

In the  
**Supreme Court of the United States**

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FIDELITY & FAITHFUL INSURANCE CO., INC.,

*Petitioner,*

v.

EFFICIENT WORKERS, INC.,

*Respondent.*

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**On Writ of Certiorari to the United States  
Court of Appeals for the Fifth Circuit**

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COMPETITION PACKET FOR THE  
TWENTY-FIRST ANNUAL JUDGE JOHN R. BROWN  
ADMIRALTY MOOT COURT COMPETITION, 2014

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DAVID MARCOU  
Judge John R. Brown Admiralty  
Moot Court Competition  
University of Texas School of Law  
727 East Dean Keeton Street  
Austin, TX 78705  
tel.: (512) 522 – 9654  
fax: (512) 471 – 8585

KATHRYN MUNSON  
Moot Court Board  
Tulane University School of Law  
6329 Freret Street  
New Orleans, LA 70118-5670  
Tel.: (504) 865 – 5988  
fax: (504) 865 – 6748

DAVID W. ROBERTSON  
MICHAEL F. STURLEY  
University of Texas School of Law

MARTIN DAVIES  
Tulane University School of Law

*Competition Committee*

*Competition Directors*

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**EFFICIENT WORKERS, INC., Plaintiff-Appellant,**

**v.**

**FIDELITY & FAITHFUL INSURANCE CO., Defendant-Appellee.**

No. 11-12345

United States Court of Appeals,  
Fifth Circuit

May 30, 2013

Appeal from the United States District Court for the Western District of Louisiana.

Before JUSTINIAN, SOLOMON, and HAMMURABI, Circuit Judges.

PER CURIAM:

Although no injured worker is a party to this case, we are called upon to interpret the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§ 901-950, the federal statute providing workers' compensation benefits to injured maritime workers. Plaintiff-Appellant Efficient Workers, Inc., raises two arguments, either of which is sufficient for it to succeed. The first argument addresses the so-called *situs* requirement of LHWCA § 3(a), 33 U.S.C. § 903(a). The second addresses the *status* requirement of LHWCA § 2(3), 33 U.S.C. § 902(3).

The Court agrees with the parties that "the determination of LHWCA coverage [is reviewed *de novo*] as a question of law." *Boomtown Belle Casino v. Bazor*, 313 F.3d 300, 302, 2003 AMC 15, 17 (5th Cir. 2002).

The district court concluded that an Efficient Workers employee satisfied both of the LHWCA requirements and was accordingly covered by the Act. In reaching its conclusion with respect to the *situs* requirement, the district court relied on our prior decisions in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 1981 AMC 2010 (5th Cir. 1980) (en banc); *Coastal Production Services, Inc. v. Hudson*, 555 F.3d 426, 2009 AMC 188 (5th Cir. 2009); and *New Orleans Depot Services, Inc. v. Director, OWCP*, 689 F.3d 400, 2012 AMC 2257 (5th Cir.

2012). Since the district court’s careful decision applying our then-settled precedents, however, our *en banc* court has vacated the panel’s decision in *New Orleans Depot* and reached the opposite conclusion. See *New Orleans Depot Services, Inc. v. Director, OWCP*, 718 F.3d 384, 2013 AMC 913 (5th Cir. 2013) (*en banc*). In the process, we overruled *Winchester* and *Coastal Production Services*. See 718 F.3d at 394, 2013 AMC at 927 (“overrul[ing] . . . *Winchester* and its progeny”); 718 F.3d at 390 & n.13, 2013 AMC at 921 & n.13 (specifying *Coastal Production Services* as a case “follow[ing] the *Winchester* analysis”). Our *en banc* decision in *New Orleans Depot* accordingly requires us to reverse the district court’s judgment here. The failure to satisfy the § 3(a) *situs* requirement means that LHWCA does not apply on the facts presented here.

Because we can dispose of this appeal on that basis alone, we need not reach Efficient Workers’ second argument and thus need not discuss the *status* requirement.

The judgment of the district court is reversed and the case is remanded to the district court for further proceedings consistent with this opinion.

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JUSTINIAN, Circuit Judge, concurring:

I fully join in the panel’s decision to reverse the district court’s judgment. This Court’s recent *en banc* decision in *New Orleans Depot* is binding on us as a three-judge panel. Thus no other solution is possible.

I write separately because I think it is appropriate to mention Efficient Workers’ second argument, even though a decision on that argument is unnecessary to our resolution of this appeal. In our *en banc* decision in *New Orleans Depot*, we addressed only the LHWCA § 3(a) *situs* requirement; the binding majority opinion did not disturb our prior jurisprudence on the LHWCA § 2(3) *status* requirement. In my view, the district court’s careful analysis on that issue remains valid. We have not overruled *Winchester* and *Coastal Production Services* with respect to the *status* requirement, despite the invitation to do so in a concurring opinion. See *New*

*Orleans Depot*, 718 F.3d at 394-398, 2013 AMC at 928-934 (Clement, J., concurring). Although we must reverse the district court's judgment because of the failure to satisfy the *situs* requirement, we should not call into question its reasoning on the *status* requirement.

