**IN THE UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

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No. 94-30387
Summary Calendar

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RYAN-WALSH, INC.,
Individually and as Assignee of Peter J. Dorsey, Jr.,

Plaintiff-Appellant,

VERSUS

MARíTIMA ARAGUA, S.A.,

Defendant-Appellee.

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Appeal from the United States District Court
for the Eastern District of Louisiana
(CA 92 3663 "L" (E)(1))

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February 13, 1995

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM:[*]

Ryan-Walsh, Inc., appeals an adverse judgment in this suit filed pursuant to the Longshore & Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 905(b). Finding no error, we affirm.

I.

[*] Local Rule 47.5.1 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that rule, the court has determined that this opinion should not be published.

Longshoreman Peter Dorsey, Jr., was injured while working for stevedore Ryan-Walsh, Inc. ("Ryan-Walsh"), which was loading cargo onto a vessel owned by Marítima Aragua, S.A. ("Marítima"). Ryan-Walsh compensated Dorsey for his injury and, individually and as Dorsey's assignee, filed this suit against Marítima seeking the amount of the benefits it had paid. Ryan-Walsh's theory was that vessel negligence caused Dorsey's injuries because Marítima failed to correct a hazard in the construction of a catwalk and because Dorsey's work area was not adequately lighted.

Ryan-Walsh and Marítima jointly moved in the district court for judgment on the issue of liability, proceeding on stipulated facts consisting of Marítima's statement of uncontested material facts and Dorsey's deposition. The district court found no liability on the part of Marítima and entered judgment in its favor. On appeal, Ryan-Walsh expressly abandons the claim regarding lighting.

## II.

The district court found the following facts. As part of Dorsey's job, he walked along a metal catwalk, which was an integral part of the ship's construction and which ran fore and aft above Hold No. 4. Dorsey's job was to give signals to a Ryan-Walsh winch operator loading cargo into the hold. The center portion of the catwalk was raised six to eight inches above the rest of the catwalk to accommodate a pipe flange. A person walking there had to step up to reach the center portion and step back down to reach

the rest of the catwalk.

On September 7, 1991, while Dorsey was working on the catwalk, a fifty-to-sixty-pound shackle block lay on the catwalk about eighteen inches from the step. Dorsey knew the location of the step and the position of the shackle block.

On that day, Dorsey worked on the catwalk for one to two hours without injury. Then, while walking on the lower portion of the catwalk and looking down into the hold directing the winch operator, Dorsey set his foot down to stride over the shackle block and onto the raised portion of the catwalk. He missed the step-up, and his right foot went under the step, causing his right knee to twist. The uncontested facts state: "Dorsey admits his inattention played the critical role in the accident: `[I]f I would have been looking down, you know, I could have stepped clear of it. I know that for sure.'"

III.

Ryan-Walsh argues that the two-level catwalk was an unseaworthy condition that Marítima negligently left uncorrected, causing Dorsey's injury. "In an admiralty action tried by the court without a jury, the factual findings of the District Court are binding unless clearly erroneous. . . . [Q]uestions concerning the existence of negligence and causation are treated as factual issues subject to the clearly erroneous standard. . . . [Q]uestions of law are subject to de novo review." Avondale Indus. v. International Marine Carriers, 15 F.3d 489, 492 (5th Cir. 1994). A

factual finding is clearly erroneous if it is not plausible in light of the record taken as a whole. Anderson v. City of Bessemer City, 470 U.S. 564, 573-76 (1985).

The section of the LHWCA under which Ryan-Walsh sued Maritima provides:

> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party . . . . If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel . . . . The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

33 U.S.C. § 905(b) (emphasis added). As the statute precludes consideration of seaworthiness, all of Ryan-Walsh's argument that is based upon unseaworthiness is immaterial.

Furthermore, Ryan-Walsh states in its brief that the district court found that the step-up was an unseaworthy condition. The district court did not make such a finding, however. It noted that the statute eliminated a claim for unseaworthiness and then observed that, if the catwalk design was defective, Marítima had nothing to do with the vessel's design.

Ryan-Walsh also argues that Marítima should be held liable because the vessel was turned over to it with an open and obvious hazard))the step-up in the catwalk))and because curing the hazard was impracticable at the time, leaving Dorsey with only the choice

of working or refusing to work. In Scindia Steam Nav. Co. v. De los Santos, 451 U.S. 156 (1981), the Supreme Court outlined three exceptions to the general immunity that vessels enjoy under § 905(b). See Howlett v. Birkdale Shipping Co., 114 S. Ct. 2057, 2063 (1994). The first, the "turnover duty," concerns the condition of the ship when the stevedoring operations begin. The second, which applies once the stevedoring operations commence, requires a shipowner to exercise reasonable care to prevent injuries to longshoremen in areas that remain under the "active control of the vessel." The third, the "duty to intervene," relates to the shipowner's duties with respect to cargo operations in areas of the vessel that are under the principal control of the independent stevedore. Id.

Ryan-Walsh's argument regarding unseaworthiness notwithstanding, Marítima's duties may be analyzed to determine whether any of the three Scindia exceptions may be applied. First, the "turnover duty" does not extend to defects that are open and obvious and that the longshoreman should have seen, even though they existed when the shipowner turned the vessel over to the stevedore. Pimental v. LTD Canadian Pac. Bul, 965 F.2d 13, 16 (5th Cir. 1992). The parties agreed that, before the injury, Dorsey was aware of the configuration of the catwalk, as he testified in deposition that he knew of the step-up.

Nevertheless, Marítima may be held liable for failing to turn over a safe vessel if Dorsey's only alternatives when facing the alleged hazard were unduly impracticable or time consuming. Id.

The district court found that there is no evidence to indicate that any alternatives were considered, much less that they were too burdensome. Ryan-Walsh attempts to dispute this by asserting that Dorsey's only alternative was refusing to work. Ryan-Walsh identifies nothing in the stipulated facts to support this assertion.

The second Scindia exception is inapplicable, because the area in which Dorsey was working was under the control of Ryan-Walsh, not Marítima, at the time of the injury. Under the third exception, a vessel has the "duty to intervene" when it has "actual knowledge of a dangerous condition and actual knowledge that the stevedore, in the exercise of `obviously improvident' judgment, has failed to remedy it." Id. at 17 (citation omitted). The district court found that nothing indicates that the vessel crew had any knowledge that the stevedore would not remedy any alleged hazard. Ryan-Walsh asserts that this finding is illogical, because the stevedore could not have reconfigured the catwalk. Ryan-Walsh, however, identifies nothing in the record to dispute the district court's finding.

AFFIRMED.