No. 99-60273

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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MOBIL MINING & MINERALS,

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,
Petitioners

v.

DAVID R. NIXSON,

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

_____

HENRY L. SOLANO
Solicitor of Labor

CAROL A. DE DEO
Associate Solicitor
for Employee Benefits

SAMUEL J. OSHINSKY
Counsel for Longshore

LAURA J. STOMSKI
U.S. Department of Labor
Office of the Solicitor/S4325
200 Constitution Ave., N.W.
Washington, D.C. 20210
(202) 219-4450 x105

Attorneys for the Director, OWCP

STATEMENT OF ORAL ARGUMENT

This case involves an interpretation and application of the Court'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.

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MOBIL MINING & MINERALS,
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Petitioners
v.

DAVID R. NIXSON,

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION
PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

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

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BRIEF FOR RESPONDENT, DIRECTOR, OWCP

_____

STATEMENT OF JURISDICTION

The statutory basis for the administrative law judge's (hereinafter "ALJ") subject matter jurisdiction was § 19(d) of the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 919(d). Record on Appeal ("Rec") at C. The ALJ's determination was reviewed by the Benefits Review Board ("Board") pursuant to LHWCA § 21(b)(3). 33

U.S.C. § 921(b)(3). Rec at B. Following the Board's final order, issued on March 3, 1999, Mobil Mining and Minerals ("Mobil" or "employer") filed its Petition for Review of the Board's decision with this Court on April 28, 1999, within the sixty days allowed by 33 U.S.C. § 921(c). Nixson's injury occurred in Pasadena, Texas, within this Court's territorial jurisdiction. Petitioner's brief ("Pet. Br.") at 2. Thus, the Court has jurisdiction to hear this case.

ISSUE PRESENTED

> Whether the employer's manufacturing facility, (including the rail line where the claimant was injured), located adjacent to the Houston Ship Channel, which, in the regular and systematic course of business, utilized the channel to both receive raw material and ship finished products by vessels, was a covered maritime situs because it was an area adjoining navigable waters, "customarily used in loading [and] unloading . . . a vessel" under 33 U.S.C. § 903(a) of the Longshore and Harbor Workers' Compensation Act.

STATEMENT OF THE CASE

i Course of Proceedings and disposition in court below

This case arose upon the filing of a claim for workers' compensation benefits under the LHWCA, by the claimant, David R. Nixson ("claimant"), against his employer, Mobil. A hearing was held before ALJ Lee J. Romero, Jr., in Houston, Texas, on September 22, 1997. Rec. at C1. Following the hearing, ALJ Romero's Decision and Order, awarding Nixson benefits, was filed by the district director on March 18, 1998.

Mobil sought administrative review of ALJ Romero's decision by the Benefits Review Board ("Board"), which affirmed the award in a decision issued March 3, 1999. Rec at B. Mobil then filed its appeal of the Board's ruling with this Court.

ii Statement of facts

David Nixson sustained a work-related injury on January 16, 1994, that left him permanently partially disabled as a result of the 100% impairment of his arm. Rec. at C2-3, 19. At the time of his injury, Nixson worked for Mobil as an "A Operator," unloading sulfuric acid and ammonia barges, and operating a marine loader, a buhler, used to unload rock barges, a diesel locomotive, and an overhead crane. *Id.* at 9. At the time of his injury, he

was assigned to the locomotive crew moving rail cars into position for loading. *Id*. at 8. Nixson was injured at the "rail car and track area" while attempting to couple cars together. *Id*. at 9.

The plant was located on the Houston Ship Channel, and both received raw materials and shipped some of its finished product from vessels at its docks. *Id.* at 14. The ALJ, in finding that Mobil's manufacturing plant was a covered "adjoining area" and a maritime situs, reasoned that the "facility is in the vicinity of navigable waters and is used to load and unload vessels." *Id.* It was also uncontested that as much as 50% of Nixson's duties involved maritime loading and unloading, which established his status as a maritime employee. *Id.* at 16.