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HAMMURABI, Circuit Judge, concurring:

I fully join in the panel's decision to reverse the district court's judgment. As Judge Justinian properly notes, "no other solution is possible." I also agree with Judge Justinian that it is worth mentioning Efficient Workers' second argument. Unlike Judge Justinian, however, I would rule that the district court also erred on the *status* requirement. Our *en banc* decision in *New Orleans Depot* does not require that result, but I am fully persuaded by Judge Clement's analysis in her concurring opinion. *See* 718 F.3d at 394-398, 2013 AMC at 928-934 (Clement, J., concurring).

United States District Court  
for the Western District of Louisiana

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**EFFICIENT WORKERS, INC., Plaintiff,**

**v.**

**FIDELITY & FAITHFUL INSURANCE CO., Defendant.**

No. 10-Civ-6838

August 3, 2012

PORTIA, J.:

Before the Court are a Motion for Summary Judgment filed by Defendant Fidelity & Faithful Insurance Co. (“Fidelity”) and a Cross Motion for Summary Judgment filed by Plaintiff Efficient Workers, Inc. (“EWI”). EWI is in the business of supplying temporary workers to industrial, construction, and hospitality businesses. Fidelity is a workers’ compensation insurance carrier. The sole disputed issue between the parties is whether an injury to Fred Cruz, a laborer employed by EWI, was within the coverage of the Longshore and Harbor Workers’ Compensation Act (“LHWCA”), 33 U.S.C. §§ 901-950. The parties agree that the insurance policy issued to EWI by Fidelity insulates Fidelity from any responsibility for injuries covered by the LHWCA. Fidelity accordingly contends that the LHWCA covered Cruz’s injury; EWI insists that Cruz’s injury fell outside the scope of the LHWCA.

**Factual Background**

The circumstances of Cruz’s injury are described in a joint stipulation submitted by the parties, who agree that these facts are (for present purposes) uncontested and sufficient to enable this Court to rule on the legal questions presented.

In the aftermath of the April 2010 oil spill into the Gulf of Mexico from BP's<sup>1</sup> Macondo Well, BP engaged EWI to supply workers to assist in the clean-up effort. Fred Cruz was part of an EWI crew sent to perform beach cleaning work at Grand Isle, Louisiana, and on small satellite islands. On August 20, 2010, Cruz injured his back while lifting a bag of oil-contaminated sand to throw it onto a pile of such bags located on the beach. He was working about 5 to 10 feet from the waterline of the Gulf of Mexico when the incident occurred.

The beach that Cruz was cleaning was on a small island (G1 Island) about a 25-minute boat ride from Grand Isle. The EWI workers were living on a dormitory barge moored at Grand Isle. A boat chartered by BP transported them to a pier located on the beach of G1 Island. The beach location where Cruz was injured was approximately 100 yards from the pier.

Cruz's job was to clean the beach of oil-contaminated sand. The major portion of his daily 12-hour shift consisted of filling bags with contaminated sand, taping the bags, and stacking the bags. From time to time, Cruz and other EWI workers would transfer the stacked bags to a construction loader,<sup>2</sup> which would take the bags to a location immediately alongside the pier.

Once a day, a boat chartered by BP would tie up at the pier to offload supplies for the EWI workers and load bags of contaminated sand for transportation to an undisclosed location for eventual disposal. (The parties have not revealed, and the Court has not discovered, where or how BP ultimately disposed of the bags of contaminated sand.) The unloading-loading operation generally took about 30 minutes each day. Cruz and the other EWI workers would form a chain or line of men on the land. The boat's crew would pass supplies from the pier to the EWI

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<sup>1</sup> "BP" designates BP Exploration & Production, Inc.

<sup>2</sup> A "construction loader" is a wheeled tractor with a front-mounted square wide scoop or bucket. It is designed to scoop up or lift material from the ground and move it from one place to another without pushing the material across the ground.

workers, and the EWI workers would pass the bags of contaminated sand hand to hand along the line to the boat's crew on the pier.

### **Legal Analysis**

The parties contest two requisites to LHWCA coverage.<sup>3</sup> The first is the so-called *situs* requirement, set forth in LHWCA § 3(a), 33 U.S.C. § 903(a), as follows:

[C]ompensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

The second is the *status* requirement, set forth in the LHWCA § 2(3), 33 U.S.C. § 902(3), in relevant part as follows:

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 . . . .

