

**MARINE EMPLOYERS' LIABILITIES:
CLASSIFICATION OF EMPLOYEES & INSURANCE COVERAGES**

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MARINE EMPLOYERS' LIABILITIES: CLASSIFICATION OF EMPLOYEES & INSURANCE COVERAGES

1. INTRODUCTION

For purposes of employers' liabilities and insurances against those liabilities, maritime workers fall into three general categories: (1) seamen; (2) longshore and harbor workers; and (3) workers subject to state workers compensation liability acts. As explained below, although the coverages of seaman status and the federal and state compensation acts generally have some overlap, it is possible that workers may fall between cracks and have limited remedies under the general maritime law. Each category of status involves separate exposure of the employer to differing standards of liability and to differing insurances, including, with respect to the latter two categories, insurances required, respectively, by federal and state statutes. Employers are concerned not only that they are insured against liabilities for death or injury to all categories of workers and with meeting any applicable statutory requirements so far as carrying insurance, but are also concerned with the economic considerations in not paying premiums for unnecessary multiple coverages for potential liabilities for the same injuries to their employees.

Remedies to injured workers and to their survivors in case of employment related deaths vary greatly according to the status of the worker, cause of the injury or disabling condition, and any comparative fault of the worker. Seamen are entitled to the remedies of maintenance, cure and unearned wages, irrespective of fault on the part of the employer, without deduction for any comparative fault of the seaman.² But if the death or injury to a seaman was due to any negligence of the employer or an employee of the employer, including an independent contractor engaged to perform an employer's duty to the employee, the Jones Act³ makes the employer liable for tort damages to the seaman, including damages for loss of past and future income, disability, pain and suffering and in case of death, to the seaman's statutory survivors, for loss of support, value of services, and for the seaman's own pre-death pain and suffering. Jones Act damages normally are subject to reduction for any comparative fault of the worker, but there is no deduction under the Jones Act for comparative fault of the injured seaman if the injury resulted from violation by the employer of a "safety statute", a statute or regulation enacted for the safety of such employees.⁴ Seamen also may recover tort damages for death or injury caused by any breach of the warranty of seaworthiness of the vessel on which they serve implied in their contracts

² Seamen who suffer illness, injury or death in the course of their employment are entitled as a matter of law to their unearned wages during their disability to the end of the voyage or other employment period in which they were engaged at the time the disability arose, to the reasonable costs of their medical care until maximum cure is reached, and to the reasonable costs of their room and board ashore until maximum cure is reached. The remedies of unearned wages, maintenance and cure are due if the disability becomes manifest during the period of employment irrespective that it may be due to a pre-employment condition and irrespective of any fault of the employer or fault of the seaman, and are subject to relatively few defenses (available defenses include intentional concealment by the worker of a known disabling condition, intentional self-infliction of injury, that the injury was due to willful misconduct or willful disobedience to a lawful order).

³ 46 USC 46 U.S.C. § 30104. The Jones Act extends to seamen the rights and remedies granted to railway workers under the federal Employers' Liability Act ("FELA"), 45 USC § 51 *et seq.*, to recover damages from their employers in case of employment-related death or injury caused by negligence of the employers, including negligence of fellow employees.

⁴ The issue of negligence *per se* and no reduction for comparative fault is especially important in view of the recent decision of the Supreme Court in *Chao v. Mallard Bay Drilling, Inc.*, 534 U.S. 235, 2002 AMC 305 (2002), which held that OSHA regulations apply to "uninspected" vessels operating in territorial waters, as breach of an OSHA safety regulation may be considered breach of a safety statute, resulting in barring evidence of comparative fault of injured seaman. See, e.g., *Pratico v. Portland Term. Co.*, 783 F.2d 255 (1st Cir. 1985) [a FELA case]; *Cook v. Ancich*, 2001 AMC 425 (W.D. Wa. 2000). Other courts have held that violation of an OSHA regulation does not constitute negligence *per se* under the Jones Act. See, e.g., *Jones v. Spentonbush-Red Star Co.*, 155 F.3d 1, 1999 AMC 324 (2nd Cir. 1998); *Montaperto v. Foss Maritime Co.*, 2001 AMC 729 (W.D. Wa. 2000).

of employment: a vessel is considered “unseaworthy” with respect to any death or injury caused by any unreasonably unsafe condition of the vessel, its appurtenant equipment and supplies, or crew. Comparative fault of the seaman is a partial defense, but knowledge of the employer of the dangerous condition or any opportunity to cure it is irrelevant: unseaworthiness is a strict liability cause of action. Interest on past damages may be awarded in suits brought in admiralty or, in cases other than for Jones Act negligence, even if the action is brought in state court. Importantly, courts now do not recognize punitive damages for claims for death or injury of seamen, at least in actions against their employers.⁵

It must be borne in mind that the Jones Act imposes liability on the worker's “employer”, who in some cases, such as concession operators on passenger ships, might not be the vessel's operator. A recent common practice is that officers and crew of ships may be employees of a management or crew-provider contractor, in which case the actual employer may be the contractor rather than the ship's operator. In some circumstances, charterers or caterers may employ all or some of the crew of a ship.

The federal Longshore & Harbor Workers' Compensation Act⁶ provides for compensation at a level generally more generous than compensation due under state compensation acts for injury or deaths which occur to employees covered by the LHWCA, irrespective of fault and irrespective of any comparative fault of the employee (subject to very limited defenses). If the injury or death is caused by negligence or product liability of a non-employer, the employee or survivors may have a claim for tort damages against the third party. State law would apply if the place of injury was on shore, but if it was on navigable waters, maritime law would apply.⁷ Punitive damages in third party claims might be cognizable under state law or maritime law.⁸

Compensation under state workers' compensation statutes also is due irrespective of any fault on the part of the employer or any comparative fault of the employee. Third party tort claims also may be

⁵ Several circuits have held that punitive damages will not be awarded in cases of death or injury to seamen, irrespective whether the claims are against the employer or a third party. See, e.g., *Scarborough v. Clemco Industries*, 391 F.3^d 660, 2005 AMC 96 (5th Cir. 2004); *Glynn v. Roy Al Boat Management Corp.*, 57 F.3^d 1495, 1995 AMC 2022 (9th Cir. 1995). Some other courts have allowed punitive damages if the claims arise outside of the employer-employee context. See, e.g., *Price v. Consolidation Coal Co., Inc.*, 2002 AMC 1179 (W.D. Va. 2001). Some cases have held that punitive damages can be recovered in general maritime law claims for death or injury of LHWCA workers and other non-seamen. *Wheelings v. Seatrade Groningen, BV*, 2007 U.S. Dist. LEXIS 40028 (E.D. Pa. 2007), recognized that the general maritime law survival remedy applies to deaths of longshore and harbor workers in territorial waters. *Wheelings* states:

Wheelings seeks to amend her complaint to claim punitive damages under the LHWCA. Unlike the Death on the High Seas Act, which creates a wrongful death cause of action for representatives of individuals killed on the high seas, the LHWCA does not expressly or implicitly limit available recovery. The court looks to general maritime law to inform its decision whether punitive damages are available under the LHWCA. *Rutherford v. Mallard Bay Drilling, L.L.C.*, 2000 U.S. Dist. LEXIS 9053, 2000 WL 805230 (E.D. La. 2000) (any right to punitive damages under the LHWCA arises from general maritime law, unlimited by statutory constraint). If Congress meant to limit the damages available under the LHWCA, it would have done so expressly, as it did with respect to the Death on the High Seas Act. Since the LHWCA is silent on the availability of punitive damages, the court follows general maritime law under *Sea-Land Servs. v. Gaudet*, 414 U.S. 573 ... (1974).

