No. 98-18

In the Supreme Court of the United States

OCTOBER TERM, 1997

JOSEPH G. BROOKER, PETITIONER

v.

DUROCHER DOCK AND DREDGE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Longshore and Harbor Workers' Compensation Act (LHWCA) provides compensation and benefits to employees engaged in maritime employment who suffer injuries "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)." 33 U.S.C. 903(a). The question presented is whether a seawall built on pilings and adjoining navigable waters is either an "adjoining pier" or part of an "other adjoining area customarily used" in the enumerated maritime activities.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-9) is reported at 133 F.3d 1390. The notice of affirmance from the Benefits Review Board (Pet. App. 14-15) and the decision and order of the administrative law judge (Pet. App. 11-13) are unreported.

JURISDICTION

The court of appeals entered its judgment on January 26, 1998. A petition for rehearing was denied on March 31, 1998. Pet. App. 10. The petition for a writ of certiorari was filed on June 29, 1998. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA) provides compensation to covered employees for work-related injuries that result in disability, and to survivors if the injury causes death. 33 U.S.C. 908, 909. A covered employee must meet a "status" requirement, *i.e.*, satisfy the Act's definition of "employee," see 33 U.S.C. 902(3),[1] and have been injured at a maritime "situs." See *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 264-265 (1977). This case concerns the "situs" requirement, which appears in Section 3(a) of the LHWCA and which specifies that an employee (or his survivor) is entitled to compensation under the Act only if 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).

33 U.S.C. 903(a).

2. Petitioner Joseph G. Brooker worked as a welder for respondent Durocher Dock and Dredge (Durocher). Petitioner was injured while working on

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[1] Section 2(3) of the LHWCA defines an employee, with certain exceptions not relevant here, as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker." 33 U.S.C. 902(3).

a project to build a seawall, or bulkhead, to protect the Savannah Electric and Power Company's (SEPCO's) power plant from erosion by a navigable body of water, the Savannah River. Pet. App. 1-2, 12. That seawall was intended to replace an old seawall, which had deteriorated to the point that the site of the power plant was losing soil into the river. *Id.* at 12; EX 1, at 8.[2] The new seawall was being built by driving pilings into the riverbed parallel to, and on the river side of, the existing seawall. Pet. App. 2; Pet. 3.[3]

Materials to build the seawall were unloaded from a truck onto one of two barges in the river. Pet. App. 24; see *id.* at 2. Those barges were tied to "dolphins" (clusters of closely driven piles) in the river. *Id.* at 2 & n.2; see *id.* at 24-25. Petitioner participated in loading materials onto the barge and went to the barge to get materials or equipment he needed for his welding work. *Id.* at 2, 26. Petitioner and other Durocher employees also took sheet pilings off the barge as needed for the new seawall. *Id.* at 27.[4]

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[2] "EX" refers to exhibits of the employer, respondent Durocher, that are part of the record in this case.

[3] Both the opinion of the court of appeals and the petition for a writ of certiorari state that the new seawall extends approximately 20 feet further into the river than the old seawall. Pet. App. 2; Pet. 3. Deposition testimony, however, indicates that the actual distance between the new wall and the old wall is two feet. Pet. App. 20, 21. The administrative law judge's decision does not include a factual finding on that point.

[4] Petitioner stated that he did not have to work from the barge to perform any of his welding duties. Pet. App. 2, 26. He also stated, however, that he welded rods or braces while on the barge and that those materials were then taken by crane for installation on the seawall. EX 2, at 33-35.

On November 19, 1992, petitioner injured his neck and back in the course of his employment when he fell on ground that had been eroded by the river. Pet. App. 2, 12; EX 2, at 7-8.[5] He applied for compensation under the LHWCA. Pet. App. 2. Respondent Durocher conceded that it was a maritime employer and that the injury had occurred in the course of petitioner's employment. Respondent contended, however, that petitioner was not entitled to compensation under the LHWCA because, *inter alia*, the injury had not occurred on a covered "situs." *Id.* at 4, 12.[6]

3. An administrative law judge (ALJ) denied benefits on the ground that petitioner failed to meet the situs requirement for coverage under the LHWCA. Pet. App. 11-13. The ALJ recognized that the power plant was "on the water," and that petitioner "fell less than twenty feet" from the river. *Id.* at 12. The ALJ stated, however, that the power company (SEPCO) received no shipments by water and that the seawall was not designed to facilitate the docking, loading, unloading, construction, or repair of a vessel. *Ibid.*

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[5] The court of appeals' opinion states, and we understand, that petitioner "fell landside, in the area between the old seawall and the power plant." Pet. App. 2. Petitioner asserts, however, that he "fell in the area between the old seawall and the new seawall." Pet. 4. The administrative law judge's decision does not state the exact location of the injury. See Pet. App. 12 ("Mr. Brooker fell less than twenty feet from the Savannah River.").

