Nos. 11-71703, 11-71800

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH TRACY,

Petitioner/Respondent

v.

KELLER FOUNDATION, INC./CASE FOUNDATION CO. and ACE USA/ESIS,

Petitioners/Respondents

v.

GLOBAL OFFSHORE INT'L, INC. and LIBERTY MUTUAL INSURANCE CO.; and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

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

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BRIEF FOR THE FEDERAL RESPONDENT

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The ALJ had jurisdiction to adjudicate Respondent Joseph Tracy's claims under Section 19(d) of the Act, 33 U.S.C. § 919(d). The ALJ issued

orders granting partial summary judgment in October 2004 and May 2005 and a Decision and Order Awarding Temporary Partial Disability Benefits and Hearing Benefits in August 2007. ER 139-47, 128-38, 28-127.[1] She clarified those decisions in an Order on Reconsideration filed on September 21, 2007, which incorporated her prior rulings. *Id.* at 25-7.

Keller Foundation Inc./Case Foundation Co. ("Keller") filed a timely appeal of these orders to the Board on October 9, 2007, within the 30-day period prescribed by 33 U.S.C. § 921(a). Tracy filed a timely cross-appeal on October 23, 2007. 20 C.F.R. § 802.205(a), (b) (A cross-appeal must be filed within thirty days of the ALJ's decision, or within fourteen days after a notice of appeal has been filed by another party, whichever comes later).

The Board had jurisdiction to review the ALJ's orders pursuant to Section 21(b)(3) of the Act, 33 U.S.C. § 921(b)(3). The Board modified in part, affirmed in part, and remanded the case to the ALJ in a July 2009 order. ER 1-24. The ALJ issued a Decision and Order on Remand that was filed on October 19, 2010. Tracy ER 1. Keller filed a timely appeal to the Board, which again had jurisdiction under Section 21(b)(3), on November 17, 2010. 20 C.F.R. § 802.205(a). Tracy filed a timely cross-appeal on

[1]"ER" refers to Keller's excerpts of record. References to the supplemental excerpts submitted by Tracy are referred to as "Tracy ER."

November 30, 2010. 20 C.F.R. § 802.205(b). The Board summarily affirmed the ALJ's remand order on May 4, 2011. Tracy ER 4.

Keller and Tracy appealed to this Court on June 20 and 28, respectively. This Court has jurisdiction to review the Board's orders pursuant to Section 21(c) of the Act, 33 U.S.C. § 921(c). The Board's May 4, 2011, order is final and the appeals are timely because they were filed within 60 days of the Board's May 4, 2011 order. 33 U.S.C. § 921(c). [2]

STATEMENT OF THE ISSUE

Does the Longshore Act cover an American citizen injured on foreign territorial waters in the course of his maritime employment?[3]

STATEMENT OF THE CASE

Tracy filed this Longshore Act claim in February 2003, seeking disability compensation from his most recent employer, Global International Offshore, Ltd. ("Global"). ER 140. The ALJ found that Tracy's most

[2]Both Keller and Tracy prematurely appealed the Board's July 29, 2009, order, which remanded the case to the ALJ for further action, to this Court, which properly dismissed those attempted appeals of a non-final order on October 13, 2010. Nos. 09-72928, 09-72987. The Board's May 4, 2011, order is final because it fully resolves all disputed issues in this case. *See Bish v. Brady-Hamilton Stevedore Co.*, 880 F.2d 1135, 1137 (9th Cir. 1989).

[3]The private parties raise several other issues, which are not addressed in this brief.

recent employment with Global was not covered by the Act, dismissed Global from the case, and imposed liability on Tracy's previous employer, Keller. ER 125-26. Tracy and Keller appealed to the Benefits Review Board, which affirmed. ER. 22. This appeal followed.

