No. 09-60859

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

GREAT SOUTHERN OIL & GAS COMPANY,
LOUISIANA WORKERS' COMPENSATION CORPORATION,
Petitioners

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR and TONY MEYERS,
Respondents

On Petition for Review of an Order of the Benefits
Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure And Fifth Circuit Rule 28.2.3, the Director suggests that oral argument is not Necessary as Supreme Court precedent is dispositive of the principal issue in This case concerning Mr. Meyers' coverage under the Longshore and Harbor Workers' Compensation Act. If, however, the Court deems oral argument Appropriate, the Director will participate.

TABLE OF CONTENTS

Table of Authorities

Cases

Statutes

Regulations

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BRIEF FOR THE FEDERAL RESPONDENT

Great Southern Oil & Gas Company and its insurer, Louisiana Workers' Compensation Corporation (collectively, Great Southern), appeal from agency decisions awarding Tony Meyers disability compensation under the Longshore and Harbor Workers' Compensation Act (the LHWCA), 33 U.S.C. § 901 *et seq*. The LHWCA provides benefits for covered employees who are injured while working on, or adjacent to, the navigable waters of the United States, and death benefits for

their survivors. A Department of Labor Administrative Law Judge (ALJ) awarded Mr. Meyers compensation. The Department's Benefits Review Board (BRB) affirmed the ALJ's decision. On appeal to this Court, Great Southern argues, *inter alia*, that Mr. Meyers is not entitled to benefits because the LHWCA does not cover him as an "employee."[1] The Director, Office of Workers' Compensation Programs, as the administrator of the LHWCA, supports the ALJ's determination that the statute does cover Mr. Meyers' May 28, 1994, work-related injury sustained while employed by Great Southern.

STATEMENT OF SUBJECT MATTER JURISDICTION AND APPELLATE JURISDICTION

The LHWCA contains the review provisions for claims adjudication under that statute. Section 921(a) allows a party to a claim to file an appeal with the BRB within thirty days after an administrative law judge's decision is filed in the Office of the District Director. 33 U.S.C. § 921(a); 20 C.F.R. §§ 702.393, 802.205(a). In this case, the ALJ issued a decision on April 4, 2007, denying Mr. Meyers' claim. *T.M. v. Great Southern Oil & Gas Co.*, 41 Ben. Rev. Bd. Serv. (MB) 203 (ALJ), 2007 WL 5368133 (Apr. 4, 2007), filed and served on April 5,

[1] Great Southern also challenges the merits of Mr. Meyers' compensation award. We will not address those arguments unless the Court requests our position.

2007.[2] Mr. Meyers filed a Motion for Reconsideration, which the ALJ denied on May 7, 2007. *T.M. v. Great Southern Oil & Gas Co.*, 2006-LHC-1226 (May 7, 2007), filed and served on May 8, 2007. Mr. Meyers appealed to the BRB on ****, 2007. 20 C.F.R. § 802.206(a) (timely motion for reconsideration stays time for appealing to BRB). The BRB vacated the ALJ's decision and remanded the claim for further consideration. *T.M. v. Great Southern Oil & Gas*, 42 Ben. Rev. Bd. Serv. 21 (MB), 2008 WL 2262145 (2008).

On March 19, 2009, the ALJ issued a decision on remand awarding Mr. Myers compensation. *T.M. v. Great Southern Oil & Gas Co.*, 2006-LHC-1226 (March 19, 2009), filed and served on March 20, 2009. Great Southern filed a Notice of Appeal with the BRB, which was received on April 14, 2009, within the thirty-day period for appealing an ALJ's decision. The BRB therefore had jurisdiction over the appeal. 20 C.F.R. § 802.207(a)(1) (notice of appeal considered filed as of date of receipt of notice by Clerk of the BRB). On September 29, 2009, the BRB issued a decision affirming the ALJ's decision.

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[2] In response to the Electronic Freedom of Information Act of 1996, 5 U.S.C. § 552 *passim*, Pub. L. 104-231, 110 Stat. 3028, the DOL's Chief Administrative Law Judge issued an administrative memorandum directing ALJs to use only a claimant's initials in the caption of any decision and order. The United States District Court for the District of Columbia enjoined enforcement of the Chief Administrative Law Judge's memorandum. *National Ass'n of Waterfront Employers v. Solis*, 665 F.Supp.2d 10, 19 (D.D.C. 2009).

T.M. v. Great Southern Oil & Gas, BRB No. 09-530, 2009 WL 4759863 (Sept. 29, 2009).

The LHWCA prescribes the time frames for petitioning a United States Court of Appeals for review of the Board's final decision. Section 921(c) allows sixty days for "[a]ny person adversely affected or aggrieved by a final order of the Board" to file a petition with the Court. 33 U.S.C. § 921(c); 20 C.F.R. § 802.410(a). The BRB's September 29, 2009, decision is final for purposes of § 921(c). 20 C.F.R. § 802.406. Great Southern is adversely affected by the BRB's decision because it affirms the ALJ's compensation award and imposes liability on Great Southern to pay that compensation. Great Southern filed its Petition for Review with this Court on November 16, 2009, within sixty days of the BRB's decision. The petition for review is therefore timely.

Finally, § 921(c) vests appellate jurisdiction in the "court of appeals for the circuit in which the injury occurred[.]" 33 U.S.C. § 921(c). Mr. Meyers was injured in the course of his employment on the navigable waters of the State of Louisiana. Jurisdiction lies with this Court.