The Board affirmed the ALJ's award of benefits, and, in particular, his finding that Nixson's injury occurred upon a covered maritime situs. Incorporating its decision in *Gavranovic v. Mobil Mining & Minerals,* -- BRBS – (1999) No. 98-741, involving the same facility, the Board rejected Mobil's argument that the rail line where Nixson was injured was not an "adjoining area." Attached as Addendum A at 3.[1] Instead, based on the

[1] In *Gavranovic v. Mobil Mining & Minerals*, RE at B, the Board found that Mobil's facility is adjacent to navigable waters and that "significant maritime activity (loading and unloading) occurs on the docks at employer's facility." Addendum A.

controlling authority of *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir.)(*en banc*), *cert. denied*, 452 U.S. 905 (1981), the Board held that Mobil's "entire facility constitutes a covered situs under the Act." *Id.* Mobil filed its appeal of the Board's ruling to this Court. The Director joins the claimant in arguing that the Board's decision should be affirmed.

SUMMARY OF THE ARGUMENT

Claimant Nixson was injured while in the course of his employment as an "A Operator" for Mobil, a fertilizer manufacturing plant located along the Houston Ship Channel. Mobil challenges the Board's decision, which affirmed the ALJ's finding that Nixson's injury was covered under the LHWCA, and that, in particular, the employer's facility constituted a covered maritime situs; a statutory area adjoining navigable waters customarily used for maritime purposes. In reaching their respective conclusions, both the ALJ and Board relied on this Court's decision in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980)(en banc), *cert. denied*, 452 U.S. 905 (1981). In *Winchester, t*he Court defined "adjoining" in broad geographic terms as "close to" or "neighboring" navigable waters, specifically rejecting a requirement of absolute contiguity. *Id.* at 514. The

Winchester Court also 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 well beyond an employer's facility, could constitute an "adjoining area." *Id. See also Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 557 (5th Cir. 1998)(Court reaffirmed *Winchester*).

Under *Winchester*, as both the ALJ and Board found, Mobil's facility was a covered "adjoining area." The facility was located immediately adjacent to the Houston Shipping Channel and Mobil used its maritime location in the regular and systematic operation of its business, both unloading raw materials from vessels as well as shipping a significant portion of its finished products by vessels from its docks. That Nixson's injury occurred on the rail line located within Mobil's facility was irrelevant. Under *Winchester*, coverage extended to Mobil's entire facility because of both its geographic nexus, that it was adjacent to the navigable waters of the Houston Ship Channel, and because functionally, the facility was regularly engaged in maritime shipping from its docks.

Mobil argues that *Winchester* is no longer good law, having been undermined by subsequent Supreme Court authority that directs that the plain language of a statute is controlling. Mobil concludes that under the plain statutory language of § 3(a), and consistent with the Fourth Circuit's decision in *Sidwell v. Express Container Services*, 71 F.3d 1134 (4th Cir.), *cert. denied*, 518 U.S. 1027 (1997), the employer's entire facility cannot constitute a covered "adjoining area" because it was not a discreet locale as are the other enumerated situses. Moreover, Mobil asserts that the rail line where Nixson was injured does not qualify as a covered adjoining area since it was not customarily used for maritime purposes and did not touch navigable water. Pet. Br. at 10.

The Court should reject Mobil's arguments as none of the Supreme Court authority it relies upon addresses the parameters of § 3(a). The Supreme Court's general admonishment to follow the plain language of the LHWCA where appropriate does not provide this panel with the authority to overturn this circuit's established *en banc* authority. Moreover, as the Court found in *Winchester*, the statutory terms are not plain or unambiguous and must, therefore, be interpreted within the context of the statute and to effectuate the Act's remedial purpose. 632 F.2d at 514.

In any event, Mobil's statutory construction argument that its facility is not a covered "area" because it is not a discreet structure, in line with the terms preceding it in § 3(a) is undermined by the word "terminal," appearing in § 3(a), which necessarily encompasses substantial acreage, often including specific work areas, such as piers and wharves, as well as rail lines. *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977); *Chesapeake & Ohio Railway Co. v. Schwalb*, 493 U.S. 40 (1989).