Kahumoku v. Titan Maritime, LLC, 2007 U.S. Dist. Lexis 35228 (D. Hi. 2007), held that punitive damages can be recovered in § 905(b) actions, but the facts alleged were not sufficient to sustain a claim of reckless or callous disregard for the plaintiff's rights, or gross negligence, actual malice or criminal indifference.

⁶ 33 USC §§ 901-950.

⁷ See, e.g., *Motts v. M/V Green Wave*, 210 F.3^d 565, 2000 AMC 1521 (5th Cir. 2000).

⁸ *Rutherford v. Mallard Bay Drilling, L.L.C.*, 2001 AMC 2813 (E.D. La. 2000), held that punitive damages may be recovered under maritime law in a third party action by a longshore or harbor worker under § 905(b) of the Longshore and Harbor Workers' Compensation Act.

allowed. Punitive damages could be allowed under the law of most states (but not Washington, which generally does not provide for awards of punitive damages).⁹

No law requires that employers of seamen carry insurance for potential liabilities for maintenance and cure, Jones Act negligence, or unseaworthiness. The LHWCA does require that insurance be carried with authorized carriers for liabilities to workers covered by the LHWCA, with very restrictive regulations on the employer self-insuring such liabilities. State plans vary between the states as to requirements of insurers, but insurance generally is mandatory, with restricted rights to self-insure in most states.

Unfortunately, the distinctions between “seamen”, longshore and harbor workers, and workers subject to state workers' compensation acts are not defined by “bright line” definitions: courts recognize overlapping and duplicative coverage between state workers and LHWCA workers, between LHWCA workers and seamen, and, in some Alaska cases and at least one California court of appeals case, between state compensation plan workers and seamen. Although the Supreme Court recently has resolved the question whether special purpose vessels such as floating dredges and barges used in construction irrespective that their primary purpose might not be the transporting goods or passengers may be considered a “vessel” and its crewmembers “seamen”,¹⁰ ambiguity exists as to when vessels are removed from navigation during lay-up or indefinite stationary use.

2. SEAMEN STATUS

The same three requirements for seaman status must be met for eligibility for maintenance, cure and wages as eligibility for Jones Act remedies: (a) the vessel must be “in navigation”; (b) the person has an employment connection to the vessel that is substantial both (i) in terms of duration and (ii) its nature; and (c) that his employment contributes to the work of the vessel on which he is employed. Unfortunately, application of the general rules has resulted in inconsistent results in cases of “amphibious workers” where workers divide their employment time between duties aboard a vessel or multiple vessels and shoreside duties, their on-board duties are not related to the vessel or vessels to which they are assigned “going to sea”, or the “vessels” on which they serve are laid up or are in indefinite stationary use.

2.1 Masters as “seamen”. *Warner v. Goltra*¹¹ resolved conflicting precedents on whether a vessel’s master is a seaman for purposes of Jones Act remedies, and held that the seamen’s remedies are extended to masters.

2.2 Contributes to the “Work of the Vessel”

If the other requisites are met [(1) an employment relationship that is substantial both in terms of duration and nature (2) to a vessel in navigation, a person is a “seaman” if he is employed to contribute to the “work of the vessel”. Early cases required that seamen “reef and steer” or directly contribute to the vessel's navigation. Courts broadened the definition to persons assigned to the vessel whose employment contributed to the function of the vessel. These cases resulted in miscellaneous shipboard workers who go to sea on the vessels being considered “seamen”, including such workers that we now don't question being considered “seamen”, such as fishermen on fishing vessels, hairdressers and bartenders on passengers ships, and divers on diving support vessels. Important to employers and their insurers are in some industries are decisions that hold that the following workers who are assigned to

⁹ *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 1996 AMC 305 (1996), recognized that state law, including any provision for punitive damages, may supplement maritime law with respect to death of “non-seafarers” in territorial waters.

¹⁰ *Stewart v. Dutra Const. Co.*, 543 U.S. 481, 2005 AMC 609 (2005).

¹¹ 293 US 155, 1934 AMC 1436 (1934).

vessels engaged in navigation can be “seamen”: processing workers on floating processing vessels;¹² fisheries observers;¹³ scientific workers;¹⁴ shore-based repair workers;¹⁵ harbor workers who operate

¹² *Wells v. Arctic Alaska Fisheries Corp.*, 1991 AMC 449 (W.D. Wa. 1990); *Qualls v. Arctic Alaska Fisheries Corp.*, 1991 AMC 582 (D. Ak. 1990); and *Berry v. Denali Seafoods*, No. A84-369 (D. Ak. 1987), held that processing workers contribute to the missions of fish processing vessels. Processing workers who are transported to moored vessels to work only while the vessel is at that location and who are not intended to move with the vessel may or may not be “seamen”, depending on their duties and the navigational status of the vessel during the period of their assignments. Precedents find that personnel aboard stationary processing vessels which have been removed from navigation are not “seamen” entitled to seamen’s remedies. *Kathriner v. Unisea, Inc.*, 975 F.2^d 657, 1994 AMC 2787 (9th Cir. 1992); *Garcia v. Universal Seafoods, Inc.*, 459 F.Supp. 463, 1980 AMC 2654 (W.D. Wash. 1978); *New England Fish Co. v. Sonja*, 332 F.Supp. 463, 1972 AMC 130 (D. Ak. 1971). *Hoggatt v. F/V Bering Star*, 1999 AMC 852 (W.D. Wa. 1999), held that a seafood processing barge which operated as a fish processing plant only when it was moored was not a vessel in navigation when it was moored, and a processing worker assigned to the barge was not a “seaman”. The validity of *Hoggatt* is in doubt after *Martinez v. Signature Seafoods, Inc.*, 2002 AMC 2242 (9th Cir. 2002), which held that a seafood processing barge is a “vessel” and processing workers assigned to it are “seamen” under circumstances of the vessel being towed twice a year, carrying equipment and supplies, between Seattle and Alaska.

¹³ Several trial court decisions found that fisheries observers assigned to fishing vessels are “seamen” for purposes of seamen’s remedies, in that they meet the tests for seaman status. Congress has provided by legislation that fisheries observers placed aboard vessels under federal law have no cause of action against the vessel to which they are assigned under maritime law, and they are subject to the federal workers’ compensation act. 18 USC § 1881b(c), enacted in 1996, provides that an “observer on a vessel and under contract to carry out responsibilities under this Act [the Magnuson-Stevens Fisheries Conservation and Management Act] or the Marine Mammal Protection Act of 1972 shall be deemed to be a Federal employee for the purpose of compensation under the Federal Employee Compensation Act (5 USC § 8101 *et seq.*)” 16 USC § 1383a(e)(7), part of the MMPA, precludes personal injury suit against the vessel operator or the vessel for personal injury or death of an observer placed on the vessel under the Marine Mammal Protection Act. *Schaller v. Arctic Alaska Fisheries Corp.*, 1996 AMC 438 (Ak. Superior Ct. 1995), concluded that a fisheries observer placed on a vessel under state law was a “seaman” irrespective that the contract between her employer and the boat operator provided that she would perform no crew duties. Thus, it appears that observers placed on board a vessel under either the Magnuson Act or the Marine Mammal Protection Act cannot bring any personal injury suit against the vessel or the vessel operator, but observers required to be assigned to vessels under state law are “seamen”.

