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel*.)

(Emphasis added.)

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[10] Section 2(3) of the Act defines an employee, with certain enumerated exceptions, 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 shipbreaker." 33 U.S.C. § 902(3). The ALJ found, over the employer's objection, that Bianco was a covered maritime employee. ALJ *D&O*, at 14. Having affirmed the ALJ's finding that the situs requirement was not met, the Board did not reach the issue of status. Board *D&O*, at 7.

The catchall term "adjoining area" has both geographical and functional components. The location must "adjoin" navigable waters, and it must also be "customarily used" for a specified maritime purpose.[11] The Board's conclusion that Bianco's injury did not occur upon a covered situs rests upon the premise that what it viewed as the legally relevant "area" under section 3(a) -- the knife operating department -- was not an "area customarily used" for maritime purposes. *See* Board *D&O,* at 6.

The Fifth Circuit fully considered the parameters of the term "adjoining area" in *Winchester*. As the Board recognized, "[d]ecisions of the Fifth Circuit … are binding precedent in the Eleventh Circuit … unless specifically overruled by the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*). As such, *Winchester* remains

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[11] The grammatical structure of section 3(a) has led other Courts to conclude that only the locations falling under the catch-all phrase "other adjoining area" must be "customarily used" for the specified purposes, thereby requiring a functional relationship to maritime activity. The enumerated settings, "pier, wharf, dry dock . . ." must meet only the geographical component of the situs requirement. *See Fleischmann v. Director, OWCP*, 137 F.3d 131, 138-9 (2nd Cir. 1998), *cert. denied*, 525 U.S. 981 (1998); *Hurston v. Director, OWCP*, 989 F.2d 1547, 1549-50 (9th Cir. 1993). *See also Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 280 (1977) ("it is not at all clear that the phrase 'customarily used' was intended to modify more than the immediately preceding phrase 'other areas'"); *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1219 (5th Cir. 1980) ("Congress now expressly prescribes that situs is satisfied for injuries occurring upon any pier adjoining navigable waters.")

controlling precedent in the Eleventh Circuit." Board *D&O*, at 4 n.5. Moreover, in this Circuit's most recent LHWCA situs case, *Brooker v. Durocher Dock and Dredge*, 133 F.3d 1390 (11th Cir.), *cert. granted*, 524 U.S. 982, *cert. dismissed*, 525 U.S. 957 (1998), this Court did nothing to limit its "predecessor circuit['s]" holding in *Winchester*. 133 F.3d at 1393. To the contrary, *Winchester* was cited with approval. *Id.* at 1392-93. Thus, this panel is bound by the *Winchester* Court's reasoning that a location is covered unless it is "clearly outside the waterfront area customarily used by employers" for maritime purposes. 632 F.2d at 515. *Winchester* defines "adjoining" in broad geographic terms as "close to" or "neighboring" navigable waters, and specifically rejects the requirement of absolute contiguity that GP urged in this case below. *Id.* at 514; *see also Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978)(gear locker located one-half mile from navigable water was held a covered adjoining area).[12]

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[12] The *Herron* Court identified four factors that should be considered in determining whether a location is a covered "adjoining area": (1) the particular suitability of the site for the maritime uses referred to in the statute; (2) whether adjoining properties are devoted primarily to maritime uses; (3) the proximity of the site to the waterway; and (4) whether the site is as close to the waterway as is feasible given all other circumstances. 568 F.2d at 141.

Winchester held that the perimeter of an "area" is defined by its maritime function, and that the specific location of an injury need *not* be customarily used for maritime purposes so long as the overall area was so customarily used. 632 F.2d at 515. The Court contemplated that an entire waterfront area, encompassing more than a single employer's facility, could constitute an "adjoining area." *Id.* The Court decided that to hold otherwise "would introduce into the tests for coverage a new fortuity that would frustrate the congressional objective of providing a uniform system expanding coverage to landward maritime sites." *Id.* at 514-15. That rationale echoes the reasoning of the Supreme Court in *Caputo*. Thus, the facts that: (1) GP's Brunswick Facility was not used entirely for maritime purposes; and (2) the knife operating department of GP's Brunswick Facility where Bianco was injured was not located directly upon navigable waters, are not bars to coverage under *Winchester*. The statutory terms lend themselves easily to such a result.