Mobil argues that even under *Winchester*, the specific site of injury must satisfy the situs requirement, which the rail line area fails to do, having no maritime nexus, nor adjoining navigable water. This Court in *Winchester*, however, specifically rejected the argument advanced by Mobil here, that the actual location where the injury occurred must be customarily used for maritime activity, and held that the boundaries of an area are "defined by function," recognizing the significance of the overall character of the area. 632 F.2d at 515. In fact, the 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. *Id.*

The Board's holding that the employer's facility (including the rail line) where Nixson was injured adjoined navigable water is consistent with the *Winchester* Court's construction of the term "adjoining area," both because of the facility's geographic nexus, adjacent to the Houston Ship Channel, and because of its functional nexus, regularly engaged in maritime shipping. Thus, the Court should affirm the Board's decision that Mobil's entire facility, including its rail line, is a covered adjoining area.

ARGUMENT

THE BENEFITS REVIEW BOARD PROPERLY FOUND THAT MOBIL'S ENTIRE MANUFACTURING FACILITY, LOCATED ADJACENT TO THE HOUSTON SHIPPING CHANNEL, WHICH REGULARLY UTILIZED THE CHANNEL IN RECEIVING RAW MATERIAL AND SHIPPING FINISHED PRODUCTS BY VESSELS, WAS A COVERED ADJOINING AREA CUSTOMARILLY USED IN LOADING AND UNLOADING A VESSEL UNDER LHWCA § 3(a).

A. Standard of Review

Courts review decisions of the Benefits Review Board and the district court for errors of law and for adherence to the substantial evidence standard that governs the Board's review of ALJ's factual determinations. 33 U.S.C. § 921(b)(3); *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). Questions of law are subject to de novo review. *Bunol v. George Engine Co.*, 996 F.2d 67, 68 (5th Cir. 1993). The issue presented in this case, whether Mobil Mining's entire facility is a covered maritime situs, is a mixed question of law and fact, but subject to this Court's de novo review since the relevant facts are undisputed.

B. Judicial Deference

The Fifth Circuit, within whose jurisdiction this case arises, has expressly acknowledged that the Director is the administrator of the LHWCA and that his views are thus entitled to deference on questions of interpretation of the LHWCA. *Texports Stevedore Co. v. Director, OWCP (Maples)*, 931 F.2d 331 (5th Cir. 1991); *Boudreaux v. American Workover, Inc.* 680 F.2d 1034, 1046 & n.23 (5th Cir. 1982) (en banc), *cert. denied,* 459 U.S. 1170 (1983).[2] Conversely, the Benefits Review Board's views on the proper construction of terms of the LHWCA are entitled to no special deference, since the Board does not "administer" the LHWCA. *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 278 n.18 (1980).

Thus, although the courts remain the final authorities on questions of statutory construction, where the statutory or regulatory terms are susceptible to more than one reasonable interpretation, the Director's constructions of the LHWCA, and articulations of administrative policy,

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[2] Other courts of appeals with the most substantial LHWCA dockets have also expressly recognized the deference due the Director's views on the applicable LHWCA law. *E.g. Mallot & Peterson and Industrial Indemnity Co. v. Director, OWCP*, 98 F.3d 1170 (9th Cir.1996); *Newport News Shipbuilding & Dry Dock Co. v. Howard,* 904 F.2d 206, 208-9, 210-11 (4th Cir. 1990); *Director v. General Dynamics Corp. (Bergeron)*, 982 F.2d 790 (2d Cir. 790); *Contra Sea-Land v. Rock*, 953 F.2d 56 (3d Cir. 1992); *American Ship Building*

should be accepted as controlling law unless they are unreasonable or contrary to the purposes of the statute or to clearly expressed legislative intent on the point in issue. *See generally, e.g., Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-5 & nn. 9, 11 (1984); *Chemical Manufacturers Ass'n v. NRDC*, 470 U.S. 116, 125-6 (1985). In this case, the Director contends that the statutory term, "adjoining area" found in LHWCA § 3(a), encompasses the employer's entire facility, including the rail line where the claimant was injured, and that the Board properly held that this location satisfied the maritime situs requirement. To the extent this Court finds any ambiguity in the statutory term "adjoining area," the Court should defer to the Director's reasonable construction.