All of the jurisdictional prerequisites in § 921(c) have been satisfied.[3]

STATEMENT OF THE ISSUE

Whether Mr. Meyers was an "employee" engaged in maritime employment and therefore covered by the LHWCA when he sustained a work-related injury due to a fall from a barge moored in the navigable waters of the United States?

STATEMENT OF THE CASE

Mr. Meyers injured his left knee on May 28, 1994, when he fell between two barges moored in a Louisiana canal. At the time, Mr. Meyers worked for Great Southern repairing oil derricks situated on land and in the water. Great Southern voluntarily paid state workers' compensation until June 30, 2005. Mr. Meyers thereafter claimed additional compensation under the LHWCA.

The ALJ convened the first hearing on January 10, 2007. Mr. Meyers and a co-worker, Douglas Aymond, testified at the hearing. The ALJ issued a Decision and Order on April 4, 2007, denying the claim. He found that Mr. Meyers was not an "employee" for purposes of LHWCA coverage. Because the sole issue presented for hearing concerned Mr. Meyers' status as a covered employee, the

[3] Although Great Southern casts the issue as one of "jurisdiction under the LHWCA" (*see* Petioner's Brief [Pet. Br.] at 2, 11, 16, 18), the employer confuses subject matter jurisdiction with the issue of an employee's personal coverage under the LHWCA. *See Ramos v. Universal Dredging Corp.*, 653 F.2d 1353, 1355, 1359 (9th Cir. 1981) (discussing distinction between jurisdiction and coverage). Only coverage is at issue in this case.

ALJ did not make any factual findings on Mr. Meyers' alleged work-related disability. Mr. Meyers moved for reconsideration; the ALJ denied the motion on May 7, 2007. Mr. Meyers appealed to the BRB. On May 28, 2008, the BRB issued a decision reversing the ALJ's findings on coverage. The BRB also held that Mr. Meyers was entitled to LHWCA benefits, and remanded the claim for the ALJ to enter an award.

The ALJ convened the second hearing on November 5, 2008. He issued a decision on March 19, 2009, awarding Mr. Meyers temporary total disability benefits commencing May 28, 1994 (the date he was injured), and continuing. 33 U.S.C. § 908(b). Great Southern appealed to the BRB. On September 29, 2009, the BRB affirmed the ALJ's decision. Great Southern petitioned this Court for review of the BRB's decision.

STATEMENT OF THE FACTS

A. Statutory Framework.

The LHWCA imposes two requirements for coverage of an injured worker. First, the injury must occur "upon the navigable waters of the United States" (the "situs" requirement). 33 U.S.C. § 903(a).[4] Second, the injured worker must be an

[4] "Upon" includes over navigable water. *Ward v. Director, OWCP*, 684 F.2d 1114, 1116 (5th Cir. 1982) (holding that LHWCA covers fish spotter working from an airplane flying over navigable water); *Zapata Haynie Corp. v. Barnard*, 933 F.2d 256, 260 (4th Cir. 1991) (same).

"employee" of a statutory employer, and engaged in maritime employment (the "status" requirement). 33 U.S.C. § 902(3). *See generally Northeast Marine Terminal v. Caputo*, 432 U.S. 249, 264-65 (1977).

Prior to the 1972 LHWCA amendments, the statute covered only those employees who sustained injuries on "navigable waters." Act of 1927, ch. 509, § 3(a), 44 Stat. 1426; *Caputo*, 432 U.S. at 258-9. Consequently, the situs of the employment injury alone determined coverage. The 1972 amendments enlarged the covered situs beyond the navigable water's edge, and added a "status" requirement that extended eligibility to certain workers engaged in land-based activities. *Id.* at 263-65. Congress, however, did not withdraw coverage from any injured employee who would have been covered by the pre-1972 LHWCA. Thus, any employee injured on navigable waters remained covered to the same extent as before 1972. *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 315 (1983).

In 1984, Congress enacted the current version (with one exception) of the § 902(3) definition of "employee." Pub. L. 98-426, § 2(a), 98 Stat. 1639. Section 902(3) defines "employee" to mean "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . .." 33 U.S.C. § 902(3). The remainder of this provision lists eight categories of

workers who are excluded from the definition of "employee."[5] 33 U.S.C. § 902(3)(A)-(H).

B. <u>Employment Background</u>.

Mr. Meyers worked as a derrick man (or "roughneck") for Great Southern on a crew assigned to service and repair oil-well derricks operated by Texaco. He initially worked for one year at the "yard" performing maintenance and mechanical work on derricks (2007 Hearing Transcript [2007HTr.] at 36-37). For the next one and one-half years, Mr. Meyers worked on land-based derricks (2007HTr. at 37-38). Great Southern then assigned him to work on derricks located on Louisiana waterways. Great Southern informed Mr. Meyers that this assignment could last from two to three years as the work crew moved from one well to another as needed (2007HTr. at 38). The crew could also be assigned as a relief crew to a land-based job (2007 HTr. at 38). For equipment, Mr. Meyers used a truck-mounted drilling rig that could be driven onto a barge; Great Southern employees also used the same type of rig for land-based jobs. Mr. Meyers testified that the

[5] In the American Recovery and Reinvestment Act of 2009 (ARRA), Pub. L. No. 111-5, 123 Stat. 115 (2009), Congress amended § 902(3)(F), which excludes from LHWCA coverage certain employees engaged in building, repairing and dismantling recreational vessels. Great Southern does not contend that Mr. Meyers performed any work subject to this or any of the remaining exclusions as previously or currently defined.

work he performed on land and when injured on water involved the same duties and equipment (2007 HTr. at 52-54).