SUMMARY OF RELEVANT FACTS

A. Introduction.

This case has a long procedural history, but the facts relevant to the issue addressed in this brief -- whether the Act applies to injuries on foreign waters -- are easily summarized. Tracy alleged, *inter alia*, that he suffers from work-related hearing loss as well as arthritis, carpal tunnel syndrome, and tendonitis (collectively, "upper extremity injuries"). ER 140. The ALJ agreed, finding that Tracy suffered cumulative trauma and was exposed to injurious noise throughout his employment with Keller and Global that caused, aggravated, or contributed to his hearing loss and upper extremity injuries. *Id*. at 125. These findings are not contested by the parties.

Where disability is caused by a cumulative injury or occupational disease, the last employer to employ the worker in Longshore Act-covered work is generally liable for *all* compensation by operation of the "last employer rule." *See Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621 (9th Cir. 1991). From July 1996-November 1997, Tracy worked

for Keller on the waters, docks, and yards of California. ER 33. Keller does not contest that this work was covered by the Longshore Act. Keller Br. at 3-4. The contested issue is whether Tracy's later employment with Global was also covered by the Act. *Id.* If so, Global is liable for Tracy's benefits. If not, Keller is.

B. Tracy's employment with Global from 1998-2002.

After his employment with Keller ended, Tracy started working for Global in March 1998. ER 33.[4] He spent the first two weeks of that employment in Louisiana, supervising the preparation of the *Iroquois*, a barge bound for Mexican waters, doing repairs, maintenance, and modifying the deck. *Id*. After those preparations were completed, Tracy traveled with the towed barge to Mexico for 7 days, after which he was dispatched to Singapore and assigned to another pipe-laying barge, the *Seminole*. *Id.* at 33, 140. The assignment on the *Seminole* lasted from four to six months, during which he supervised the deck crew as the barge's anchor foreman. *Id.* at 141.

Tracy was subsequently assigned to various other projects and barges in Singapore and Indonesia. *Id.* His work in Singapore "entailed loading the construction and other materials barges." *Id.* at 150. His work in Indonesia

[4]Tracy had previously worked for Global in 1995-1996. ER 33, 149.

"involved more shore-side work" but also included "the loading and unloading of major material barges and dive vessels[.]" ER 151.

Tracy's final assignment was once again aboard the *Seminole*. *Id.* at 141. His duties included deploying anchors, supervising the loading and unloading of supply boats, and general maintenance of the vessel. *Id.* During his final assignment aboard a vessel at sea, Tracy suffered a heart attack and has been unable to work since. *Id*. at 144-45. During his recuperation, he developed disabling conditions in his hands and arms and discovered his hearing impairment. ER 3.

Tracy's work with Global was governed by an employment contract that stated, in relevant part:

> Employee is covered for worker's [sic] compensation benefits, if any, payable under the laws of the Employee's country of origin, which benefits will be provided by the Employer's insurance carrier and shall be paid as the sole and exclusive remedy for any occupational injury or illness arising out of and in the course of employment under this Agreement.

ER. 47.

C. The ALJ's analysis of Tracy's work for Global.

The ALJ explained that the Act covers injuries that occur "upon the navigable waters of the United States" or certain adjoining areas on land, and found that Tracy's work in the ports of Singapore and Indonesia failed

to satisfy this situs requirement. ER 136 (quoting 33 U.S.C. § 903(a)). The ALJ acknowledged that the Benefits Review Board, in *Weber v. S.C. Loveland Co.*, 28 BRBS 321 (1994), *aff'd*, 35 BRBS 75 (2001), had extended coverage to a claimant who injured his back after slipping on a barge catwalk in the port of Kingston, Jamaica. The ALJ distinguished Tracy's foreign work based solely on its duration, explaining:

> The facts of the instant case are distinguishable from those in *Weber* []. Unlike the worker in *Weber*, [Tracy] did not spend ninety percent of his time in the United States. While on assignment in the ports of Singapore and Indonesia, [Tracy] spent *all* of his time in those foreign ports. Since those assignments never required him to enter the United States, it can hardly be said that 'all contacts but the site of injury are within the United States.' Given the Board's careful limitation of the holding in *Weber* to the specific facts of that case, I conclude that *Weber* is not controlling in the instant matter.