1. "Area"

The *Winchester* Court stated: "[t]he answer to the question of where the boundaries are to an 'area' is found right in the statute. The perimeter of an area is defined by function." 632 F.2d at 515. The Court was careful to add, however, that the functional component should be defined *broadly*,

holding that there is no requirement that the area be used exclusively for maritime purposes. *Id.* Instead, the "area" must be one customarily used by an employer in maritime employment. *Id.*

The term "area" is obviously too general a concept to lend itself to a fixed, unambiguous meaning. To the extent that any part of the entire Facility is involved in the process of unloading gypsum from the employer's vessels, the entire Facility should be deemed an "adjoining area" within the meaning of section 3(a). In this case, the area in question is defined by its relationship to the maritime function of "unloading of vessels." *See* 33 U.S.C. § 903(a). Significantly, the ALJ did not draw the line for the outer limit of LHWCA situs coverage at the transfer house outside GP's Facility. Instead, he extended it so far as the rock shed within the Facility. ALJ *D&O*, at 11. Nevertheless, he found that the knife operating department where Bianco was injured – which is also within the Facility -- is not a covered situs because the employer does not customarily use the knife

operating department in its vessel unloading process. *See id*. at 13. The Board concurred. Board *D&O,* at 7.[13]

Winchester flatly rejects the approach of focusing on the knife operating department alone as the critical "area." The *Winchester* Court found that because the boundaries of an area are "defined by function," situs may arise not only from the character of the specific locus of the injury, but also from the overall character of the area. 632 F.2d at 515. The *Winchester* Court found a gear locker located five blocks from the gate of the nearest dock to be a covered situs because it was located in a general area habitually used for maritime purposes. *Id.* The Court ruled that the gear locker was "as close to the docks as feasible ... in an area customarily used by employers for loading." *Id.* Thus, in the present case, the fact that the knife

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[13] This Court's most recent consideration of the scope of the LHWCA situs requirement in *Brooker v. Durocher Dock and Dredge*, 133 F.3d 1390 (1998), does not address the question presented here -- the appropriateness of dividing an employer's single facility into covered and non-covered areas. The ALJ cited *Brooker* only in passing, for a proposition not readily material. ALJ *D&O,* at 12 n.12. *Brooker* stated that situs could not be based solely on the "vessel activity" of neighboring non-employer entities and denied situs coverage in that case because "neither [the claimant's] employer, nor the premises owner, used the [area in dispute there] to load, unload, repair, dismantle, or build a vessel." 133 F.3d at 1394. *Brooker* is clearly distinguishable because GP customarily uses its Facility for the maritime purpose of unloading vessels.

operating department was not itself used for maritime purposes is irrelevant, as it is located within a facility that GP "customarily use[s] for [the] significant maritime activity" of unloading vessels carrying its critical raw material, gypsum. *Id.; see* ALJ *D&O*, at 13. Even a cursory reading of *Winchester* reveals that it specifically rejected the position that the particular locus in which a worker is injured must be used for maritime activity.

Not only is the entire Facility of the employer properly viewed as a covered "adjoining area," the leading cases (with the exception of the Fourth Circuit in *Sidwell v. Express Container Services, Inc.,* 71 F.3d 1134, 1140 n.11 (4th Cir. 1995)) have found maritime situs for covered adjoining areas that were indisputably *outside* any employer's facility. The *Winchester* Court clearly contemplated that a covered "adjoining area" could extend well beyond a single employer's facility, specifically noting that fence-lines and local designations are inconclusive. 632 F.2d at 515. As noted above, five full blocks of intervening properties separated the gear room in *Winchester* from the nearest dock. *Id.* at 507. Similarly, in *Brady-Hamilton*, the Ninth Circuit held that a gear locker located a half-mile from navigable water was a LHWCA covered situs. 568 F.2d at 141. It is easier to conclude that the situs requirement was satisfied in this case because the knife operating department where Bianco's injury occurred was, as the ALJ

found, indisputably part of "the Georgia Pacific complex." ALJ *D&O,* at 13.[14]