When he was injured, Mr. Meyers was working on a water-based derrick pulling off pipe and laying down new pipe (2007 HTr. at 40). The derrick was located in a secondary channel off a main waterway near Lafitte, Louisiana (2007 HTr. at 44-45). Mr. Meyers performed his work on a keyway barge that served as a work platform. The barge was temporarily affixed (or "spudded") to the seabed to prevent its movement during the repair work.[6] A pipe barge and a blending (or tank) barge were attached to the keyway barge. A tugboat moved the pipe and blending barges during the work day; the keyway barge could be detached and floated to a different work site once the repair crew completed its work (2007 HTr. at 54-56).

On May 28, 1994, Mr. Meyers injured his left knee when he fell between the pipe and blending barges (2007 HTr. at 46-47). He had been working at the site for four or five days at the time of injury (2007 HTr. at 50). Prior to the assignment, Mr. Meyers had worked for Great Southern only on land.

[6] A "keyway" is a "slot in the edge of the barge hull of a jackup drilling unit over which the drilling rig is mounted and through which drilling tools are lowered and removed from the well being drilled." *See* Oil and Gas Glossary http://oilgasglossary.com/search/keyway.

C. The Decisions Below.

1. The ALJ's 2007 Decision and Order.

The ALJ found that Mr. Meyers was not engaged in maritime employment and denied the claim (Great Southern Record Excerpts [Rec. Exc.], tab 7). He determined Mr. Meyers was not covered by the LHWCA because the keyway barge where he worked at the time of his injury was a fixed platform, which the Supreme Court has held is akin to an artificial island rather than a vessel (Rec. Exc., tab 7 at 9). 33 U.S.C. §§ 902(3), 903(a); *Herb's Welding, Inc. v. Gray*, 470 U.S. 414 (1985). The ALJ acknowledged that *Herb's Welding* involved a platform permanently affixed to the seabed, while Mr. Meyers worked on a "floating structure" (Rec. Exc., tab 7 at 8).[7] Nevertheless, the ALJ concluded that the keyway barge was a fixed platform "at the time of Claimant's injury" (Rec. Exc., tab 7 at 9). He based this finding on the following facts: (i) the barge was already in place when Mr. Meyers was injured; (ii) the barge did not move while he worked at the site; (iii) the barge would remain secured at one work-site for months; (iv) the barge was not used for transportation, a tugboat provided its momentum, and any movement was incidental to shifting to a new work-site; (v)

[7] In a lengthy footnote, the ALJ found the evidence insufficient to prove the keyway barge was a "vessel" as that term has been construed in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005) and *Holmes v. Atlantic Sounding Co., Inc.*, 437 F.3d 441 (5th Cir. 2006) (Rec. Exc., tab 7 at 8 n.4).

the barge did not have any sleeping quarters; and (vi) the repair crew performed the same tasks both on land and water (Rec. Exc., tab 7 at 8-9).

The ALJ also found that the derrick's location was immaterial as Mr. Meyers performed the same tasks on land and water (Rec. Exc., tab 7 at 9). In so finding, the ALJ concluded the circumstances of this case were similar to those cited by the Supreme Court in *Herb's Welding* as grounds for excluding LHWCA coverage:

> Gray was a welder. His work had nothing to do with the loading or unloading process, nor is there any indication he was even employed in the maintenance of equipment used in such tasks. Gray's welding work was far removed from traditional LHWCA activities, notwithstanding the fact that he unloaded his own gear upon arriving at the platform by boat. He built and maintained pipelines and the platforms themselves. There is nothing inherently maritime about those tasks. They are also performed on land, and their nature is not significantly altered by the maritime environment . . ..

(Rec. Exc., tab 7 at 9, quoting 470 U.S. at 425). Accordingly, the ALJ concluded that Mr. Meyers failed the "status" test.

2. <u>The BRB's 2008 Decision</u>.

The BRB reversed and held that the LHWCA covered Mr. Meyers' claim. *T.M.*, 42 Ben. Rev. Bd. (MB) Serv. 21 (Rec. Exc., tab 3). Specifically, the BRB determined that the "uncontradicted evidence" proved Mr. Meyers was injured on navigable waters when he attempted to cross between two floating barges while performing his job duties as a derrick-man (Rec. Exc., tab 3 at 3). Citing *Perini*,

459 U.S. 297, the BRB held that these facts were sufficient to confer LHWCA coverage (Rec. Exc., tab 3 at 3).

The BRB further held that coverage could not be denied because the keyway barge was a fixed platform rather than a "vessel in navigation." The BRB determined the ALJ erred on both the facts and the law. First, the BRB summarized the ALJ's factual determinations that the keyway barge was "otherwise afloat on navigable waters" and could be moved from site to site as needed (Rec. Exc., tab 3 at 3-4). Given these findings, the BRB concluded the barge was not permanently affixed to the waterway bed despite its temporary immobility during individual repair projects, which precluded fixed-platform status (Rec. Exc., tab 3 at 4-5). Second, the BRB held that the ALJ erroneously interpreted the law by requiring the keyway barge to satisfy the criteria for a "vessel in navigation" (Rec. Exc., tab 3 at 4). *See* n.7, *supra*. As support for this holding, the BRB relied on the decisions in *Morganti v. Lockheed Martin Corp.*, 37 Ben. Rev. Bd. Serv. (MB) 126 (2003), *aff'd* 412 F.3d 407, 415-16 (2d Cir. 2005) (both decisions agreeing with Director that "vessel" status is irrelevant to determining whether LHWCA covers employee's injury occurring on navigable water and involving floating structure).[8]