ER 136. The ALJ found that Tracy was a seaman covered by the Jones Act -- and thus excluded from the Longshore Act by operation of 33 U.S.C. § 902(3)(G) -- during his assignments to the *Iroquois* and *Seminole* before and after his work in Singapore and Indonesia. ER 30. Having found all of Tracy's work with Global to be outside the Act's purview, the ALJ ordered Keller to pay Tracy's disability compensation as his last covered employer. *Id.* at 30-31.

D. The Board's review of the ALJ's analysis.

On appeal to the Board, both Keller and Tracy argued that the present case is indistinguishable from *Weber*. ER 11. The Board disagreed. The Board recognized the continuing vitality of its *Weber* decision, and acknowledged that Section 39(b) of the Act specifically permits the Secretary of Labor to establish compensation districts for "any injury or death occurring on the high seas." 33 U.S.C. § 939(b). It also recognized "the trend in admiralty law to extend coverage into foreign waters to provide uniform coverage for American workers, especially when all contacts, except for the site of the injury, are with the U.S." ER 10-11.

The Board nevertheless agreed with the ALJ that Tracy's work in Indonesia and Singapore did not take place "on the navigable waters of the United States" because his work was distinguishable from the *Weber* claimant's employment. According to the Board:

> Claimant in this case was a long term, contractual, Global employee who was based overseas between 1998 and 2002. During that time, he spent many months in ports in Singapore, Malaysia, and Indonesia, and he worked aboard barges which were berthed in and departed from those ports. His voyages did not begin in the U.S., and they did not 'merely deviate' onto the high seas or foreign waters. Rather, his assignments commenced and terminated in foreign territories on foreign waters. The administrative law judge relied on this prolonged foreign assignment to conclude that while claimant was working in Indonesia and Singapore, all of his contacts were with those countries, as his assignments never required him to

> enter the U.S. Thus, the administrative law judge rationally found that the facts of this case are materially distinguishable from those in *Weber*. Consequently, it cannot be said that claimant's injuries, developing either on land in Asia or on the foreign seas, occurred on 'navigable waters of the United States.'

ER at 12 (citations omitted).[5] The Board also affirmed the ALJ's finding that Tracy was an exempt seaman during his remaining employment with Global and her ultimate ruling that Keller was liable for Tracy's disability compensation. *Id.* at 22.

SUMMARY OF ARGUMENT

This case turns on whether the territorial waters of Singapore and Indonesia are "navigable waters of the United States" for purposes of the Longshore Act's situs requirement. The limitation "of the United States" distinguishes landlocked, intra-state waters from navigable waters subject to the federal government's admiralty authority. It does not limit the Act's seaward reach, which extends to all navigable waters. Section 39(b) of the Act specifically contemplates the coverage of injuries on the "high seas" and

[5]The Board noted that American law governed the controversy. ER at 5 n. 8. (Because Tracy's "employment was governed by a contract in which the parties agreed that the workers' compensation law of claimant's 'country of origin' would apply" any "choice of law issues are eliminated.").

both the Second and Fifth Circuits have held that the Act applies to injuries in international waters.

Nothing in the Act suggests that a coverage border should be drawn between international and foreign navigable waters. This Court has held that the term "high seas" for purposes of the Death on the High Seas Act includes foreign waters, and the federal courts have routinely applied other maritime causes of action to personal injuries and deaths on foreign territorial waters. The Longshore Act should be similarly interpreted, and the Board's ruling that Tracy's work in Singaporean and Indonesian waters was not covered by the Act should be reversed.

STANDARD OF REVIEW

This case presents a question of law: whether the Longshore Act covers injuries on foreign territorial waters. The Benefits Review Board's interpretation of the Act is not "entitled to any special deference[,]" *Stevedoring Services of America v. Price*, 382 F.3d 878, 883 (9th Cir. 2004), and is subject to *de novo* review. As the administrator of the Act, the Director's interpretation of it is entitled to deference. *See, e.g.*, *Metro. Stevedore Co. v. Rambo*, 521 U.S. 121, 136 (1997) (since "the Secretary of Labor has delegated the bulk of her statutory authority to administer and enforce the Act, including rule-making power, to the Director," the

Director's "reasonable interpretation of the Act" has some "persuasive force") (citations omitted); *see also Saipan Stevedore Company, Inc. v. Director, OWCP*, 133 F.3d 717, 723 (9th Cir. 1998).