Indeed, the ALJ specifically found that a maritime nexus existed for the Facility as "[GP] located its wall board and gypcrete production plants near the East River to facilitate its receipt of the critical raw ingredient, gypsum." *Id.* Yet, despite the fact that this finding supports the conclusion that Bianco was injured on a covered situs, the ALJ erroneously ruled that "I do not believe that choice of location for convenience bestows maritime situs upon the entire Georgia Pacific complex." *Id.* This conclusion, accepted by the Board, ignores the import of *Caputo* and *Winchester*.

The Board's reasoning erroneously produces the result that maritime employees may be covered under the LHWCA if injured in one part of a waterfront facility, but not covered if injured in a different part of the same complex. As this Circuit has recognized, such an outcome exacerbates the problem that the 1972 amendments to the LHWCA, Pub. L. No. 92-576, 86

[14] Even the container repair facility at issue in *Sidwell* was eight-tenths of a mile from the closest ship terminal and was "surrounded by various business and residential developments." 71 F.3d at 1135. It is impossible to be certain whether the Fourth Circuit would have made the same situs determination had the container repair operation still been located (as it previously had been) "near the gate of the Portsmouth Marine Terminal." *Id.*

Stat. 1251 (October 27, 1972) ("1972 LHWCA Amendments") were expressly intended to address – that of maritime employees such as Bianco "walk[ing] in and out of coverage as their work moves to different sides of the 'point of rest' [of a maritime cargo]…. [leaving] only persons handling cargo on the maritime side of the 'point of rest' [ ] covered by the LHWCA." *Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 615 (11th Cir. 1990), *quoting P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 76 (1979). *See also Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 278-79 (1977).

The ALJ's finding that the last "point of rest" of the gypsum divides the Facility into covered and non-covered portions has been rejected by the Supreme Court because it is

> a theory that nowhere appears in the Act, that was never mentioned by Congress during the legislative process, that does not comport with Congress' intent, and that restricts the coverage of a remedial Act designed to extend coverage.

Caputo, 432 U.S. at 278-79.

As the Supreme Court foretold in rejecting the "point of rest" theory, a ruling such as that of the Board in the present case resurrects "the evil of the [pre-1972] Act that bifurcated coverage for essentially the same employment … since the same employee engaged in an activity beyond the

point of rest would cease to be covered." *Caputo* at 276; *see also Coleman*, 904 F.2d at 615. Application of the Board's ruling to this case caused coverage to arbitrarily turn upon which "area" of GP's Facility Bianco happened to be in when she was injured. The Board's resolution leaves "injured employees and their counsel [to] comb the waterfronts … probing hopelessly, like Diogenes with his lantern, for that elusive 'point of rest' upon which coverage depends." 432 U.S. at 276 n.38. This is exactly the result that the Supreme Court in *Caputo*, the Director and Congress sought to avoid. The analysis followed below not only resurrects the confusion and uncertainty created by the discredited approach of dividing a single maritime facility into many parts, it also produces an irrational system requiring LHWCA adjudicators to engage in complex line drawing between an employer's internal operational boundaries. As the precedent holds that not even external property lines are dispositive, the ALJ's approach must be rejected. To follow it would leave this Circuit with a LHWCA situs standard so fact-specific that every case could potentially spend years on appeal as the parties debated the proper place to set the situs boundary within one employer's maritime facility.