[8] In *Morganti*, the BRB criticized the ALJ's focus on whether a research barge moored to a lakebed was a "vessel" within the meaning of judicial decisions

Finally, the BRB rejected Great Southern's argument (raised in a response brief) that Mr. Meyers may be denied coverage because he had previously performed his derrick-man duties for two and one-half years on land (Rec. Exc., tab 3 at 5-6). The BRB noted that the work Mr. Meyers performed for Great Southern prior to his injury on navigable waters is irrelevant: Mr. Meyers is covered by virtue of *Perini* (Rec. Exc., tab 3 at 6). Accordingly, the BRB held that Mr. Meyers was entitled to benefits, and remanded the case to the ALJ to enter an award (Rec. Exc., tab 3 at 7). The ALJ thereafter issued the award of compensation (Rec. Exc., tab 5), which the BRB affirmed (Rec. Exc., tab 4).

SUMMARY OF THE ARGUMENT

This appeal is governed by the Supreme Court's decision in *Perini*. The Court held that the LHWCA confers maritime employment status on an employee injured in the course of employment while on the navigable waters of the United States. Mr. Meyers was injured on the Louisiana coastal waterways while performing his work repairing an oil derrick located on the water. For purposes of LHWCA coverage, these facts fall squarely within *Perini*.

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interpreting the characteristics of a "vessel in navigation" in other contexts. The BRB noted that the LHWCA covers injuries occurring on floating structures that fail to meet the criteria for a "vessel in navigation." Consequently, the BRB concluded that the injured employee need not work on a "vessel" at all provided he does work on a structure floating in navigable waters.

Great Southern, however, argues that the 1984 LHWCA Amendments and the Supreme Court's decision in *Herb's Welding* indicate an intention by Congress and the Court to impose a general maritime-employment requirement on all LHWCA claimants (whether injured on water or land). Neither Congress nor the Court evinced any such intent. Congress intended to exclude certain specific occupations from coverage even if the employee sustained an injury on navigable waters. Meyers was not employed in any of these occupations. *Herb's Welding* simply excluded a welder from coverage because he worked on a fixed platform, *i.e.*, land, and his work did not otherwise qualify as maritime employment. The Court actually reiterated its view that injuries occurring on navigable waters remained covered pursuant to *Perini*. Meyers was working on navigable waters, not a fixed platform, when he was injured.

Finally, Great Southern attempts to avoid liability for Mr. Meyers' claim by arguing that he was "transiently or fortuitously" on navigable waters when he was injured. Great Southern pegs its argument to the fact that Mr. Meyers had previously worked for two-plus years on land and only four or five days on water when he was injured. This argument, however, overlooks the fact that Mr. Meyers was working on water at Great Southern's direction and in the course of his employment when he was injured. His presence on water was neither transient –

he worked solely on water for those four or five days – nor fortuitous: Mr. Meyers was on the keyway barge because that was his assigned work site.

Great Southern has not established any basis for excluding Mr. Meyers from LWHCA coverage. Accordingly, Great Southern is liable for Mr. Meyers' compensation unless this Court overturns the award on the merits.

STANDARD OF REVIEW

This Court reviews the BRB's decision "under the same standard as it reviews the decision of the ALJ: Whether the decision is supported by substantial evidence and is in accordance with the law." *Craven v. Director, Office of Workers Compensation Programs*, -- F.3d --, 2010 WL 1660241, * 2 (5th Cir. April 27, 2010) (*quoting Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822 (5th Cir.1991)); *B&D Contracting v. Pearley*, 548 F.3d 338, 340 (5th Cir. 2008). "Substantial evidence" means the quantity and quality of evidence that a reasonable mind would accept as an adequate basis for a factual conclusion. *See Richardson v. Perales*, 402 U.S. 389, 401 (1971). As for legal issues, this Court reviews the BRB's decision *de novo*. *Bollinger Shipyards, Inc. v. Director, OWCP*, -- F.3d --, 2010 WL 1614594, at * 5 (5th Cir. April 22, 2010). In the context of LHWCA coverage issues, this Court reviews the ALJ's determinations on situs and status issues as factual findings. *Coastal Production Services, Inc. v. Hudson*, 555 F.3d 426, 430-31 (5th Cir. 2009).

The Director, OWCP, is the agency official charged by the Secretary of Labor with the administration of the LHWCA. 20 C.F.R. § 701.202 (2009). This Court will afford deference to the views of the Director on matters of statutory construction involving the LHWCA. *B & D Contracting*, 548 F.3d at 340.

ARGUMENT

Great Southern effectively concedes that *Perini* supports "situs-determinative" entitlement for work-related injuries occurring on navigable waters (Pet. Br. at 11-12). Nevertheless, the employer argues that the subsequent Supreme Court decision in *Herb's Welding* and the 1984 LHWCA Amendments have curtailed the broad reach of *Perini* by withdrawing certain types of employment from LHWCA coverage (Pet. Br. at 12-14). Great Southern then infers that the Supreme Court and Congress intended to impose a general "maritime-employment" status requirement for all employees regardless whether an injury occurs on land or water (Pet. Br. at 14-15). Contrary to Great Southern's argument, neither post-*Perini* caselaw nor the 1984 LHWCA Amendments impose a general "maritime-status" requirement for an employee injured on navigable waters in the course of his employment and not otherwise excluded from coverage: the employee's status derives from the injury occurring on the water.