ARGUMENT

To be covered by the Act, a claimant must satisfy both a "status" requirement and a "situs" requirement. *Chesapeake & Ohio Ry. v. Schwalb*, 493 U.S. 40, 45 (1989); *McGray Construction Co. v. Director, OWCP*, 181 F.3d 1008, 1010 (9th Cir. 1999). The "status" inquiry concerns whether the claimant is a maritime employee, including a "longshoreman . . . harbor-worker, . . . or ship repairman[.]" 33 U.S.C. § 902(3). The "situs" inquiry concerns whether the worker was injured "upon the navigable waters of the United States" or certain enumerated onshore locations. 33 U.S.C. § 903(a). There is no question that a portion of the work that Mr. Tracy performed for Global in Singapore and Indonesia satisfies the status test. ER 140-41. The dispute centers on whether that work was performed on a covered situs.

A. The Longshore Act is not limited to injuries on American territorial waters.

To be covered by the Longshore Act, an injury must "occur[] upon the navigable waters of the United States" or certain specified adjoining areas. 33 U.S.C. § 903(a). The foreign waters on which Tracy worked for Global

are unquestionably navigable. At first blush, however, Section 3(a)'s reference to the navigable waters *of the United States*" might suggest that the Act covers only employees injured on American territorial waters. But that reading is inconsistent with Section 39(b) of the Act, which instructs the Secretary of Labor to "establish compensation districts to include the high seas" and specifies the appropriate judicial venue for Longshore Act proceedings "in respect to any injury or death occurring on the high seas[.]" 33 U.S.C. § 939(b).

Any apparent tension between Sections 3(a) and 39(b) is illusory. Section 3(a) limits the Act's inward reach by forbidding its application to injuries on intra-State waters; it has little bearing on the Act's seaward reach. *See Reynolds v. Ingalls Shipbuilding, Litton Systems, Inc.*, 788 F.2d 264, 270 (5th Cir. 1986) ("In the context of admiralty jurisdiction, the phrase 'navigable waters of the United States' has been used in contradistinction to navigable *State* waters, not in contrast to the high seas.") (citations omitted). Section 39(b)'s use of the term "high seas" is dispositive: the Act is not limited to injuries on American territorial waters.

The Second and Fifth Circuits have accordingly held that the Act applies to injuries outside American waters. *See Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 75 (2d Cir. 1994) (repairman injured on ship

outside American waters more than 3 miles from the coast covered by the Act); *Reynolds*, 788 F.2d at 268 (shipfitter injured on the high seas covered by the Act). Both courts primarily relied on Section 39(b)'s reference to injuries on the high seas in rejecting attempts to confine the Act to American waters. *Kollias*, 29 F.3d at 74 ("No plausible explanation exists for Section 39(b)'s reference to the high seas other than that Congress intended LHWCA coverage for injuries sustained on the high seas" and for the Act "to apply extra-territorially"); *Reynolds*, 788 F.2d at 269 ("The language of the Act itself" supports "the conclusion that the LHWCA does not cease to operate at the three-mile line.").[6]

The *Kollias* and *Reynolds* courts pointed out that drawing a strict coverage line at the border between American waters and the high seas would undermine "[a] central purpose underlying the LHWCA . . . to create a '*uniform* compensation system' in which a longshoreman's or harbor

[6]The Fifth Circuit found further textual evidence that Section 3(a) does not prohibit Longshore coverage beyond American territorial waters in Section 2(9) of the Act, which defines the "United States," when that term is used in "the geographic sense," as "the several States and Territories and the District of Columbia, including the territorial waters thereof." 33 U.S.C. § 902(9). As that court explained, if "navigable waters" were to exclude the high seas and foreign waters and encompass only territorial waters, "then the phrase 'navigable waters of the United States' in § 903 would be unnecessary and redundant since the term United States includes, by definition, the nation's territorial waters." *Reynolds*, 788 F.2d at 269.