C. The Statutory Terms

The Longshore and Harbor Workers' Compensation Act ("LHWCA" or "Act") provides compensation to covered maritime employees for work-related disabilities, or to their survivors where the injury causes death. 33 U.S.C. §§ 908; 909. Section 2(3), 33 U.S.C. § 902(3), which defines an

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Co. v. Director, OWCP, 865 F.2d 727 (6th Cir 1989) (citing *Director, OWCP v. Detroit Harbor Terminals, Inc.*, 850 F.2d 283, 286-7 (6th Cir. 1988).

"employee," establishes an occupational or "status" requirement.[3] LHWCA § 3(a), at issue in this case, establishes a geographical or "situs" requirement for coverage under the Act. Accordingly, an injured worker must satisfy both the maritime situs and status requirements for coverage 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.)

The catch-all 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.[4] The

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[3] 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, and the Board affirmed, over the employer's objection, that Nixson was a covered maritime employee. Rec. at B-3. The employer no longer disputes those rulings.

[4] Because only an "other adjoining area" is qualified so as to require a functional relationship to maritime activity, the courts have concluded that only the catch-all location must be "customarily used" for the specified purposes; thus, the enumerated locations, "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 (2d Cir), *cert. denied*, 119 S. Ct. 444 (1998); *Hurston v. Director, OWCP*, 989 F.2d 1547, 1549-50 (9th Cir. 1993). *See also*

employer's argument that Nixson's injury did not occur upon a covered situs is twofold: the legally relevant "area" under § 3(a), the rail car area, was not physically contiguous to and thus did not "adjoin" navigable waters, nor was the rail car area an "area customarily used" for maritime purposes.

This Court fully considered the parameters of the term "adjoining area" in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980)(en banc), *cert. denied*, 452 U.S. 905 (1981), rejecting both prongs of the construction of the terms urged by the employer in this case. The Court defined "adjoining" in broad geographic terms as "close to" or "neighboring" navigable waters, specifically rejecting a requirement of absolute contiguity. *Id.* at 514; *See also Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 557 (5th Cir. 1998); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (1978)(gear locker located ½ mile from navigable water was held a covered adjoining area).[5] The *Winchester* Court also held that the specific

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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.")

[5] The Court in *Herron* identified four factors that "among others" 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)

location of injury need *not* be customarily used for maritime purposes so long as the overall area – which the Court clearly contemplated could encompass well beyond an entire facility –was so customarily used.

The employer appears to concede that its statutory construction is contrary to this Court's *Winchester* decision, but argues that *Winchester* is no longer good law, having been undermined by later Supreme Court precedent. Mobil states that recent Supreme Court directives require a court to construe the Act's terms according to their plain language. Pet. Br. at 6-8. Mobil concludes that under the plain statutory language of § 3(a), and in line with the Fourth Circuit's decision in *Sidwell v. Express Container Services*, 71 F.3d 1134 (4th Cir.), *cert. denied*, 518 U.S. 1027 (1997), the employer's entire facility cannot constitute a covered "adjoining area" because it is not a discrete locale. Moreover, Mobil avers that the rail line where Nixson was injured does not qualify as a covered adjoining area since it was not customarily used for maritime purposes and did not touch navigable water. Pet. Br. at 10.

As discussed more fully below, this Court correctly concluded in *Winchester* that the term "adjoining area" does not have a single, ordinary

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whether the site is as close to the waterway as is feasible given all other circumstances. 558

meaning and consequently should be given a liberal construction in conformance with the context in which it is placed, and the remedial purpose of the Act. Under *Winchester*, the ALJ correctly found, and the Board affirmed, that the employer's facility regularly utilized its location adjoining navigable waters in the systematic loading and unloading of vessels and, therefore, the entire facility was a covered situs.

First, none of the Supreme Court authority upon which the employer relies touches on the statutory construction of § 3(a).[6] Instead, the employer bases its argument only on the Court's general admonishment to follow the plain language of the LHWCA where appropriate. The suggestion that the Supreme Court's more recent reference to the long established and unexceptional mandate to "follow the plain language" could constitute "intervening Supreme Court precedent" justifying one panel's re-examination of specific and established *en banc* circuit court authority is tenuous at best.

F.2d at 141.

[6] *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469 (1992) (Under the plain language of LHWCA § 33(g), a worker becomes "person entitled to compensation," when he has a vested right to compensation); *Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates),* 519 U.S. 248 (1997)(Under the plain language of LHWCA § 33(g), spouse of injured worker was not, prior to the death of the worker, a "person entitled to compensation," because she had no vested right to LHWCA compensation.)