¹⁴ *Smith v. Odom Offshore Surveys, Inc.*, 791 F.2^d 411, 1987 AMC 438 (5th Cir. 1986), held that Coast Guard designation of the vessel as an “oceanographic research vessel” for purposes of documentation is a prerequisite to exclusion of its scientific workers from Jones Act status as seamen under the provisions of the Oceanographic Research Vessels Act, 46 USC App. § 441, *et seq.* *Presley v. Vessel Caribbean Seal*, 709 F.2^d 406, 1984 AMC 2307 (5th Cir. 1983); *Mitola v. Johns Hopkins University*, 1995 AMC 245 (D. Md. 1993); *Kelly v. Western Geophysical Co. of America*, 666 F.Supp. 890, 1988 AMC 1259 (E.D. La. 1987); and *Sennet v. Shell Oil Co.*, 325 F.Supp. 1, 1972 AMC 1346 (E.D. La. 1971), held that scientific personnel serving aboard Coast Guard-designated “oceanographic research vessels” may still be considered “seamen” entitled to the warranty of a seaworthy vessel and are entitled to maintenance and cure, though they are deprived of any Jones Act remedy for personal injuries or death. *Craig v. M/V Peacock*, 760 F.2^d 953, 1986 AMC 2565 (9th Cir. 1985), reexamined the issue whether scientific personnel aboard oceanographic research vessels can be considered to be “seamen” for purposes of the Jones Act and application of the Death on the High Seas Act. *Craig* held that the issue was one of fact rather than of law, and refused to review the trial magistrate’s finding that the scientist in question was not a “seaman” on a vessel which was chartered by his employer to transport him and his fellow scientific workers and to provide a platform for them to conduct their surveys.

¹⁵ Shore-based workers who are not employed to spend a substantial portion of their employment aboard a vessel or identifiable fleet of vessels underway at sea aiding in the work of the vessel are not “seamen”. *Heise v. Fishing Co. of Alaska, Inc.*, 79 F.3^d 903 (9th Cir. 1996), 1996 AMC 1217, interpreted *Chandris, Inc. v. Latsis*, 515 U.S. 347, 1995 AMC 1840 (1995), as holding that a shore-based worker cannot be a seaman. *Heise* involved a laborer who was hired to repair the engine and perform other repair work on a fishing vessel which was in port for extended annual repairs. The employment of its operating crew was terminated, though some employees were retained to accomplish the repairs. Quarters aboard the ship were provided as a convenience. Though the laborer “hoped” to be hired as a crewmember when repairs were complete, such employment was not promised. Summary judgment dismissing claims based on “seaman” status was affirmed.

vessels used to service or repair other vessels;¹⁶ harbor workers on floating cranes used to load and unload other ships;¹⁷ and casino employees on floating casinos.¹⁸

The Supreme Court in *McDermott International, Inc. v. Wilander*¹⁹ held that a person will be considered a “seaman” for purposes of seamen's remedies so long as the person claiming seaman status was more or less permanently assigned to a vessel in navigation and the person contributed to the “function of the vessel in navigation”. The language of the decision may create confusion in that it extends seaman status to persons that “perform the work of a vessel”:

In this regard, we believe the requirement that an employee's duties must “contribut[e] to the function of the vessel or to the accomplishment of its mission” captures well an important requirement of seaman status. It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work.

Wilander upheld a finding of fact that a paint foreman who was assigned to a vessel which was used in painting offshore oil platforms contributed to that function, or the “ship's work”, of that vessel, thus was a “seaman”, though he suffered an injury while performing maintenance on a stationary platform to which he had been transported by the vessel.²⁰

¹⁶ *Gizoni v. Southwest Marine, Inc.*, 502 U.S. 951, 1992 AMC 305 (1991), resolved a conflict between the circuits whether a worker subject to the LHWCA also could be a “seaman” subject to seamen’s remedies relative to injuries suffered while serving a crewmember aboard a vessel, which was part of his LHWCA duties. *Gizoni* ruled that a shipyard worker whose duties were those of a crewmember (a rigging foreman) of an un-powered floating platform used in ship repair operations is entitled to seaman's remedies for personal injury, and remedies under the Longshore & Harbor Worker's Compensation Act are not exclusive where the harbor worker also qualifies as a “seaman”. *Figueroa v. Campbell Industries*, 1995 AMC 793 (9th Cir. 1995), held that such dual workers may recover their medical expenses and loss of income under applicable workers compensation statutes and compensation for general damages under the Jones Act, so long as the workers' compensation claim has not been actually contested and tried, and there is an offset against damages for prior compensation payments.

¹⁷ *Endeavor Marine v. Crane Operators, Inc.*, 234 F.3^d 287, 2001 AMC 581 (5th Cir. 2000), held that a crane operator on a floating crane used to load and unload cargo ships was a seaman, though he came aboard the crane barge only when it was moored or was in the process of mooring. *Endeavor Marine* interpreted the “take him to sea” requirement of *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 1997 AMC 1817 (1997), discussed *infra*, only as requiring that the employee's connection to the vessel regularly exposes him “to the perils of the sea”.

¹⁸ *Thompson v. Casino Magic Corp.*, 708 So.2^d 878 (Ms. S. Ct. 1998); and *Lane v. Grand Casinos of Mississippi, Inc.*, 708 So.2^d 1377 (Ms. S. Ct. 1998), held that workers on floating casinos were not “seamen” entitled to seamen's remedies where they were shore-based workers, had no connection with the vessel when it was in navigation. The courts in both cases made it clear that a casino barge can be a “vessel” under some circumstances, and that a worker assisting as a member of its crew while the vessel was being moved could be considered a “seaman”. See, e.g., *Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F.3^d 379, 2001 AMC 2563 (7th Cir. 2001), which held that the Jones Act would apply to the claims for injury of a worker of a floating casino if the river in which it operated was “navigable” at that place and the craft was considered a “vessel”. A line of cases does hold that workers who serve aboard such vessels when they are underway may be seamen: see, e.g., *Harvey's Casino v. Isenhour*, 2007 AMC 692 (Ia. App. 2006) (two casino workers assigned to a vessel that did operate underway approximately 200 hours per year were “seamen”, thus were not within the jurisdiction of state workers’ compensation coverage); *Wiora v. Harrah's Illinois Corp.*, 2000 AMC 2259 (N.D. Il. 1999) (a full time waitress employed on a riverboat casino is a “seaman”, whose exclusive remedies are under federal maritime law); *Knight v. Grand Victoria Casino*, 2000 U.S. Dist. Lexis 14471 (N.D. Il. 2000) (a blackjack dealer assigned to a casino ship which sometimes cruised contributed to the vessel's mission of entertaining passengers, leaving to the jury the determination whether the plaintiff met the “substantial connection” test of a “seaman”); *Lara v. Harveys Iowa Management Co., Inc.*, 2001 AMC 393 (S.D. Ia. 2000) (a cocktail server on a casino ship was a seaman, though she worked only afternoons and the ship cruised only in the mornings and remained moored the rest of the day).