worker's coverage did not depend on the precise site of his injury." *Kollias*, 29 F.3d at 74 (quoting *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 317 n. 26 (1983)); *accord Reynolds*, 788 F.2d at 266.[7]

While this Court has not directly faced the question, it strongly suggested that it would agree with the Second and Fifth Circuits that the Longshore Act is not limited to American waters in *Saipan Stevedore Co., Inc. v. Director, OWCP*, 133 F.3d 717 (9th Cir. 1998). The claimant in *Saipan Stevedore* was injured while unloading a container aboard a ship docked in the Commonwealth of the Northern Mariana Islands, an American territory. In concluding that the claimant was covered by the Act, however, the panel considered the extraterritorial application of the Act beyond those waters. It largely adopted the *Kollias* court's reasoning on that score, explaining that

> the Act contains a clear indication of congressional intent to apply extra-territorially, including the high seas. The *Kollias* court found that Congress' overriding purpose in enacting [the Act] was to provide consistent workers' compensation coverage to eligible longshore and harbor workers, a goal that would be frustrated by limiting the LHWCA to territorial application. A

[7] *Reynolds's* extension of the Act to international waters repudiates language in two previous Fifth Circuit cases, *Aparicio v. Swan Lake*, 643 F.2d 1109, 1117 n.14 (5th Cir. 1981) and *Panama Agencies v. Franco*, 111 F.2d 263, 265 (5th Cir. 1940), suggesting, without analysis, that the Act covered only injuries in American territorial waters. *Kollias* likewise disposes of similar language in *Mahramas v. American Export Isbrandtsen Lines, Inc.*, 475 F.2d 165, 169 n.3 (2d Cir. 1973).

> central purpose underlying the Act was to create a uniform compensation system in which a longshoreman's or harbor worker's coverage did not depend on the precise site of his injury. Thus, construing the Act to apply to an accident in the Northern Mariana Islands is completely consistent with Congressional intent.

133 F.3d at 723. Given Section 39(b)'s explicit reference to injuries on the high seas and the Act's goal of providing uniform coverage to maritime workers, this Court should follow the Second and Fifth Circuits. The "navigable waters of the United States," for purposes of the Longshore Act, do not end at the border between American and international waters.

B. The Longshore Act covers Tracy's injury on foreign territorial waters.

Because Tracy's last employment with Global took place, in part, over foreign waters, this case presents the additional question of whether Longshore Act coverage ends at the border between international and foreign waters.[8] While the foreign sovereign's interest in regulating its waters is relevant to a choice-of-law analysis, it has no impact on the

[8] At least some of Tracy's work during his last stint with Global involved loading and unloading barges over the navigable waters of Indonesia and Singapore. ER 140-41, 150. As a result, the question of whether a maritime worker's injury on foreign land can be covered by the Longshore Act is not directly presented. As noted above, the Act's situs test includes not only the navigable waters of the United States but certain adjoining locations on land. 33 U.S.C. § 903(a).

Longshore Act's situs requirement. Like injuries on international waters, injuries on foreign navigable waters are covered by the Act.

This question was not presented in *Kollias* or *Reynolds*, which involved injuries on international waters. But the Benefits Review Board, after carefully analyzing those cases and other relevant precedents, held that the Act covers injuries on foreign territorial waters in *Weber v. S.C. Loveland Co.*, 28 Ben. Rev. Bd. Serv. 321 (1994), *aff'd*, 33 Ben. Rev. Bd. Serv. 75 (2001). The Board accepted the *Reynolds* court's conclusion that "the term [navigable waters of the United States] embodies the same distinction under the Longshore Act as it does under admiralty, *i.e.*, the distinction between state waters and waters of the United States, and not between territorial waters and the high seas." 28 Ben. Rev. Bd. Serv. at 326. It also observed that numerous federal courts had applied the Jones Act and the Death on the High Seas Act ("DOHSA") to injuries on foreign waters. *Id.* at 329-332 (collecting cases).