After carefully analyzing the briefing of the parties and conducting its own independent research, this Court is convinced that the injury to Fred Cruz satisfies both of those requirements for LHWCA coverage.

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<sup>3</sup> EWI does not dispute that it was a LHWCA *employer*, defined in LHWCA § 2(4), 33 U.S.C. § 902(4), to mean "an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." *Cf. Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 509-510 n.8, 1981 AMC 2010, 2015-16 n.8 (5th Cir. 1980) (en banc) (quoting a statement in H. Rep. No. 92-1441, 92d Cong., 2d Sess. 11 (1972), that a LHWCA *employer* is any "person at least some of whose employees are engaged, in whole or in part in some form of maritime employment.").



### A. The *Situs* Requirement

Fidelity maintains that there is no question that the beach where Cruz was injured is a LHWCA situs. Fidelity relies on *Nelson v. American Dredging Co.*, 143 F.3d 789, 1998 AMC 2471 (3d Cir. 1998), in which a sand beach was held to be an adjoining area customarily used by an employer in unloading vessels. EWI counters with *Brooker v. Durocher Dock & Dredge*, 133 F.3d 1390, 1998 AMC 1314 (11th Cir. 1998), which held that an employee hurt while working on a seawall did not meet the situs test because, although the seawall adjoined navigable water, there was no evidence that it had ever been used for maritime purposes.<sup>4</sup> Neither authority is particularly helpful.

The dispositive authorities for this Court are three Fifth Circuit decisions. In *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 1981 AMC 2010 (5th Cir. 1980) (en banc), the court of appeals held that a gear locker located on Avenue N in Houston, five city blocks from the gate of the nearest dock, was an LHWCA situs. Noting the LHWCA's "policy of liberal construction [and] the presumption of coverage," 632 F.2d at 510, 1981 AMC at 2013, the court reasoned that it was required by *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268, 1977 AMC 1037, 1051 (1977), to "take an expansive view" of § 3(a). *Winchester*, 632 F.2d at 510, 1981 AMC at 2017 (quoting *Caputo*). Viewed in that light, the § 3(a) term "adjoining" should be read to mean "neighboring." 632 F.2d at 514, 1981 AMC at 2023. The term "area" means "overall area" rather than the precise point of injury. 632 F.2d at 515-516, 1981 AMC at 2024-26. And the "customarily used" requirement is satisfied if the overall area that includes the injury site was "customarily used for significant maritime activity." 632 F.2d at 515, 1981 AMC at 2024.

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<sup>4</sup> EWI also cites *Thibodeaux v. Grasso Production Management Inc.*, 370 F.3d 486, 494, 2004 AMC 1694, 1703 (5th Cir. 2004) ("assum[ing] that . . . a platform and marsh a short distance away from navigable water . . . qualifies as an 'adjoining area'"). EWI neglects to mention that, despite its satisfying the "adjoining" requirement, the marsh-and-platform area in *Thibodeaux* was held *not* to constitute a LHWCA situs because it was not "'customarily used for significant maritime activity.'" *Id.* (quoting *Winchester*, 632 F.2d at 515, 1981 AMC at 2024).

*Coastal Production Services, Inc. v. Hudson*, 555 F.3d 426, 2009 AMC 188 (5th Cir. 2009), carefully followed the teachings of *Winchester*. The *Coastal* panel’s analysis of the *situs* issue presented in that case — the facts of which are usefully analogous to those presented here — leads this Court to conclude that the location where Fred Cruz was injured both adjoins navigable water, *see* 555 F.3d at 432 & n.17, 2009 AMC at 195 & n.17, and is part of an overall water-adjoining area that included the location adjacent to the pier where the bags of contaminated sand were placed to await loading onto the BP boat, *see* 555 F.3d at 432-433 & n.17, 2009 AMC at 195-196 & n.17. *Coastal* further indicates (by powerful analogy) that the relevant adjoining area here was customarily used for loading the BP boat, *see* 555 F.3d at 433 & n.23, 2009 AMC at 197 & n.23, *and* that the precise point at which Cruz was injured may well also have qualified as a “customarily used” location, *see* 555 F.3d at 433-434 & n.24, 2009 AMC at 197 & n.24.