¹⁹ 498 U.S. 112, 1991 AMC 913 (1991).

²⁰ Not every worker who lives or works aboard a vessel is a “seaman”. The Court noted that there was no challenge in the appeal as to the sufficiency of the trial court's findings that the “ship's work” in that case was to maintain and repair offshore platforms (rather than merely transporting the painters to their work and providing a work base for painters once on station). *Bolden v. Offshore Express, Inc.*, 1992 AMC 2043 (E.D. La. 1992), interpreted *Wilander* as not altering the requirement that

2.3 Employment is “substantial in terms of duration”

In *Chandris v. Latsis*, the Supreme Court rejected the “snapshot” or “duration of voyage” test of determining whether “amphibious” workers who have both shoreside duties and shipboard duties are seamen for the periods they actually are assigned to vessels engaged on voyages: irrespective that the workers may be members of the crew of the vessels for the duration of the vessel’s voyage, *Chandris* holds that seaman status for such workers should be determined on whether the employment as a whole involves substantial duties of going to sea on a vessel or fleet of vessels under common ownership. A determination of “substantial” is guided by a rule-of-thumb whether the on-board duties involve at least 30% of the employee’s recent employment history.

the person claiming status as a seaman was assigned permanently to a vessel or performed a substantial part of his work on the vessel. *Bolden* granted summary judgment holding that as a matter of law a worker was not a “seaman” on a tender vessel on which he slept and ate, but performed no work functions on that vessel. *Hufnagel v. Omega Service Industries, Inc.* 183 F.3d 340 (5th Cir. 1999), held that a drilling platform worker, who was lodged on a jack-up vessel which functioned as a hotel where fixed-platform workers ate and slept, was not a seaman. Though the plaintiff had worked on 26 different offshore platforms owned by thirteen different customers of his employer, the court held the vessels did not constitute a “fleet” of vessels because they were not subject to common ownership or control. Hufnagel's duties as a platform worker in no way contributed to “doing the ship's work.” See *McDermott, Int'l v. Wilander*, 111 S.Ct. 807, 817 (1991). *St. Romain v. Industrial Fabrication & Repair Service, Inc.*, 203 F.3d 376, 2000 AMC 860 (5th Cir. 2000), involved facts similar to *Hufnagel*, with the same result: during his employment with the defendant, he worked aboard liftboats owned by nine different companies and chartered by five different entities, and none of the vessels was owned or operated by his employer. *Johnnie v. Nome Del. Corp., Inc.*, 780 F.Supp. 669 (D. Ak. 1991), construed the *Wilander* rule to find that a food service worker assigned to serve food to oil spill cleanup workers did not contribute to the “function” or “ship's work” of a barracks vessel. The court found that the “function” or ship's work of the vessel was to serve as a floating hotel and, surprisingly, found that serving food to persons living aboard did not contribute to that function. *Kjar v. American Divers, Inc.*, 1994 AMC 522 (D. Hi. 1992), held that the function of a diver support vessel was transporting and tending divers, and divers who assisted in those functions in tying up and unmooring the vessel and tending divers when they were not themselves diving were seamen, and, further, divers are seamen when they were diving. The questions of fact of defining the “ship's work” of a particular vessel and whether a particular plaintiff had seagoing duties that contributed to that work will result in much future litigation. The Supreme Court in *Gizoni v. Southwest Marine, Inc.*, 590 U.S. 951, 1992 AMC 305 (1991), ruled that a shipyard worker whose duties were those of a crewmember (a rigging foreman) of an un-powered floating platform used in ship repair operations is entitled to seaman's remedies for personal injury, and remedies under the Longshore & Harbor Workers’ Compensation Act are not exclusive where the harbor worker also qualifies as a “seaman”. A footnote to *Gizoni* is that, on remand, it was determined by the trial court that the paint float to which the plaintiff claimed he was assigned was not a “vessel in navigation”. On appeal, it was determined that the punt could be a vessel, though it did not have a transportation function. *Gizoni v. Southwest Marine, Inc.*, 56 F.3d 1138, 1995 AMC 2093 (9th Cir. 1995). *Yoash v. McLean Contracting Co., Inc.*, 907 F.2d 1481 (4th Cir. 1990), held that pile bucks whose primary functions were to aid in bridge construction rather than in navigation of the floating crane barge on which they were injured, did not contribute to their vessel's “transportation function”. *Garret v. Dean Shank Drilling Co., Inc.*, 799 F.2d 1007 (5th Cir. 1986); and *Golden v. Rowan Companies, Inc.*, 778 F.2d 1022 (5th Cir. 1985), discussed the test in terms of whether the claimant performed duties which contribute to the function of the vessel, to the accomplishment of its mission, or to its maintenance during its movement or its anchorage. The requirement that a seaman be aboard a vessel “primarily to aid in navigation” applies more stringently to shore-based maritime workers than to waterborne employees who risk the “hazards of the sea”. *Weber v. S.C. Loveland Co., Inc.*, 1989 AMC 2273 (E.D. Pa. 1989). *Gates v. Delta Corrosion Offshore, Inc.*, 715 F.Supp. 160, 1989 AMC 2324 (W.D. La. 1989), held that a diver who was quartered aboard a vessel did not meet the test of “permanent assignment” or “substantial work” and contributing to the function of the vessel, though he performed some deckhand duties incidental to his non-maritime work as a diver, following *Barrett* in finding that seaman status should be given to “workers whose duties are truly navigational [despite having] serve[d] aboard a vessel for a relatively short period of time.” *Gates* found that the worker's presence aboard the vessel was “essentially fortuitous”, as his primary duties were aboard a drilling rig, and that his reason for presence on the vessel was transportation before and after his work, and off-hours quartering during his work on the platform. It found that the “function” of the vessel was to transport and house the divers and their equipment, and the plaintiff diver was the beneficiary or object of the mission, not a contributor to it. *Griffen v. Martech Int'l, Inc.*, 1990 AMC 2651 (C.D. Ca. 1989), reached a similar conclusion with respect to a commercial diver that was essentially a passenger aboard the vessel when it was underway.

The traditional test for “seaman” status required that the worker have a “more or less permanent attachment” to a vessel in navigation. This test is appropriately applied to “deep sea” seamen who serve on lengthy voyages, but does not apply well to people whose employment is “amphibious”, involving duties ashore or that do not involve taking a vessel to sea. In *Chandris, Inc. v. Latsis*,²¹ the Supreme Court reviewed the policy reasons for extending seamen status to “part-time” crewmembers and stated a two part test for “seaman” status:²²

[T]he essential requirements for seaman status are twofold. First ... an employee's duties must contribute to the function of the vessel or to the accomplishment of her mission. ... Second, ... a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.

The Court rejected the plaintiff's argument for a “duration of the voyage” rule that extended seamen status during a voyage to any crewmember who was engaged to complete the voyage (which would apply to even short voyages). As to what constitutes a “substantial connection”, the Court stated:

Generally, the Fifth Circuit seems to have identified an appropriate rule of thumb for the ordinary case: a worker who spends less than about 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones Act. This figure of course serves as no more than a guideline established by years of experience, and departure from it will certainly be justified in appropriate cases. As we have said, “[t]he inquiry into seaman status is of necessity fact specific; it will depend on the nature of the vessel and the employee's precise relation to it.” *Wilander*, 498 U.S. at 356. Nevertheless, we believe that courts, employers and maritime workers can all benefit from reference to these general principles.