Recognizing that DOHSA and the Jones Act, like the Longshore Act, derive from the federal admiralty power and are designed to provide uniform remedies for maritime injuries, the Board held that the Longshore Act covered an injury on Jamaican waters. *Id.* at 322, 333.[9] While the Board's

[9] The Board below did not overturn *Weber*. ER 12. Rather, it distinguished

legal conclusions do not bind the courts, *Weber's* reasoning is persuasive and should be followed.[10]

Subsequent authorities have only increased *Weber's* persuasive value. Particularly relevant is *Howard v. Crystal Cruises, Inc.*, 41 F.3d 527 (9th Cir. 1994). In *Howard*, this Court construed the term "high seas" as used in DOHSA, which provides an exclusive cause of action in admiralty for wrongful death "occurring on the high seas beyond a marine league from the shore of [the United States.]" *Id.* at 529 (quoting 46 U.S.C. § 761). The *Howard* plaintiff's husband died as the result of injuries he suffered while disembarking from a cruise ship in Mexican territorial waters. *Id.* at 528.

Weber on the ground that the claimant was in Jamaica on a "temporary assignment" while Tracy "was a long-term, contractual Global employee who was based overseas between 1998 and 2002." *Id.* The Board erred in treating this fact as dispositive on the situs question. The amount of time a worker spends on a given stretch of ocean cannot determine whether or not that water is part of the "navigable waters of the United States." *Cf. Kollias*, 29 F.3d at 75 (repudiating dicta in an earlier Second Circuit decision suggesting that the high seas were part of the "navigable waters of the United States . . . only under certain limited circumstances"). Nor is it relevant to status, because Tracy's work with Global in Singapore and Indonesia was indisputably maritime in character. The length of Tracy's tenure overseas is relevant, if at all, only to the strength of the United States' interest in this case for purposes of a choice-of-law analysis. *See infra* at 21-22.

[10]The only published decision to consider *Weber's* holding on this issue agreed with it, and held that a worker injured while unloading materials from one barge to another off the shores of Sakhalin Island, Russia was covered by the Longshore Act. *Grennan v. Crowley Marine Services, Inc.*, 116 P.3d 1024 (Wash. App. 2005).

She brought suit and the district court held that DOHSA governed the claim. This Court affirmed, holding that the term "high seas" includes the territorial waters of foreign states for purposes of DOHSA. The panel explained that "the clear weight of authority" rejected the appellant's contention that DOHSA coverage ends where foreign territorial waters begin. *Id.* at 529 (collecting cases and scholarly commentary).

The lesson of *Kollias*, *Reynolds*, and Section 39(b) is that "the phrase 'navigable waters of the United States' in section 3(a) . . . include[es] the high seas[.]" *Kollias*, 29 F.3d at 75. In *Howard*, this court interpreted the term "high seas" in DOHSA to include foreign territorial waters. There is no apparent justification for interpreting the term "high seas" in Section 39(b) of the Longshore Act differently. Like DOHSA, the Act is an exercise of Congress' admiralty authority designed to remedy a certain category of maritime accidents. As the *Howard* court explained, "there is nothing inherently absurd with the notion of an American court applying American law to an action filed by an American plaintiff against an American defendant, particularly when the law in question was expressly designed to cover wrongful deaths outside the territorial boundaries of the United States." 41 F.3d at 530. This reasoning applies with equal force to the Longshore Act.

The Act's applicability to injuries on foreign waters is also strongly suggested by this Court's rationale in *Saipan Stevedore.* In applying the Act to an injury on the Northern Marianas, this Court explained that Congress, in enacting the Longshore Act, intended "to exercise to the fullest extent all the power and jurisdiction it had over the subject matter under the United States admiralty authority" with "no restrictions on coverage short of the limits of maritime jurisdiction." *Saipan Stevedore,* 133 F.3d at 723.