Moreover, subsequent to the Supreme Court authority upon which Mobil relies, this Court recently reaffirmed that *Winchester* remains controlling authority. *Sisson v. Davis & Sons, Inc.*, 131 F.3d 555 (5th Cir. 1998) (Court applied *Winchester* and held that a parking lot at a heliport used to transport offshore platform workers located about 50 yards from navigable water failed to satisfy the functional requirement for a covered adjoining area). As in *Winchester*, the Court in *Sisson* reaffirmed that because the statutory terms were ambiguous, reliance was properly placed on the legislative history to the Act, to liberally construe the statutory terms to effectuate the remedial purpose of the Act. *Id.* at 557.[7]

In any event, this Court should reject Mobil's "plain language" argument since, as the Court recognized in *Winchester*, there is nothing plain or unambiguous about the terms "adjoining area."

1. "Adjoining"

[7] In fact, the Court's construction of the statutory terms is fully consistent with the Director's statutory construction, for which deference is owed, as expressed in LHWCA Program Memorandum No. 58, *Guidelines for Determination of Coverage of Claims Under Amended Longshoremen's Act*, pp. 10-4 (Aug. 10, 1977) ("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 water; it suffices that the overall area which includes the location is part of a terminal adjoining the water.") Attached as Addendum B to this brief.

The Court began its analysis in *Winchester* with a resort to a number of dictionaries which reflected that the statutory term "adjoining" is susceptible to more than one reasonable interpretation. 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, and contrary to the employer's assertion here, this Court expressly considered and rejected the notion that the statutory term "adjoining" was "plain" and, finding ambiguity in the statutory language, properly relied upon the Act's remedial purpose in its liberal statutory construction.

2. <u>"Area"</u>

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 cautioned, however, that the functional component should be defined broadly, and 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.*

Even Mobil does not make the obviously untenable suggestion that the term "area" has a plain or unambiguous meaning. Mobil argues instead that, contrary to the *Winchester* Court's holding, "[t]he employer's entire facility cannot possibly be an 'other adjoining area' because that term is limited by the other 'adjoining' areas preceding it in the statute: piers, wharves, dry docks, terminals, building ways, and marine railways . . . *specific work areas [that] are subsets of manufacturing facilities*." Pet. Br. at 12 (emphasis added).

Even assuming that Mobil's position constitutes a "plain language" argument, its assertion is nevertheless belied by the term "terminal" within the statutory list. A "terminal" cannot reasonably be interpreted to be a specific work area or subset of a manufacturing facility. A marine terminal may, as a feature of modern cargo-handling techniques, encompass substantial acreage, including within its domain, rail lines, and other "specific work areas," so characterized by the employer, i.e., piers and wharves.

In *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977), the Court held that claimant Blundo, a "checker" who worked at a marine terminal, and claimant Caputo, a "terminal laborer" who assisted loading trucks, both preformed tasks integral to the loading and unloading process. The Court had little difficulty finding maritime situs for claimant Blundo's injury because it occurred on a pier within a terminal area, which the Court observed, was a "fenced-in facility," some two blocks long, which itself included two piers. *Id.* at 279-280. The Court also found maritime situs for claimant Caputo, who was injured while loading a truck "parked inside the terminal area," which was unquestionably a covered situs because it adjoined navigable waters and "'parts of the terminal are used in loading and unloading ships.'" *Id.* at 279, *quoting Northeast Marine's brief.*

Similarly, and of particular note, in *Chesapeake & Ohio Railway Co. v. Schwalb*, 493 U.S. 40 (1989), two separate terminals were described, each of which included rail-line areas where coal was loaded from rail cars onto ships. *Id.* at 42-3. In *Schwalb*, the Court found that claimants who repaired and maintained equipment used to unload coal from rail cars onto ships were nevertheless essential to the loading and unloading process. *Id.* at 47. It was

undisputed that the claimants in *Schwalb*, although railroad workers, were injured on covered maritime sites. *Id.* at 45.