Drake v. Danos & Curole Marine Contractors., L.L.C., 2007 U.S. Dist. Lexis 17883 (E.D. La. 2007), involved a cook assigned to a vessel 11 days when he received injury when the ship allided with an offshore structure. The court held he was not a “seaman”, on the rationale that the plaintiff's employer was a contractor who assigned plaintiff to both shoreside and shipboard jobs, that during the assignment to the vessel in issue the plaintiff's job description had not changed, and that during his employment history for that employer he was assigned to vessels less than 30% of the time.

2.3.1 Rule of thumb: 30% of employment time on vessel. *Chandris, Inc. v. Latsis* propounded the general rule that the worker's duties towards the function of the vessel must be substantial both in terms of duration and nature, approving a rule of thumb that shipboard duties be at least 30% of an “amphibious employee's” employment. *Roberts v. Cardinal Services, Inc.*²³ held that an amphibious offshore oil field worker who spent only 27.5% of his time on vessels under common ownership (though if his employment time on third-party owned vessels was included his work history would exceed the 30% rule) did not meet the 30% rule of thumb, and the employer was entitled to summary judgment that the worker was not a seaman as a matter of law. *Lormand v. Superior Oil Co.*²⁴ reviewed the issue and held that a welder who performed only 14% of his work duties aboard vessels was not a “seaman”. *Cavin v. State of Alaska*²⁵ held that though a state police trooper had been assigned to enforcement vessels only 19% of his employment duties on “boat duty” and 26% on “mixed boat and land” duty over the prior three years the trial court considered, the issue of his status as a Jones Act seaman should go to a jury because of the seasonal nature of his boat-duty assignments and testimony that boat duty in the first four years of his seven year employment involved substantially more boat time. Other decisions also have not consistently enforced this rule: *Eckert v. United States*²⁶ held that even

²¹ 515 U.S. 347, 1995 AMC 1840 (1995).

²² 515 U.S. at 369, 1995 AMC at 1856, citations and internal quotation marks omitted.

²³ 266 F.3^d 368, 2002 AMC 83 (5th Cir. 2001).

²⁴ 845 F.2^d 346 (5th Cir. 1987).

²⁵ 3 P.3^d 323 (Ak. 2000).

²⁶ 2002 AMC 2064 (S. D. Fl. 2002).

marginal cases should be decided by the jury: in *Eckert*, a crewmember whose afloat time was estimated to be only 16% to 25% of his total employment time was allowed to argue his case to the jury.

2.3.2 New hires and changes of job classification. *Foulk v. Donjon Marine Co.*²⁷ reversed the summary judgment of a trial court that a commercial diver who was injured on the first day of his employment did not have a sufficient connection with a vessel because he was assigned to the vessel for only ten days: the Third Circuit held that the number of days of an assignment is only one factor to be considered in determining whether there was a “substantial connection” to a vessel in navigation, and the issue of fact should have been submitted to the jury. *Harbor Tug & Barge Co. v. Papat*²⁸ held that though a professional seaman spent most of his time at sea, he was not a “seaman” the day he accepted a temporary job to perform dock-side painting on a tug. *Shade v. Great Lakes Dredge*²⁹ also involved injury to a dredge worker who received his work assignments through a union hiring hall. The jury found that he was a “seaman”, based on his long-term employment history. On appeal of the issue of “substantial connection”, the Court of Appeals reversed and remanded for new trial because the trial court had refused to exclude evidence of the plaintiff’s prior work history. The Court of Appeals held that the plaintiff be employed on vessels under common ownership on a continual, uninterrupted basis:

After the termination of the employment relationship, the employee severs any duties that the employee had towards the employer with respect to the performance of the former job. The employee does not have any ongoing or regular responsibilities relating the vessels in the former employer’s fleet. Upon being rehired, the employee does not recapture that prior relationship. Instead, the employee adopts a prospective set of duties and responsibilities that may be distinct from the employee’s former performance and the connections the employee once had to any vessels in the employer’s fleet are thus separate from the employee’s new status. In effect, the employment in the new position could be considered to be for an entirely different employer, and as such, evidence of the prior employment would have no relevance to the employee’s later position with the employer. Thus, we hold that evidence of an employee’s prior assignment with the same employer is not admissible under the Fleet Seaman Doctrine if those assignments were not part of a continuous employment relationship between the employer and employee.

*Sologub v. The City of New York*³⁰ affirmed the finding that a ferry system worker assigned to terminal duties was not a “seaman” at the time he was injured by assisting in the docking of a ferry. Though the plaintiff’s job title was “deckhand” and he had served as crewmember of various ferry boats previously, he had been assigned terminal duties for over five months preceding his injury, with only one shift as a relief crewmember on a ferry, and was reassigned to a “steady position” as a terminal worker more than a month prior to his injury. *Little v. Amoco Production Company*³¹ addressed the substantial connection issue in the context of a member of a “casing crew” assigned to a spud barge at the time of injury. The plaintiff had been hired by the employer for three weeks, during which he had worked with two crews on five work assignments, four of the five involving vessels, but none of the vessels was owned or operated by his employer. His combined work time in the three weeks was 43 hours, 10 hours on a land-based job, 3 hours on one vessel, 10 hours on another, 6 hours on another, and 4 hours on the spud barge. The trial court granted summary judgment dismissing claims against the employer on the ground that the plaintiff was not a seaman as he had no substantial connection with either a single vessel or with an identifiable fleet of vessels having common ownership or control: though the percentage of his employment time on vessels was 77% in the three weeks preceding his injury, his assignment to each vessel was transitory, he was not a member of the crew of any of the vessels, and there had been no “new

²⁷ 144 F.3^d 252, 1998 AMC 2926 (3rd Cir. 1998).

²⁸ 520 U.S. 548, 1997 AMC 1817 (1997).

²⁹ 154 F.3^d 143, 1999 AMC 147 (3rd Cir. 1998).

³⁰ 202 F.3^d 175, 2000 AMC 742 (2nd Cir. 2000).

³¹ 734 So.2^d 933 (La. App. 1999).

assignment” which changed his essential duties. The court distinguished *Wisner v. Professional Divers of New Orleans*³² as being based on the fact that Wisner was engaged in “inherently maritime” employment, doing “classical seamen's work” (a diver).