The federal courts have routinely applied other admiralty remedies to injuries suffered on foreign waters -- and even on foreign land. *See*, *e.g.*, *Howard*, 41 F.3d at 530 (DOHSA applies to injury on Mexican waters); *Doe v. Crystal Cruises, Inc.*, 394 F.3d 891, 900-902 (11th Cir. 2004) (admiralty jurisdiction extends to sexual assault in public Bermudan park by cruise ship employee against passenger); *Doyle v. Graske,* 579 F.3d 898, 904 (8th Cir. 2009) (affirming damages award under maritime tort law for personal injury off the coast of Grand Cayman Island); *Motts v. M/V Green Wave,* 210 F.3d 565, 566 (5th Cir. 2000) (DOHSA applied where decedent was injured on high seas returning from Antarctica even if negligent actions and death occurred on shore); *Neely v. Club Med Mgmt. Servs., Inc.*, 63 F.3d 166, 197 (3d Cir. 1995) (en banc) (Jones Act and American general maritime law covers American scuba instructor's injury off the shores of St. Lucia);

McClure v. United States Lines Co., 368 F.2d 197, 202 (4th Cir. 1966) (Jones Act covers American seaman killed in French territorial waters).

Like DOHSA, the Jones Act, and maritime tort law, the Longshore Act is an exercise of the federal admiralty power designed to redress maritime accidents. *See Crowell v. Benson*, 285 U.S. 22, 39 (1932). In the absence of any express provision in the Act barring its reach to foreign waters, Longshore coverage should be interpreted, consistently with those other maritime remedies, to extend to injuries on foreign territorial waters. The Board's refusal to do so in this case was legal error.

This is not to say that injuries occurring in foreign waters do not raise concerns beyond those of a typical Longshore Act claim. The foreign sovereign has an interest in the dispute that must be compared to the United States' interest in a choice-of-law analysis. "In the absence of a contractual choice-of-law clause, federal courts sitting in admiralty apply federal maritime choice-of-law principles derived from the Supreme Court's decision in *Lauritzen v. Larsen*, 345 U.S. 571 (1953) and its progeny." *Chan v. Society Expeditions, Inc.*, 123 F.3d 1287, 1296 (9th Cir. 1997).[11]

[11]While the flexible *Lauritzen* test was originally developed to determine the law applicable to claims by Jones Act seamen, "[t]he broad principles of choice of law and the applicable criteria of selection set forth in *Lauritzen* were intended to guide courts in the application of maritime law generally." *Romero v. Int'l Terminal Operating Co.*, 358 U.S. 354, 382 (1959) (applying

But there is no need to consider that extensive line of authority to resolve this case, because Tracy's employment contract with Global specified that the workers' compensation law of his country of origin (*i.e.*, the United States) applies. ER 5, n.8. Where the parties have chosen American law by contract, that choice will be honored unless "the United States has no substantial relationship to the parties" or if the "application of U.S. law would be contrary to a fundamental policy" of a foreign country with "a materially greater interest than the U.S." *Chan*, 123 F.3d at 1297. Tracy's citizenship provides a more-than-substantial relationship with the United States and no foreign country with a materially greater interest in this dispute has been identified.

Lauritzen choice-of-law analysis to a personal injury claim under general maritime law), *superseded by statute on other grounds as recognized in Miles v. Apex Marine Corp.*, 498 U.S. 19, 33 (1990). It would likely require some modifications to fit the Longshore context, as it has undergone in its application to other maritime remedies. *See generally Zipfel v. Halliburton Co.*, 832 F.2d 1477, 1482-1482 (9th Cir. 1987) (adapting *Lauritzen* factors to oil rig workers); *Neely*, 63 F.3d at 186 (adapting *Lauritzen* factors to scuba instructor). Because Tracy's employment contract resolves the choice-of-law question without the need to apply the *Lauritzen* factors, that issue is not before the Court.

CONCLUSION

The Director respectfully submits that the Benefits Review Board's ruling that Tracy's employment with Global was not covered by the Longshore Act because it took place on foreign territorial waters should be reversed and the case remanded for the appropriate redetermination of the compensation payable by Global.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The Director is unaware of any related cases pending before this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14 point typeface, and contains 4,362 words, as counted by Microsoft Office Word 2003.

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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2011, I electronically filed the foregoing Brief of the Federal Respondent with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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