*New Orleans Depot Services, Inc. v. Director, OWCP*, 689 F.3d 400, 2012 AMC 2257 (5th Cir. 2012), continues the lesson of *Winchester*. The injury in that case occurred in a container-repair facility called the Chef Yard located 300 yards from the nearest navigable water. The facility repaired containers used in rail, truck, and maritime transport, making no differentiations among those operations. The Chef Yard was separated from the water by non-maritime facilities and businesses. Yet the employer “conceded that the Chef Yard satisfies the geographic proximity requirement of the *situs* inquiry,” 689 F.3d at 406, 2012 AMC at 2263, *i.e.*, that the Chef Yard was an “adjoining area” to navigable water. Respecting the “customarily used” requirement, the *New Orleans Depot* panel quoted *Winchester* for the proposition that “[t]he statute does not require that the area’s exclusive use be for maritime purposes so long as it is customarily used for significant maritime activity.” 689 F.3d at 407, 2012 AMC at 2263 (quoting *Winchester*, 632 F.2d at 515, 1981 AMC at 2024). Further, “[t]he *situs* need not be

used . . . even primarily for maritime purposes . . . .” 689 F.3d at 407, 2012 AMC at 2263 (quoting *Coastal*, 555 F.3d at 432, 2009 AMC at 195) (omissions in *Coastal* opinion). As long as “some of the . . . containers repaired by NOSDI were used for maritime transportation and were offloaded at the port of New Orleans,” the “customarily used” requirement was met. 689 F.3d at 407, 2012 AMC at 2264.

In light of *Winchester*, *Coastal*, and *New Orleans Depot*, it seems clear that the “area” where Cruz was injured “adjoined” the Gulf of Mexico and was “customarily used” for significant maritime activity. Thus, the LHWCA’s *situs* requirement was satisfied.

## **B. The Status Requirement**

In its first decision addressing the coverage provisions of the LHWCA as amended in 1972, the Supreme Court said that all workers who “spend at least some of their time in indisputably longshoring operations” satisfy the LHWCA status requirement. *Caputo*, 432 U.S. at 273, 1977 AMC at 1056. The Court reiterated that principle in *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 83 n.18, 1979 AMC 2319, 2329 n.18 (1979). *See also Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 49, 1989 AMC 2965, 2971-72 (1989) (Blackmun, J., concurring, joined by Justices Marshall and O’Connor). The Fifth Circuit has faithfully adhered to it. *See Winchester*, 632 F.2d at 511, 1981 AMC at 2018 (stating that any worker who “spends some of his time in activities traditionally performed by longshoremen” satisfies the status requirement); *Coastal*, 555 F.3d at 440-441, 2009 AMC at 208-209 (holding that a worker who spent about 9.7% of his time in vessel-loading activities had LHWCA status); *New Orleans Depot*, 689 F.3d at 405, 2012 AMC at 2260 (stating that a worker who “repaired marine containers at least some of the time” met the status requirement); 689 F.3d at 409, 2012 AMC at 2266-67 (quoting *Coastal*, 555 F.3d at 441, 2009 AMC at 209, for the proposition that “an employee who spent

only 2.5-5% of his employment engaged in maritime activities”” satisfied the status requirement).

Cruz participated once a day in loading/unloading a vessel. This Court does not believe that Cruz was required to step onto the pier or the BP boat in order to be considered a longshoreman. Unquestionably the chain-gang of which Cruz was a daily member, when it off-loaded supplies from and loaded contaminated sand to the pier at which the boat docked, was an integral part of the loading and unloading of a vessel. This Court agrees with Fidelity that 30 minutes per day spent in loading and unloading operations was adequate to make Cruz a longshoreman, notwithstanding that a much larger portion of his labor was devoted to filling and stacking sand bags on the beach. Accordingly, the Court finds that the status requirement was met and that Cruz’s injury was covered under the LHWCA.

### **Conclusion**

For the reasons set forth above, the motion for summary judgment filed by Fidelity will be granted and the motion to dismiss/motion for summary judgment filed by EWI will be denied.

It is so ordered.

**Selected Chronology of the Case\***

Apr. 20, 2010	Oil spill from BP's Macondo Well begins
Aug. 20, 2010	Plaintiff's employee, Fred Cruz, injured
Sept. 6, 2010	Plaintiff files present action in the United States District Court for the Western District of Louisiana asserting that Cruz's injury was not covered by the Longshore and Harbor Workers' Compensation Act because either the <i>situs</i> or the <i>status</i> requirement had not been satisfied
Aug. 3, 2012	Defendant's motion for summary judgment granted and plaintiff's cross motion for summary judgment denied with an opinion (reported as <i>Efficient Workers, Inc. v. Fidelity &amp; Faithful Insurance Co.</i> , 2012 AMC 3335 (W.D. La. 2012))
Aug. 13, 2012	Notice of appeal filed
May 30, 2013	Court of appeals reversed the district court's judgment and remanded the case with an opinion (reported at 717 F.3d 1383, 2013 AMC 3333)
July 5, 2013	Motion for rehearing denied without comment
Oct. 1, 2013	Petition for certiorari filed raising only (1) the <i>situs</i> issue and (2) the <i>status</i> issue (docket number 13-420)
Dec. 2, 2013	Petition for certiorari granted

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\* This information is included in the packet for the information of Competition participants. Unlike the preceding pages, it should not be considered part of the APPENDIX TO THE PETITION FOR CERTIORARI filed with the Court.