2.3.3 Recreational sailors as “seamen”. *Naglieri v. Bay*³³ held that an “avid sailor” who participated in many races, including a number aboard the vessel on the boat on which he was serving when he was swept overboard, did not derive his livelihood from the sea and thus was not a “seaman”. *Hardesty v. Rossi*³⁴ held that a recreational sailor who occasionally crewed a racing sailboat did not meet “seaman” test where she spent substantially less than 30% of her total combined employment and recreation time aboard the defendant's vessel. Professional seamen on yachts can be considered seamen entitled to Jones Act remedies and the remedies of maintenance and cure if they meet the tests of their duties contributing to the function of the vessel and the employment is substantial in terms of both its duration and its nature. *Boy Scouts of America v. Graham*³⁵ held that issues of fact precluded summary judgment that an adult who served as mate on a Sea Scout ship engaged on a ten-day training and recreation cruise was or was not a “seaman” where he had applied for and had been accepted for the position, and the vessel owner retained control of termination of employment and on-the-job conduct. *Knight v. Longaker*³⁶ reviewed *Graham* and other precedents³⁶ on crewmembers on recreational vessels and granted summary judgment determining that a frequent crewmember on a sailboat that had entered 16 or 17 recreational races in the year preceding injury was not a “seaman”, as she had only a transitory or sporadic connection to the vessel.³⁷

2.3.4 Employment must be on vessel. *Nunez v. B & B Dredging, Inc.*³⁸ held that the vessel-related time must be actually on board the vessel: a dredge foreman who was permanently assigned to supervise the operations of a dredge but who spent only about 10% of his working time actually on board the vessel and most of the balance of his time supervising the operations at the discharge end of the dredge's hoses did not meet the test of a seaman. *O'Hara v. Weeks Marine, Inc.*³⁹ held that a worker who spent more than half of his working hours during the five month period before his injury aboard two construction barges was not a “seaman”, as his duties aboard the barges were not related to the vessels' functions as such, but, rather, were in performing tasks related to repair of a pier to which the barges were secured, and he did not derive any part of his livelihood from sea-based activities. *Ryan v. United States*⁴⁰ held that vessel-related time need not all be on the vessel: time spent ashore in preparing or cleaning up from a voyage can be included.

2.3.5 Fleets of vessels. Workers assigned to fleets of vessels and who devote a substantial amount of their employment activities to work aboard that fleet when the vessels are in navigation have been held to have seamen status.

³² 1999 AMC 1189 (La. 1999).

³³ 977 F.Supp. 131, 1997 AMC 2009 (D. Cn. 1997).

³⁴ 1995 AMC 2596 (D. Md. 1995).

³⁵ 86 F.3^d 861, 1996 AMC (9th Cir. 1996.,

³⁶ 2007 U.S. Dist. Lexis 47080 (N.D. Ca. 2007).

³⁷ See also *Xanadu Maritime Trust v. Meyer*, 21 F.Supp. 2^d 1104 (N.D. Ca. 1998); *Naglieri v. Bay*, 977 F. Supp. 131, 1997 AMC 2009 (D. Cn. 1997); *Hardesty v. Rossi*, 1995 AMC 2596 (D. Md. 1995); *In re Complaint of Falkiner*, 1989 AMC 796 (E.D. Va. 1989); *Heath v. American Sail Training Association*, 644 F. Supp. 1459, 1988 AMC 2963 (D. R.I. 1986).

³⁸ 288 F.3^d 271, 2002 AMC 1664 (5th Cir. 2002).

³⁹ 2002 AMC 1356 (2nd Cir. 2002).

⁴⁰ 331 F. Supp. 2d 371, 2004 AMC 2151 (D. Md. 2004).

By fleet we mean an identifiable group of vessels acting together or under one control. We reject the notion that fleet of vessels in this context means any group of vessels an employee happens to work aboard. Unless fleet is given its ordinary meaning, the fundamental distinction between members of a crew and transitory maritime workers such as longshoremen is totally obliterated.⁴¹

To be considered a “fleet”, the group of vessels must be identifiable as a fleet or be under common ownership.⁴²

2.3.6 Transitory workers performing only vessel-related work. *Bertrand v. International Mooring & Marine, Inc.*⁴³ found to be a “seaman” a member of an anchor-handling crew assigned to various vessels and who was injured after a seven day mission on a vessel chartered by his employer. He was found to be performing traditional maritime activity of a blue-water seaman on a vessel or vessels comprising an identifiable fleet in every respect except common control or ownership, spent 100% of his time on vessel-related work and his job was coextensive in time with the missions of the vessel.⁴⁴ *Whitney v. The Tug Moby Ruth*⁴⁵ held that the operator of a mobile truck crane which was stationed on a construction barge for a 10 day project within a harbor did not meet the “substantial in duration” test for status as a seaman. *Whitney* also found that the worker was not a “seaman” on the tug on which he ate and slept during the 10 day employment.

2.3.7 Transitory workers who are assigned by employers to different non-owned vessels. The *Chandris* rule clarifies the status of “amphibious” workers who spend part of their employment ashore and part at sea, but does not address the issue of the status of a person who is not otherwise employed except for brief periods as a crewmember of one or a series of different vessels. *Borque v. D. Huston Charter Services, Inc.*⁴⁶ held that a retiree friend of a towboat master who agreed to act as a deckhand on an assignment expected to take only 2.5 hours did not meet the test of a “more or less permanent connection with the vessel.” *Van Norman v. Baker Hughes, Inc.*⁴⁷ and *Brown v. Trinity Catering, Inc.*⁴⁸ held that members of crews of vessels that were employed by crew supplying companies or caterers and were assigned to vessels of various owners and operators for short periods as short as one-week do not qualify as “seamen”. This author believes the *Brown* and *Van Norman* courts have misconstrued the “snapshot” test of seaman status: that test was intended to apply to “amphibious” workers who sometimes work ashore and sometimes on ships. The rejection of the snapshot test or voyage test by *Chandris, Inc. v. Latsis* was to prevent land-based amphibious workers moving into and out of seamen’s status depending on which side of the shoreline they are employed on a given day. It

⁴¹ *Barrett v. Chevron U.S.A., Inc.*, 781 F.2^d 1067, 1986 AMC 2455 (5th Cir. 1986). See also *Lirette v. N. L. Sperry Sun, Inc.*, 831 F.2^d 554, 1988 AMC 1042, (5th Cir. 1987); *Langston v. Schlumberger Offshore Services, Inc.*, 809 F.2^d 1192 (5th Cir. 1987); *Buras v. Commercial Testing & Engineering Co.*, 736 F.2^d 307, 1985 AMC 1177 (5th Cir. 1984); *Laudry v. John E. Graham & Sons, Inc.*, 525 So.2^d 276,, 1989 AMC 1368 (La. App. 1988). *Laudry* held that a port captain assigned to a fleet of 80 vessels was a “seaman”.

⁴² *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 1997 AMC 1817 (1997), held that a “fleet” must be under common ownership.

⁴³ 700 F.2^d 240, 1984 AMC 1740 (5th Cir. 1983).

⁴⁴ See also *Buras v. Commercial Testing & Engineering Co.*, 736 F.2^d 307, 1975 AMC 1177 (5th Cir. 1984), which discussed the issue in finding that a land-based coal tester was not a seaman where he had no permanent or substantial connection with any vessel or fleet of vessels, and spent 25% of his time working on land. *Lirette v. N. L. Sperry Sun, Inc.*, 831 F.2^d 554, 1988 AMC 1042 (5th Cir. 1987), found that the claimant was a “transitory worker” because his duties aboard the owner’s vessel on which he served were not the traditional duties of a seaman.

⁴⁵ 2002 AMC 2742 (S.D. Fl. 2002).

⁴⁶ 2007 U.S. Dist. Lexis 91346 (S.D. Tx. 2007).

⁴⁷ 2007 U.S. Dist. LEXIS 91861 (S.D. Tx. 2007).