A. The LHWCA covers Mr. Meyers' claim because he was injured on the navigable waters of the United States in the course of his employment and no statutory exceptions to the LHWCA definition of "employee" apply.

As noted above, coverage was a simple function of situs prior to the 1972 LHWCA amendments. If an employee incurred a work-related injury on navigable waters, was not a member of an excluded class, and worked for a statutory "employer," that employee was eligible for benefits.[9] *Caputo*, 432 U.S. at 264. "[T]he consistent interpretation given to LHWCA before 1972 by the Director, the deputy commissioners, the courts and the commentators was that . . . *any* worker injured upon navigable waters in the course of employment was covered . . . without any inquiry into what he was doing (or supposed to be doing) at the time of his injury." *Perini*, 459 U.S. at 311 (emphasis in original; internal quotations omitted); *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 124 (1962) (the LHWCA "was designed to ensure that a compensation remedy existed for all injuries sustained by employees on navigable waters"). No further inquiry was necessary to establish a maritime connection between the injured employee's work and navigation or commerce. *See, e.g., Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 246-47 (1941) (upholding LHWCA coverage for employee who was principally a

[9] Prior to 1972, the definition of "employee" excluded only "a master or member of a crew of any vessel" and "any person engaged by the master to load or unload or repair any small vessel under eighteen tons net." Pub. L. 92-576, § 2(a).

land-based janitor, but drowned in navigable waters while riding in employer's boat at coworker's request).

The 1972 amendments expanded the scope of the covered "navigable waters" situs landward to include certain land-based structures under § 903, and added a "maritime employment" requirement for employee status under § 902(3). *Caputo*, 432 U.S. at 263-64. Statutory situs coverage expanded to include the:

> disability or death of an employee, but only if his 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 load, unloading, repairing, or building a vessel).

33 U.S.C. § 903(a) (1972) (exclusions omitted). This geographic expansion was the genesis of the "status" requirement for land-based workers. The amended definition of "employee" provided:

> 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 ship-breaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

33 U.S.C. § 902(3) (1972).

In *Perini*, the Court concluded that the amendments did not withdraw coverage from any employees whom the LHWCA covered prior to 1972. 459 U.S.

at 315. The new status requirement applied only to land-based activities.[10] The Court noted, in particular, that Congress was addressing land-based injuries in expanding coverage landward; Congress "assumed that injuries occurring on the actual navigable waters were covered, and would remain covered;" and Congress was presumptively aware of Supreme Court precedent addressing coverage for "traditional" employees in *Parker*, 314 U.S. 244, *Calbeck*, 370 U.S. 114, and *Davis v. Department of Labor*, 317 U.S. 249 (1942). 459 U.S. at 319-320.

The *Perini* Court summarized its holding as follows:

> [W]hen a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3), and is covered under the LHWCA, providing, of course, that he is the employee of a statutory "employer," and is not excluded by any other provision of the Act. We consider these employees to be "engaged in maritime employment" not simply because they are injured in a historically maritime locale, but because they are required to perform their employment duties upon navigable waters.

Id. at 324 (footnotes omitted). Thus, an employee injured on the "actual" navigable waters did not have to prove that "his employment possessed a direct (or substantial) relation to navigation or commerce in order to be covered." *Id.* at 318-19.

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[10] Significantly, the Court drew a deliberate distinction between "*actual* navigable waters," *i.e.*, the 1927 Act provision defining a covered situs that ends at the shoreline ("navigable waters of the United States (including any dry dock)"), and the expanded concept established by the 1972 Amendments, which added "certain adjoining shoreside areas." 459 U.S. at 300 n.2.

Despite the clarity of *Perini*'s holding, Great Southern argues that Mr. Meyers must be denied coverage because he performed the same type of work using the same equipment on both land and water, thereby proving his duties were not maritime in nature (Pet. Br. at 14-15). This argument is foreclosed by the Supreme Court's *Parker* decision, which was excplicitly relied upon in *Perini*. The employee, Armistead, worked primarily as a janitor and porter for a motor boat sales company. 314 U.S. at 244-45. At the request of another employee, Armistead accompanied the employee to test a motor boat for a customer. The boat capsized and Armistead drowned. *Id.* at 245. The Court held that the LHWCA covered Armistead's death:

> For habitual performance of other and different duties on land cannot alter the fact that at the time of the accident [Armistead] was riding in a boat on a navigable river, and it is in connection with that clearly maritime activity that the award here was made.

Id. at 247. That the Court referred to "other and different duties on land" is irrelevant because the overall nature of the employee's duties was deemed irrelevant. *Parker*'s holding focuses on the employee's "clearly maritime activity" when he drowned.

The Court's subsequent decision in *Pennsylvania R. Co. v. Rourke,* 344 U.S. 334 (1953), unequivocally rejected any notion that an employment-related injury occurring on navigable water required any further nexus to traditional concepts of

maritime employment. Rourke worked for a railroad that moved freight and passenger cars by water using car floats. He sustained a work-related injury on water. The Court held that the LHWCA covered his injury. In so holding, the Court noted that "the emphasis on the nature of [Rourke's] duties misses the mark. The statute applies, by its own terms, to accidents on navigable waters . . .." *Id.* at 339.[11] The Court concluded that "[if], then, the accident occurs on navigable waters, the Act must apply if the injured longshoreman was there in furtherance of his employer's business, irrespective of whether he himself can be labeled 'maritime.'" *Id.* at 341-342.