[6] Durocher also argued that petitioner was not engaged in maritime employment and therefore failed to satisfy the LHWCA's status requirement. See p. 2 & note 1, *supra*. That issue was not addressed by the administrative law judge, the Benefits Review Board, or the court of appeals.

The ALJ concluded that the seawall was not a covered situs because it had "no function which relates to a vessel or to navigation." *Ibid.* Petitioner appealed to the Benefits Review Board. See 33 U.S.C. 921(a) and (b).

4. In 1996, Congress directed that all appeals that had been pending before the Board for more than one year were to be deemed affirmed if the Board did not act by September 12, 1996. Department of Labor Appropriations Act, 1996, Pub. L. No. 104-134, Tit. I, 110 Stat. 1321-219; see 33 U.S.C. 921 note (Supp. II 1996). Petitioner's appeal had been pending before the Board for more than one year on September 12, 1996, and the ALJ's decision therefore became final as of that date. Pet. App. 14-15; see *id.* at 16-17 (Board's denial of motion for reconsideration). Petitioner sought further review in the court of appeals.[7]

5. The court of appeals affirmed the denial of benefits. Pet. App. 1-9. The court recognized that the point of contention between the parties was "whether the seawall is a 'pier . . . or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.'"

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[7] Because petitioner sought court of appeals review within 60 days after September 12, 1996, this case does not present the question whether a petition for reconsideration before the Board tolls the 60-day period for seeking review of Board decisions. See 33 U.S.C. 921(c) ("Any person adversely affected or aggrieved by a final order of the Board" may obtain judicial review by filing a petition for review in the court of appeals "within sixty days following the issuance of such Board order"); *Ramey* v. *Stevedoring Servs. of Am.*, 134 F.3d 954, 958-959 (9th Cir. 1998) (rejecting Director's argument that Pub. L. No. 104-134, *supra*, divested the Board of jurisdiction to entertain rehearing petitions).

Id. at 4 (quoting 33 U.S.C. 903(a)). The court first concluded that the seawall on which petitioner was injured was not a "pier" within the meaning of the Act. It stated that "whether a facility is a 'pier' is a pure factual question in the absence of a definition in the LHWCA." Pet. App. 7. The court determined, based on photographs included in the record, that the seawall at issue in this case did not have the physical appearance of a "pier." *Ibid.* It also observed that "the supervisor of the seawall construction project with fourteen years of experience unequivocally answered 'no,' when asked whether the facility was a pier." *Ibid.* The court therefore held that "substantial evidence supports the ALJ's implicit rejection of [petitioner's] pier argument." *Ibid.*[8]

The court of appeals also held that the seawall was not an "other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." Pet. App. 8 (quoting 33 U.S.C. 903(a)). The court rejected petitioner's argument that the seawall was a covered situs because of its proximity to a neighboring port used for vessel activity. Pet. App. 8. The court also stated that neither petitioner's employer (respondent Durocher) nor the premises owner (SEPCO) used the seawall for activities specified in 33 U.S.C. 903(a). Pet. App. 8. Because "Durocher tethered its barges to dolphins rather than the seawall," the court determined, "[a]ny loading and unloading on the barges was accomplished

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[8] The court of appeals therefore declined to resolve the question whether a "pier" must be "customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel," 33 U.S.C. 903(a), in order to qualify as a covered situs under the LHWCA. See Pet. App. 7.

without resort to the seawall." *Id.* at 8-9. The court therefore concluded that, "while the seawall adjoined a navigable waterway, it was not a place of traditional maritime activity at the time of [petitioner's] injury." *Id.* at 9.

ARGUMENT

Although we believe that the court of appeals' decision is erroneous, this case does not present any question warranting the Court's review. In particular, no square conflict exists between the decision below and that of the Second Circuit in *Fleischmann* v. *Director, OWCP*, 137 F.3d 131 (1998), petition for cert. pending, No. 97-1894.[9] The petition for a writ of certiorari should therefore be denied.