⁴⁸ 2007 U.S. Dist. LEXIS 90868 (E.D. La. 2007).

was not intended to deny seamen's remedies to workers who in fact are full-time seamen, who regularly go to sea on the ships to which they are assigned, with respect to the illnesses and injuries they sustain in the service of those vessels, and would qualify as seamen but for the fact that they are employed by a third party instead of the operators of the vessels to which they are assigned. The status of such workers is in doubt: if may be that they are not covered employees under the federal Longshore & Harbor Workers's Compensation Act are exempt from application of the workers' compensation acts of some states (see, e.g., R.C.W. 51.12.100(1), which excludes from coverage of the Washington legislation the "master or member of a crew of any vessel").

2.3.8 Work is related to going to sea. *Chandris* expressed that the test that the employment involve a "substantial connection" with a vessel in navigation required some combination both that the employment was of substantial duration and that the nature of the employment involved "going to sea", to separate "the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation."⁴⁹ In *Harbor Tug & Barge Co. v. Papai*,⁵⁰ the Supreme Court reviewed the "substantial connection" issue in the context of seafarers who are hired from a union hiring hall on a day-to-day basis to work on tugs of three separate and unrelated employers, where the employee was not assigned to take the vessel to sea on the day for which he was hired to perform maintenance work on a tug. Some days the plaintiff performed deckhand duties while underway on the tugs of one of the three employers. Other days he performed maintenance duties while a tug was docked. In the 2½ months prior to his injury, he had been employed by Harbor Tug on 12 separate occasions, and had worked for other employers. Though the plaintiff estimated that 70% of his employment over the prior two years was as a deckhand on tugs underway, he was injured on a day he was hired to paint on a temporary job assignment a tug which was then moored to a dock, and his employment did not anticipate that the tug would be underway. The Court stated:

[The engagement in question] was the sort of "transitory or sporadic" connection to a vessel or group of vessels that, as we explained in *Chandris*, does not qualify one for seaman status. ...

Jones Act coverage is confined to seamen, those workers who face regular exposure to the perils of the sea. An important part of the test for determining who is a seaman is whether the injured worker seeking coverage has a substantial connection to a vessel or a fleet of vessels, and the latter concept requires a requisite degree of common ownership or control. The substantial connection test is important in distinguishing between sea- and land-based employment, for land-based employment is inconsistent with Jones Act coverage.

...

Importantly, the Court in *Papai* commented that the "substantial connection" element required that the employee have sea-going duties:

For the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea. This will give substance to the inquiry both as the duration and the nature of the employee's connection to the vessel and be helpful in distinguishing land-based from sea-based employees.

Papai denied seaman status to the plaintiff though he was a professional seaman who spent more than 70% of his employment status on vessels which went to sea on short voyages because he was employed only on a day-to-day basis by unrelated employers and, at the time of his injury, he was hired only to perform non-seagoing maintenance on a vessel.⁵¹ *Spears v. Kajima Engineering & Construction, Inc.*⁵²

⁴⁹ *Chandris*, 515 U.S. at 368, 1995 AMC at 1856.

⁵⁰ 520 U.S. 548, 1997 AMC 1817 (1997).

⁵¹ A number of other cases illustrate the problems with application of this doctrine. *Sologub v. The City of New York*, 202 F.3d 175, 2000 AMC 742 (2nd Cir. 2000), affirmed the finding that a ferry system worker assigned to terminal duties was not a "seaman" at the time he was injured by assisting in the docking of a ferry. Though the plaintiff's job title was "deckhand" and he had served as crewmember of various ferry boats previously, he had been assigned terminal duties for over five months

held that a worker on a construction barge who was dispatched from an operating engineers' union to work for the employer as a repairman on a construction project, who did not work on the vessel when it was not secured by a headline to the shore and had never worked aboard the barge before and presented to evidence that he would work aboard the barge after completion of the project, was not a "seaman", as he was not engaged in a sea-based activity or duty when the accident occurred. *O'Hara v. Weeks Marine, Inc.*⁵³ held that a worker who spent more than half of his working hours during the five month period before his injury aboard two construction barges was not a "seaman", as his duties aboard the barges were not related to the vessels' functions as such, but, rather, were in performing tasks related to repair of a pier to which the barges were secured, and he did not derive any part of his livelihood from sea-based activities. See also *Delange v. Dutra Construction Co., Inc.*, quoted *supra*. *Cabral v. Healy*

preceding his injury, with only one shift as a relief crewmember on a ferry, and was reassigned to a "steady position" as a terminal worker more than a month prior to his injury. *Naglieri v. Bay*, 977 F.Supp. 131, 1997 AMC 2009 (D. Cn. 1997), held that an "avid sailor" who participated in many races, including a number aboard the vessel on the boat on which he was serving when he was swept overboard, did not derive his livelihood from the sea and thus was not a "seaman". *Cavin v. State of Alaska*, 3 P.3^d 323 (Ak. 2000), held that though a state police trooper had been assigned to enforcement vessels only 19% of his employment duties on "boat duty" and 26% on "mixed boat and land" duty over the prior three years the trial court considered, the issue of his status as a Jones Act seaman should go to a jury because of the seasonal nature of his boat-duty assignments and testimony that boat duty in the first four years of his seven year employment involved substantially more boat time. *Jones v. United States*, 1996 WL 75583 (E.D. La. 1995), held that a riverboat pilot employed on various vessels did not have a sufficient connection to the particular vessel on which he sustained injury. *Fouk v. Donjon Marine Co.*, 144 F.3^d 252, 1998 AMC 2926 (3rd Cir. 1998), reversed the summary judgment of a trial court that a commercial diver who was injured on the first day of his employment did not have a sufficient connection with a vessel because he was assigned to the vessel for only ten days: the Third Circuit held that the number of days of an assignment is only one factor to be considered in determining whether there was a "substantial connection" to a vessel in navigation, and the issue of fact should have been submitted to the jury. *Wisner v. Professional Divers of New Orleans*, 1999 AMC 1189 (La. 1999), held that a commercial diver whose employment placed him on vessels for 90% of his employment time is a Jones Act seaman, irrespective that the vessels on which he worked were not under common ownership or control. *Witte v. Matson Navigation Co., Inc.*, 1998 AMC 2968 (W.D. Wa. 1998), held that a Port Relief Engineer hired to perform the duties of the regular engineering duty officers while a ship was in port for three days but was not hired to take the vessel to sea did not meet the test of a sufficient "substantial connection" to the vessel. *Lewis & Clark Marine, Inc. Limitation Process*, 50 F.Supp.2^d 925, 1999 AMC 2764 (E.D. Mo. 1999), held that fireworks technicians working on a barge during a fireworks display did not have the requisite "substantial connection" with the vessel to qualify as "seamen" for purposes of Jones Act status or entitlement to warranties of seaworthiness. *Bundens v. J. E. Brenneman Co.*, 46 F.3^d 292, 1995 AMC 1330 (3rd Cir. 1995), affirmed a determination that a diver who was killed while assisting in securing mooring lines of a barge from which he sometimes worked was not a "seaman" where he (1) kept his diving equipment at home, rather than on the vessel, (2) commuted to work and received his diving assignments on shore, (3) never ate or slept on the vessel, (4) his duties included diving and dockbuilding, (5) his job title was "wharf and dockbuilder", (6) was a member of the Wharf and Dockbuilders and Pile Drivers Union, (7) had dockbuilding duties that remained the same whether he was working on land or from the barges, and (8) spent approximately two-thirds of his time as a dockbuilder and one-third as a diver. See also *Gipson v. Kajima Engineering & Const. Inc.*, 972 F.Supp. 537, 1997 AMC 2606 (C.D. Ca. 1997). *Little v. Amoco Production Company*, 734 So.2^d 933 (La. App. 1999), involved the substantial connection issue in the context of a member of a "casing crew" assigned to a spud barge at the time of injury. The plaintiff had been hired by the employer for three weeks, during which he had worked with two crews on five work assignments, four of the five involving vessels, but none of the vessels was owned or operated by his employer. His combined work time in the three weeks was 43 hours, 10 hours on a land-based job, 3 hours on one vessel, 10 hours on another, 6 hours on another, and 4 hours on the spud barge. The trial court granted summary judgment dismissing claims against the employer on the ground that the plaintiff was not a seaman as he had no substantial connection with either a single vessel or with an identifiable fleet of vessels having common ownership or control: though the percentage of his employment time on vessels was 77% in the three weeks preceding his injury, his assignment to each vessel was transitory, he was not a member of the crew of any of the vessels, and there had been no "new assignment" which changed his essential duties. The court distinguished *Wisner v. Professional Divers of New Orleans*, 1999 AMC 1189 (La. 1999), as being based on the fact that Wisner was engaged in "inherently maritime" employment, doing "classical seamen's work" (a diver).