Great Southern does not dispute that Mr. Meyers sustained a work-related injury on actual navigable waters.[12] Contrary to Great Southern's position and consistent with the foregoing Supreme Court jurisprudence, Mr. Meyers need not

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[11] The Court observed that "[t]he result in Parker, as well, is totally inconsistent with any 'duties test'" because LHWCA compensation could not have been awarded "if we were to test [the Act's] applicability by the nature of [Armistead's] regular work." 344 U.S. at 341. *Cf. Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 845 (5th Cir. 1989) (stating that "employee status may be based *either* upon the maritime nature of the claimant's activity at the time of his injury *or* upon the maritime nature of his employment as a whole"); *Hudson*, 555 F.3d at 440 (same).

[12] Before the BRB, Great Southern supported the ALJ's finding that the keyway barge was a fixed platform, which is deemed land and not navigable waters (Rec. Exc., tab 3 at 2). The BRB rejected this argument (Rec. Exc., tab 3 at 3-5), and Great Southern has since abandoned it. Great Southern therefore now accepts that the keyway barge was a floating structure on navigable water.

further prove his actual duties on the water at the time of injury involved maritime activities. Accordingly, the LHWCA covers Mr. Meyers' claim unless a § 902(3) exclusion applies.[13]

For the first time in the proceedings on Mr. Meyers' claim, Great Southern argues to this Court that he is excluded from coverage by a statutory exclusion. Specifically, Great Southern contends that Mr. Meyers was a crew member of the barge/vessel -- a seaman -- and his remedy is in tort under the Jones Act (Pet. Br. at 17, 18). The Jones Act, 46 U.S.C. § 30104 *et seq.*, affords a seaman a negligence cause of action against his employer for personal injury. The Jones Act and the LHWCA provide mutually exclusive coverage schemes: a seaman covered by the Jones Act is ineligible for LHWCA benefits because § 902(3)(G) excludes from coverage any "master or member of a crew." *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 553 (1997).

[13] Regarding its own status as an employer, Great Southern merely states in its "Summary of the Argument" that Mr. Meyers did not work for a maritime employer (Pet. Br. at 5). This Court ordinarily does not consider issues that are raised but not adequately briefed by a party. *Rutherford v. Harris County, Tex.*, 197 F.3d 173, 193 (5th Cir. 1999). The Court should therefore consider Great Southern to be a statutory employer in the absence of any effective argument to the contrary. In any event, § 902(4) defines "employer" to mean ""an employer any of whose employees are employed in maritime employment[.]" 33 U.S.C. § 902(4). Because Mr. Meyers was so engaged at the time of his injury, Great Southern satisfies the statutory definition.

"Ordinarily an appellate court does not give consideration to issues not raised below." *Hormel v. Helvering*, 312 U.S. 552, 556 (1941); *Kinash v. Callahan*, 129 F.3d 736, 739 (5th Cir. 1997) ("As a general rule, this Court does not review issues that are raised for the first time upon appeal"). In the context of administrative proceedings, this principle carries most weight if the proceedings are adversarial in nature and the parties have the opportunity to develop evidence for the agency to make factual findings and resolve issues. *Sims v. Apfel*, 530 U.S. 103, 108-110 (2000).

A hearing on a LHWCA claim is subject to the procedural requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*. 33 U.S.C. § 919(d). The parties may submit evidence and offer arguments for the ALJ to consider in determining whether a claimant is entitled to compensation. 5 U.S.C. § 557(c). Given the adversarial nature of LHWCA claims adjudication and the salutary principles limiting appellate consideration of untimely presented issues, this Court should decline to consider Great Southern's argument on the § 902(3)(G) exclusion because the employer raised this issue for the first time in its opening brief.[14] Great Southern does not offer any argument based on the remaining § 902(3) exclusions.

[14] Although a party may posit inconsistent arguments, Great Southern has done so to an extreme in challenging Mr. Meyers' status as a maritime employee. In Great

As interpreted by *Perini*, the LHWCA covers Mr. Meyers' claim because his injury occurred on navigable waters, the situs of his injury confers maritime status, and no statutory exception applies to exclude him from coverage. Consequently, Great Southern must rely on some other grounds as support for refuting coverage.

B. Post-*Perini*: *Herb's Welding* and the 1984 Amendments do not alter LHWCA coverage for an employee injured on navigable water and not otherwise excluded by § 902(3)(A)-(H).

The crux of Great Southern's argument rests on the proposition that the 1984 Amendments and *Herb's Welding* circumscribe *Perini* and impose a general "maritime employment" requirement for any employee seeking LHWCA benefits. Great Southern is correct in asserting that the 1984 Amendments withdrew from coverage certain types of employment regardless whether the employee's injury

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Southern's view, either (i) Mr. Meyers' work bears no relationship to maritime employment because his duties could be performed on land or water, or (ii) he is a seaman because he was a permanent member of the keyway barge crew. In effect, Great Southern suggests Mr. Meyers' employment was either entirely non-maritime or the archetypal type of maritime employment.

Assuming *arguendo* Great Southern has not waived its argument for Jones Act coverage, the issue is not ripe for review. The ALJ has not made any of the requisite factual findings necessary to determine whether Meyers would qualify as a crew-member under the Jones Act. Consequently, the Court would have to remand the case to the ALJ to make those findings. *Hillibush v. U.S. Dept. of Labor, Benefits Rev. Bd.*, 853 F.2d 197, 207 (3d Cir. 1988) ("When an administrative law judge fails to make material factual findings, the proper course is remand for further consideration in light of the correct legal standards").

occurred on land or navigable waters. 33 U.S.C. § 902(3)(A)-(H). To that extent, the Amendments do limit *Perini* because previously covered individuals are now excluded from coverage.