2. "Adjoining"

The second prong of the situs test requires that the area for which coverage is claimed "adjoin" navigable waters. 33 U.S.C. § 903(a). The *Winchester* Court began its analysis of the statutory term "adjoining" by referring to a number of dictionaries. Not surprisingly, the Court found that the term was susceptible to multiple reasonable interpretations. 632 F.2d at 514 nn.17-19. The Court observed that "'adjoin' can be defined as 'contiguous to' or 'to border upon,'" but adopted a broader definition, holding that the statutory term should be interpreted to mean "close to" or "neighboring," "in keeping with the spirit of the congressional purposes." *Id.* at 514. Accordingly, the *Winchester* Court found ambiguity in the statutory language, properly relied upon the Act's remedial purpose in its statutory construction, and held that a gear room five blocks inland "adjoined" a navigable waterway. *Id.*

Applying these principles to the circumstances present in this case compels the conclusion that the entire GP Facility is an "adjoining area." A mere glance at the aerial photograph of the Facility makes it plain that all portions of the Facility "adjoin" not just one but two waterways. *See JX* 1. As the *Winchester* Court noted, "Aerial photographs … are extremely helpful in determining whether or not a particular site is within an 'adjoining area.' 632 F.2d at 516 n.20. Such is certainly the case here.

The first of the two waterways, the East River – where GP docks its gypsum vessels for unloading, is indeed separated from the Facility by slivers of intervening property. Board *D&O,* at 2. It is worthy of note that this intervening property consists of the Brunswick Port Authority, an indisputably maritime situs. Board *D&O,* at 3. Moreover, the physical layout of the triangle of land where the Facility lies did not deter the Board from properly upholding the ALJ's finding that the covered "adjoining area" did extend across this property, along GP's conveyor belt, and as far into the Facility as the rock shed. Board *D&O,* at 6-7. Yet, the knife operating department – in the same point of the triangle as the rock shed and abutting a waterway full of boats -- was not found to be a covered adjoining area. It is just such an illogical result that the 1972 LHWCA Amendments, the Director's Program Memorandum and the *Winchester* decision were designed to prevent.

The second waterway was an otherwise unidentified inlet. Although it is true that the ALJ stated "the only water adjoining the plant is a small inlet which has not been shown to be navigable," ALJ *D&O*, at 10, that statement is both legally incorrect and factually misleading. The inlet to which the ALJ refers runs the entire length of GP's Facility and lies mere feet away from the knife operating department. *JX* 1. Whether the inlet was navigable

was simply not the subject of evidence one way or the other, but *JX* 1 clearly shows sizable boats floating in it. Moreover, the record contains testimony that apparently contradicts the ALJ. The inlet comes in contact with the East River, which flows to the ocean. *Transcript of March 3, 1999 ALJ Hearing* at 64, 77.

Although the ALJ erroneously downplays its legal significance, the Facility's setting on a triangle of land that juts out into the water was chosen precisely because it facilitates the receipt of gypsum from ships. As the Facility's entire purpose is to process gypsum, it must receive the raw material in order to function. Under *Winchester*, the ALJ's finding that GP regularly utilizes the Facility's location adjoining navigable waters in furtherance of its business purpose mandates the designation of the Facility as a maritime situs.

The Board – unlike the ALJ – acknowledged *Winchester* as controlling precedent but misapplied it, basing its denial of coverage on its unilateral pronouncement that "claimant's contention that the [ALJ] erred by dividing employer's manufacturing facility into maritime and non-maritime manufacturing sites is without merit." Board *D&O,* at 6.

The Court should reverse the Board's decision that the entire Facility is not a covered maritime situs, as it conflicts with the thoroughly considered

construction of the term "adjoining area" in *Winchester*. Under *Winchester*, GP's Facility is a covered situs both because of its geographic nexus to the navigable waters of the East and Turtle Rivers, and because the Facility is regularly engaged in maritime shipping, through its receipt of raw materials. Thus, the GP Facility's maritime location and function qualifies the entire Facility as a maritime situs. *See also Northeast Marine Terminal Co. v. Caputo*, 432 U.S. at 279-80 (entire terminal covered). Accordingly, under the controlling precedent of *Winchester*, the Board's situs determination was clearly incorrect and should be reversed.

CONCLUSION

For the reasons stated, the Board's ruling -- that the knife operating department where Bianco's injury occurred was not a covered adjoining area -- should be reversed and the case remanded for a final agency determination on the issue of whether Bianco's duties at the time of her 1993 injury satisfied the Act's maritime status requirement.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2002, two copies of the foregoing Director's Response to Petition for Review were served by mail, postage prepaid, on the following:

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