1. The term "pier" is not defined in the LHWCA. Its common meaning, however, is broad enough to include a seawall, like the one in this case, that is built on pilings, extends into navigable waters, and serves to protect land from erosion. See *Webster's Ninth New Collegiate Dictionary* 890 (1989); *Fleischmann* Gov't Br. in Opp. at 10-11. Treating the seawall in the instant case as a pier also effectuates Congress's intent that the LHWCA provide a "uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 272 (1977) (quoting S. Rep. No. 1125, 92d Cong., 2d Sess. 13 (1972); H.R. Rep. No. 1441, 92d Cong., 2d Sess. 10-11 (1972)); see *Fleischmann* Gov't Br. in Opp. at 11-12. Petitioner went to and from a barge in navigable waters when getting

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[9] We have provided counsel for the other parties in this case with copies of our brief in opposition in *Fleischmann*.

materials needed for his work, and he would clearly have been covered if he had been injured during those activities. See *Director, OWCP* v. *Perini N. River Assocs.*, 459 U.S. 297, 323-324 (1983). Petitioner's injury would also have been covered if he had fallen from the seawall into the water, rather than landward. See *ibid.*; *Fleischmann* Gov't Br. in Opp. at 12; note 5, *supra*.

Although we believe that the court of appeals erred in concluding that the seawall was not a "pier," we do not believe that the holding warrants this Court's review. The court stated that "whether a facility is a 'pier' is a pure factual question"; it placed primary emphasis on the appearance of the structure and the fact that "the supervisor of the seawall construction project with fourteen years of experience unequivocally answered 'no,' when asked whether the facility was a pier." Pet. App. 7. Its decision is therefore unlikely to have broad application even within the Eleventh Circuit. Nor do we believe that the court of appeals' decision squarely conflicts with that of the Second Circuit in *Fleischmann*.[10] The two decisions are concededly in tension, since the courts reached different conclusions regarding the application of the situs requirement to somewhat similar physical structures. As we explain in our brief in opposition in *Fleischmann* (at 13), however, the circumstances of

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[10] Petitioner also asserts (Pet. 6, 12) that the decision below conflicts with *Hurston* v. *Director, OWCP*, 989 F.2d 1547 (9th Cir. 1993). *Hurston*, however, did not decide whether a seawall was a pier. Rather, it held that a structure built on pilings, which looked like a pier and extended into navigable waters, was a "pier" within the meaning of the LHWCA even though it was used for storing oil rather than loading or unloading vessels. See *id.* at 1548-1550.

that case may be somewhat more supportive of a finding of LHWCA coverage than are the circumstances here. In any event, the heavily factual nature of the relevant inquiry suggests that review by this Court is unwarranted.

2. Even if the seawall at issue in this case were not a "pier," we believe that petitioner would be entitled to compensation under the LHWCA because his injury occurred in an "adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. 903(a); see *Northeast Marine Terminal*, 432 U.S. at 280-281 (whether or not the pier at issue in that case was by itself a covered situs, an injury on the pier was covered since the pier was part of an entire terminal facility adjoining water, and one of the facility's piers was used for loading and unloading vessels). Respondent Durocher is indisputably a maritime employer, see Pet. App. 4, 12, and the barges it used in building the seawall were "vessels." See *Norton* v. *Warner Co.*, 321 U.S. 565, 571 (1944). Durocher's employees, including petitioner, customarily loaded pilings onto those vessels and unloaded the pilings as they were needed to form the new seawall. Pet. App. 27.[11] Petitioner's injury occurred in the area where the pilings were unloaded and driven into the river bed. See p. 3, *supra*. That location adjoins the water

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[11] Driving pilings into the bottom of the waterway from a floating barge is typically the first step in the pier construction process. *Trotti & Thompson* v. *Crawford*, 631 F.2d 1214, 1215 (5th Cir. 1980); see also *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 534 (1995) (describing process by which workers lifted and replaced pilings with a crane that sat on a barge stationed in a river, activities that occurred on "navigable waters" for purposes of admiralty jurisdiction).

and is properly characterized as an "area customarily used by an employer in * * * unloading * * * a vessel." 33 U.S.C. 903(a).

In holding that petitioner was not injured in a covered "adjoining area," the court of appeals relied exclusively on the fact that the seawall itself was not used to load, unload, repair, dismantle, or build a vessel. Pet. App. 8; see also *id.* at 12 (ALJ decision). We believe that the court of appeals' focus was unduly limited. In our view, the court should also have considered whether materials used to build the new seawall were loaded or unloaded from a vessel, and whether petitioner's injury occurred in the area where such loading or unloading customarily occurred. Cf. *Nelson* v. *American Dredging Co.*, 143 F.3d 789, 796-797 (3d Cir. 1998) (situs requirement satisfied for employee injured on a beach reclamation project because the employer unloaded sand onto the beach from a vessel as part of the reclamation project). We do not believe, however, that this aspect of the court of appeals' decision—which involves the misapplication of law to fact—warrants review by this Court. See, *e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) (this Court generally "do[es] not grant a certiorari to review evidence and discuss specific facts").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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