Congress could have drawn a much broader basis for limiting coverage for work-related, water-based injuries that would have eviscerated *Perini*. Yet it confined the exclusions to very specific categories. One underpinning of *Perini* itself is the long-standing canon of statutory construction that Congress is presumed to be aware of judicial precedent when it enacts or amends a statute. 459 U.S. at 319. *See, e.g., Merck & Co., Inc. v. Reynolds*, -- U.S. --, 2010 WL 1655827, at * 11 (April 27, 2010); *Jacobs v. National Drug Intelligence Center*, 548 F.3d 375, 378 (5th Cir. 2008) ("Congress is presumed to be aware of court decisions construing statutes and may, of course, amend a statute as a result"). No aspect of the statutory changes made to the definition of "employee," however, limits *Perini* other than by excluding specific classes of employees previously covered by the LHWCA. By implication, Congress must have accepted that *Perini* and the precedent upon which that decision rested would continue to confer coverage on employees other than those specifically within the exclusions.

As for *Herb's Welding v. Gray*, that decision actually supports Mr. Meyers' claim. The case involved Gray's status as a maritime employee. He was injured while working as a welder on a fixed platform oil rig erected off the Louisiana

coast. 470 U.S. at 416-17. The Court did not address the situs prong for LHWCA coverage. *Id.* at 427. It merely noted that the injury occurred on a fixed platform, *id.* at 417 n.2, and not on navigable waters, *id.* at 424 n.10.[15] The Court therefore took for granted that Gray worked on "land," and only considered whether his land-based work satisfied the status requirement for maritime employment. The Court held that Gray's work building and maintaining oil-derrick platforms was "far removed" from the activities that define maritime employment in § 902(3), which precluded his status as a covered employee. *Id.* at 425.

Herb's Welding clearly rejects Great Southern's position that the 1984 Amendments adopted a general "maritime employment" test for any employee seeking LHWCA benefits regardless of the injury situs. The Court explained:

> The expansion of the definition of navigable waters to include rather large shoreside areas necessitated an affirmative description of the particular employees working in those areas who would be covered. This was the function of the maritime employment requirement.

470 U.S. at 423.

Although *Herb's Welding* addresses only maritime employment status for a worker injured on a fixed platform, the Court acknowledged that its interpretation "does not preclude benefits for those whose injury would have been covered before

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[15] In *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352, 360 (1969), the Court had held that a stationary drilling rig is not subject to admiralty jurisdiction because it is an artificial island.

1972 because it occurred 'on navigable waters[,]'" citing *Perini*. 470 U.S. at 424 n.10. The Court further observed that the rationale behind *Perini* was that "first, any employee injured on navigable waters would have been covered prior to 1972, and, second, Congress did not intend to restrict coverage in adopting its 'maritime employment' test." *Id.*

Finally, this Court has addressed, and accepted, the Director's interpretation of *Perini* and *Herb's Welding*. *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999) (*en banc*). Bienvenu was a pumper specialist responsible for maintaining equipment on fixed oil production platforms located off the Louisiana coast. He moved among the platforms by boat. Bienvenu sustained two separate injuries while on navigable waters: first, while moving his tool box from the dock to the boat; and second, while tying the boat to the dock. As a result of these injuries, he ceased working. A panel of this Court held that Bienvenu was entitled to LHWCA benefits because he was injured on navigable waters. *Bienvenu v. Texaco, Inc.*, 124 F.3d 692, 692-3 (5th Cir. 1997).

On rehearing *en banc*, the majority first reviewed the evolution of LHWCA coverage with a special emphasis on *Parker, O'Rourke, Perini*, and *Herb's Welding*. 164 F.3d at 903-904. The Court noted, in particular, those portions of the decisions that acknowledged LHWCA coverage for employees injured on

navigable waters and rejected any maritime employment requirement for coverage. The Court concluded:

> In light of Bienvenu's injury on navigable waters, Texaco acknowledges, as it must, that Bienvenu need not establish that he was engaged in maritime employment as that term is used § 2(3) of the Act. The Supreme Court's decisions in *Perini* and *Herb's Welding* foreclose this argument. Those cases recognize that the 1972 Amendments were not intended to alter the scope of coverage for workmen injured on navigable waters. As our discussion above demonstrates, before 1972, any workman injured in the course of his employment actually engaged in the performance of his assigned duties on navigable waters enjoyed coverage under the LHWCA. He was not required to perform the traditional maritime work described in § 2(3) of the Act.

164 F.3d at 906-07. *See also Morganti*, 412 F.3d at 412 ("Thus, coverage under the Act still requires both situs and status, but certain kinds of situs, i.e., physical presence on actual navigable waters, will fulfill the status requirement").

Great Southern does not address the *Bienvenu en banc* decision other than to quote a passage from a dissenting opinion. This omission is especially troubling because *Bienvenu* acknowledged *Perini* coverage for employees injured in the course of their employment on navigable waters, and affirmatively rejected Great Southern's interpretation of *Herb's Welding*. Aside from ignoring controlling precedent from this Court, Great Southern also overlooks the fact that a dissenting opinion is not precedent. *U.S. v. Goodrich*, 871 F.2d 1011, 1013 (11th Cir. 1989).