Thus, as the Supreme Court recognized in both *Caputo* and *Schwalb*, and contrary to Mobil's assertion here, a statutory "terminal" is *not* a discrete structure or specific work site, nor a "subset" of a facility, but rather may be an area of considerable size which itself includes such specific work sites. Accordingly, there is no reasonable basis to suggest that the terms preceding "area" in § 3(a) require a limitation on the term to a specific work site. Thus, Mobil's position, that its entire facility cannot be an "adjoining area" because that term, in conformance with the terms that precede it, must be a specific work site, would be indefensible even if it were not foreclosed by *Winchester*.

Alternatively, Mobil argues that even if *Winchester* is applied, the rail line where Nixson was injured is not a covered situs. Mobil acknowledges that the rail line was "physically close to the water's edge," and thus that, under *Winchester,* the site "adjoins" navigable waters. Pet. Br. at 14. However, Mobil argues that "[p]hysical location near a waterway alone is not enough to satisfy the situs requirement ***unless that specific area is***

customarily used by the employer to load and unload vessels." Pet. Br. at 14, emphasis in original.

Winchester, in fact, flatly rejects that proposition. 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. *Id.* Thus, in *Winchester*, the Court found a gear locker, located 5 blocks from the gate of the nearest dock, to be a covered situs, not only because the locker itself was an area used for maritime purposes, but also because it was located in an overall area customarily used for maritime purposes. The Court found that the gear locker was "as close to the docks as feasible . . . in an area customarily used by employers for loading."[8] *Id.* Thus, the *Winchester* Court specifically rejected the position that Mobil advances here -- that *Winchester* requires that the specific area in which the claimant was injured must be used for maritime activity.

In fact, 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. At the same time, the Court dismissed as "absurd" a suggestion similar to the one Mobil advances here, that if, under its expansive reading of the term "area," its whole facility is covered, then arguably the entire city of New Orleans is covered (Pet. Br. at 12). *Winchester*, 632 F.2d at 515 (Court rejected similar suggestion that all of Houston is an area adjoining navigable waters).

Indeed, with the exception of the Fourth Circuit, the leading cases have found maritime situs on areas that were indisputably *outside* any employer's facility, which were nevertheless covered adjoining areas. For instance, the gear room in *Winchester* was located 5 blocks from the nearest dock. 632 F.2d at 507. In *Brady-Hamilton*, the Court held that a gear locker located ½ mile from navigable water was nonetheless covered. 568 F.2d at 141. In contrast, the rail line where Nixson's injury occurred was, as the ALJ found, "on the premises of Employer's facility." Rec. at C15.[9]

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[8] The gear room was used to store tools and machinery used by stevedores in loading and unloading ships, and for repairing and maintaining the gear. 632 F.2d. at 507.

[9] 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 that court would have reached the same decision had the container repair operation still been located (as it had previously been) "near the gate of the Portsmouth Marine Terminal." *Id.*

Mobil also makes a fruitless factual argument concerning the maritime activity of its facility, asserting that the location of its manufacturing plant is "fortuitous;" and that "claimant's location at the manufacturing plant was no different than it would have been at another manufacturing plant anywhere in the land." Pet. Br. at 12.

The ALJ, however, found directly to the contrary. Based on the overwhelming weight of the record evidence, the ALJ found that Mobil fully utilized its maritime location along the Houston Ship Channel to further its business concerns. Nixson testified that: (1) approximately 900,000 tons of phosphate rock were unloaded from barges at Mobil in the year preceding his injury, and that the plant could not operate without it. Transcript ("TR") at 36; (2) Mobil produces approximately 580,000 tons of dry fertilizer a year, which it ships to its consumers via barge, ships and railcars. TR at 42; and (3) Mobil, using its marine loader, is able to load 5,000 tons of fertilizer a day onto vessels, as compared to only 3,000 tons into railcars. TR at 43-4. As the ALJ held, "the location is a definite benefit to Employer given its maritime receipt and shipment activity." RE at C14. Accordingly, the ALJ had little trouble finding that Mobil's entire facility "in the vicinity of

navigable waters [was] . . . used to load and unload vessels." RE at C14. He reasoned:

> it is elementary that Employer's site on the Houston Ship Channel is suitable for its maritime receipt of raw materials necessary for use in its manufacturing process and shipment of finished product in commerce to its customers. The docks located along the waterway service Employer's maritime receipt of manufacturing materials and are certainly adjoining navigable waterways. Such docks are connected to the storage and manufacturing areas by conveyor belt systems to facilitate receipt and shipment. Employer's facility is situated on the Houston Ship Channel and arguably could not have been located any closer to the waterway. The proximity of its location is a definite benefit to Employer given its maritime receipt and shipment activity.