As previously argued, Great Southern effectively concedes that Mr. Meyers was injured on navigable waters in the course of his employment because the keyway barge on which he was working was afloat on those waters. Employees injured on navigable waters are covered by the LHWCA unless they fall within a category explicity excluded by the 1984 Amendments. Mr. Meyers's work does not fit any of the statutory exclusions. *Herb's Welding* involved a land-based employee, and the Court unequivocally stated that the maritime employment requirement pertains only to land-based workers. More significantly, the Supreme Court endorsed the continuing viability of *Perini* to determine coverage for water-based employees in *Herb's Welding*. This Court reached the same conclusion in *Bienvenu*. Great Southern's argument is inconsistent with the plain language of the 1984 Amendments, the plain import of *Herb's Welding*, and this Court's controlling precedent.

C. Mr. Meyers was not "transiently or fortuitously" employed on navigable waters when he was injured.

Assuming *Perini* is controlling law, Great Southern further argues that Mr. Meyers lacks employee status because he was only "transiently or fortuitously" on navigable waters when he was injured. The employer cites the few days Mr. Meyers worked at the water-based derrick compared to the two-plus years he previously worked on land as evidence of his incidental presence at the canal (Pet.

Br. at 16-17). Great Southern also reasons that any of its employees would be transiently or fortuitously on water because they worked on both land and water and used the same equipment in both areas (Pet. Br. at 17).

Great Southern's argument implicates a question left open by the Supreme Court in *Perini* and *Herb's Welding*. In *Perini*, the Court reserved any opinion on whether LHWCA coverage "extends to a worker injured while transiently or fortuitously upon actual navigable waters . . .." 459 U.S. at 324 n.34. *Herb's Welding* did not answer the question, but the Court did "note in passing a substantial difference between a worker performing a set of tasks requiring him to be both on and off navigable waters, and a worker whose job is entirely land-based but who takes a boat to work." 470 U.S. at 427 n.13.

This Court has addressed the "transient or fortuitous" issue left unresolved by the Supreme Court. In *Bienvenu*, this Court held that:

> a worker injured in the course of his employment on navigable waters is engaged in maritime employment and meets the status test only if his presence on the water at the time of injury was neither transient nor fortuitous. The presence, however, of a worker injured on the water and who performs a "not insubstantial" amount of his work on navigable waters is neither transient nor fortuitous.

164 F.3d at 908 (footnote omitted). This Court declined to adopt a bright-line standard for determining whether an employee's presence on navigable water was "transient or fortuitous." *Id.* For guidance in making such determinations,

however, the Court stated that the "threshold amount must be greater than a modicum of activity in order to preclude coverage to those employees who are merely commuting from shore to work by boat." *Id.*

This Court held that the LHWCA covered Bienvenu because he spent 8.3 percent of his working day engaged in tasks on navigable water. The Court characterized the 8.3 percent as "not an insubstantial amount of Bienvenu's work time" and sufficient for coverage. *Id.* *See also Hudson*, 555 F.3d at 440-41 (holding that 9.7 percent of employee's time in maritime activities was more than sufficient for coverage); *Anaya v. Traylor Bros., Inc.*, 478 F.3d 251, 254 (5th Cir. 2007) (holding LHWCA covered deceased employee because he spent "majority" of his time working on barge on navigable waters and work assignment on day he died "was not an aberration from his normal work tasks"); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 1348 (5th Cir. 1980) (upholding maritime status for employee who spent 2.5-5 percent of time in maritime activities because those activities were part of regularly assigned duties); *compare Brockington v. Certified Electric, Inc.*, 903 F.2d 1523, 1528 (11th Cir. 1990) (finding no LHWCA coverage because land-based electrician's overall work was not maritime employment under *Herb's Welding*, and injury occurred while incidentally traveling over water to job on land).

Contrary to Great Southern's argument, Mr. Meyers was not transiently or fortuitously present on navigable waters when he fell between two barges. Great Southern assigned Mr. Meyers to work on the barges at the derrick situated in the canal. When he was injured, Mr. Meyers was on the water in the course of his employment. That he had worked only four or five days at that site prior to his injury is irrelevant: all of his work took place at the derrick each of those days. *Parker*, 314 U.S. at 247 (recognizing LHWCA coverage for employee who was fatally injured in his only instance of "clearly maritime activity"). Finally, the nature of Mr. Meyers' duties, skills or equipment need not be uniquely maritime to confer status given the circumstances of his injury. *O'Rourke*, 344 U.S. at 341-42; *Parker*, 314 U.S. at 247; *Bienvenu*, 164 F.3d at 906-07.

CONCLUSION

The LHWCA covers Mr. Meyers' claim for disability compensation because he was injured on the navigable waters of the United States in the course of his employment and no statutory (or other) exclusion excludes him from coverage. The Director, Office of Workers' Compensation Programs, urges this Court to affirm the BRB's decision as to coverage.

Respectfully submitted,

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COMBINED CERTIFICATES

I hereby certify with regard to the Director's Brief for the Federal Respondent that:

1) required privacy redactions have been made to the brief;

2) the electronic brief is an exact copy of the paper document;

3) the brief has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses;

4) pursuant to Fed.R.App.Proc. 32(a)(7)(B) and (C), the brief has been prepared using Microsoft Word, fourteen-point proportionally spaced typeface (Times New Roman), and that, exclusive of the certificates of compliance and service, the brief contains 7,698 words; and

5) on June 2, 2010, a copy was served through the Court's electronic filing system on the following registered users:

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