Id.

The ALJ also found that the rail car area where Nixson was injured was on Mobil's premises, "separated from the waterway by buildings which themselves are used for unloading raw materials and loading finished product." RE at 15. Thus, the evidence demonstrated that the employer's "location was not merely incidental but essential" to its business. The ALJ correctly concluded that Mobil's entire "facility, including its rail line, is an adjoining area under the Act since it is customarily used for maritime

activity, the loading and unloading of vessels." Id. See *also Alford v. American Bridge Div.,* 642 F.2d 807 (5th Cir. 1981)[10].

The Court should affirm the Board's decision in this case that Mobil's entire facility is a covered maritime situs, as it is in accordance with this Court's thoroughly considered construction of the term "adjoining area" in *Winchester*. Under *Winchester*, Mobil's facility is a covered situs because of both its geographic nexus, adjacent to the navigable waters of the Houston Ship Channel, and because the facility was regularly engaged in maritime shipping, both through its receipt of raw materials and shipment of its finished product. Thus, the Mobil facility's maritime location and function qualifies the entire facility as a maritime situs. *See also Northeast Marine*, 432 U.S. 249, 279-80 (1977)(entire terminal covered). Accordingly, under the controlling precedent of *Winchester*, the ALJ's decision, affirmed by the Board was clearly correct.[11]

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[10] In *Alford*, the Court held that a steel fabrication plant located on a navigable river, which constructed component parts used in shipbuilding, was a covered adjoining area customarily used in shipbuilding. The Court based its holding on the facility's geographic location, the plant's history as a shipyard, its ongoing operations, and its belief that the fabrication of component parts was an integral part of the overall process of shipbuilding. 642 F.2d at 815-6.

[11] Mobil also complains that rulings of the Benefits Review Board applying *Winchester* have been inconsistent, but cites a single example, *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998) (PR at 9), now pending before this Court, No. 98-60550. In *Stroup*, the Board held that a warehouse bay of a steel manufacturing facility, located

CONCLUSION

For the reasons stated, the Board's determination, that Mobil's entire facility, including the rail car area where Nixson's injury occurred, was a covered adjoining area customarily engaged in loading and unloading, should be affirmed.

Respectfully submitted,

HENRY L. SOLANO
Solicitor of Labor

CAROL A. DE DEO
Associate Solicitor for
Employee Benefits

SAMUEL J. OSHINSKY
Counsel for Longshore

LAURA J. STOMSKI
Attorney
U.S. Department of Labor
Suite S-4325
200 Constitution Ave., N.W.

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one-quarter mile from navigable water, was not a covered adjoining area. The Board in *Gavranovic*, supra., distinguished its decision in *Stroup* based on the physical distance between the warehouse bay and navigable water. Addendum A. The Director has filed a responsive pleading with the Court in *Stroup*, arguing that the Board erred, and that it should have found [as it did in this case] that the employer's entire facility was a covered "adjoining area." In any event, whatever the ultimate resolution of *Stroup*, the facts presented here, as discussed above, demonstrate that Mobil regularly and systematically conducted maritime activities at its facility, utilizing the adjacent waterways, which clearly establish the entire plant as a covered maritime situs.

Washington, D.C. 20210
(202) 219-4450 x 105#

Attorneys for the Director, Office of Workers' Compensation

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

I hereby certify that on _____, a copy of the foregoing document was served by mail, postage prepaid, on the following:

J. Corbin Van Arsdale, Esq.
Fitzhugh & Elliot
12727 Kimberley, Suite 302
Houston, TX 77024-0450

Dennis L. Brown, Esq.
Law Offices of Dennis L. Brown
24 Greenway Plaza, Suite 1818
Houston, TX 77046

LaWanda J. Hamlin
Paralegal Specialist
U.S. Department of Labor