⁵² 2002 AMC 2157 (Cal. App. 2002).

⁵³ 2002 AMC 1356 (2nd Cir. 2002).

*Tibbits Builders, Inc.*⁵⁴ addressed the maritime nature of the employment as part of the “substantial connection” test. *Cabral* applied *Chandris* and *Papai* to determine that a crane operator who was injured while operating a crane on a barge did not meet the test of a “seaman”, though his duties on the barge involved approximately 90% of his employment time, as he was basically a crane operator who just happened to be assigned to a crane on a barge:

Cabral was hired to work on *Barge 538* as a crane operator and not as a crew member. ... All of the evidence points to one conclusion: that Cabral was a land-based crane operator who happened to be assigned to a project which required him to work aboard *Barge 538*.

*Endeavor Marine, Inc. Limitation Process*⁵⁵ reached the opposite result on similar facts. *Endeavor Marine* interpreted the “going to sea” prong of the “substantial connection” test so far as the employment's nature was not an absolute requirement but was instead an expression that the employment must involve exposure to the perils of the sea. In *Endeavor*, though the operator of a floating crane accompanied the barge only once while it was being transported to a new location, the Fifth Circuit held that the facts that he spent almost all of his employment time on the vessel and during his employment he was routinely exposed to the perils of the sea, he was a “seaman”. *Gipson v. Kajima Engineering & Const. Inc.*⁵⁶ held that a worker's employment was “land based” because his time on board was limited to the time the barge on which he served was a secured work platform.

*Saienni v. Capital Marine Supply, Inc.*⁵⁷ provides an excellent analysis of whether the duties of a shoreside mechanic met the *Chandris* test that the employment involved sufficient seagoing duties. *Poole v. Kirby Inland Marine, L.P.*, 2006 U.S. Dist. Lexis 50019 (S.D. Tx. 2006), involved a harbor worker whose duties aboard a fleet of vessels similarly did not involve taking them to sea. *James v. Wards Cove Packing Co.*⁵⁸ reversed a summary judgment that the duties of former crewmember who was employed during off-season lay-up of a fleet of commercial fishing vessels did not “go to sea”: the facts that the vessels were from time-to-time moved about their in-water berths during the off-season and the worker performed the same duties during the summer operating season raised issues of fact whether the vessels were removed from navigation and the plaintiff did take them to sea as a seaman. *Grennan v. Crowley Marine Services, Inc.*⁵⁹ held that a person employed only to load and unload vessels and did not “go to sea” on them was a land-based worker although he lived on the vessels of the fleet of tugs and barges that were being unloaded in a remote area of eastern Russia, and he was forbidden by immigration laws from going ashore. *Phelps v. Bulk III Inc.*⁶⁰ denied summary judgment that a plaintiff who was hired only to load and unload barges was not a seaman, without discussion of this element of determining seaman status.

2.4 Status of Vessel

For an employee to have seaman status, he must be assigned to and be serving on a “vessel”, and that vessel must be “in navigation” on “navigable waters”.

2.4.1 Definition of a “vessel”. Until the Supreme Court decided that a “vessel” can be any floating structure used or capable of being used as a means of transporting goods or personnel by

⁵⁴ 118 F.3^d 1363, 1997 AMC 2419, amended 128 F.3^d 1290, 1998 AMC 275 (9th Cir. 1997).

⁵⁵ 234 F.3^d 287, 2001 AMC 581 (5th Cir. 2000).

⁵⁶ 972 F.Supp. 537, 1997 AMC 2606 (C.D. Ca. 1997).

⁵⁷ 2005 U.S. Dist. Lexis 6928 (E.D. La. 2005).

⁵⁸ 2007 AMC 897 (9th Cir. 2006).

⁵⁹ 128 Wn. App. 517, 116 P.3^d 1024 (Wn. App. 2005).

⁶⁰ 2007 U.S. Dist. LEXIS 81000 (E.D. La. 2007).

water, the various circuit courts of appeal used varying rules as to whether special purpose vessels that did not have as their primary purpose transportation on the water were “vessels”.⁶¹

⁶¹ Until the decision of the Supreme Court in *Stewart v. Dutra Const. Co.*, all circuits but the Ninth Circuit required that a watercraft other than a traditional vessel be an instrumentality of commerce or be used to transport passengers, cargo or equipment from place to place on navigable waters, or be actually involved in transit at the time of injury to be considered a “vessel” for purposes of its crewmembers qualifying for “seamen” status. See, e.g., *DiGiovanni v. Traylor Bros. Inc.*, 959 F.2^d 1119, 1992 AMC 1521 (1st Cir. 1991); *Tonnesen v. Yonkers Contracting Co.*, 82 F.3^d 30, 1996 AMC 1777 (2nd Cir. 1996); *Ellender v. Kiva Construction & Engineering, Inc.*, 909 F.2^d 803 (5th Cir. 1990); *Giffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2^d 31, 1975 AMC 2527 (3rd Cir. 1975). *Stewart* adopted the definition stated in 1 U.S.C. § 3, that, unless otherwise clear from the context, the term “vessel” includes “every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water,” making it clear that the watercraft need not have a transportation function so long as it was in navigation, meaning that it was not taken out of service, permanently moored, or otherwise rendered practically incapable of maritime transport. *Stewart* states:

A ship and its crew do not move in and out of Jones Act coverage depending on whether the ship is at anchor, docked for loading or unloading, or berthed for minor repairs, in the same way that ships taken permanently out of the water as a practical matter do not remain vessels merely because of the remote possibility that they may one day sail again.

The Court further stated:

[T]he “in navigation” requirement is an element of the vessel status of a watercraft. It is relevant to whether the craft is “used, or capable of being used” for maritime transportation. A ship long lodged in a drydock or shipyard can again be put to sea, no less than one permanently moored to shore or the ocean floor can be cut loose and made to sail. The question remains in all cases whether the watercraft’s use “as a means of transportation on water” is a practical possibility or merely a theoretical one.

Thus, the *Stewart* opinion adopts the 1 U.S.C. § 3 definition, but states that to be a “vessel” the watercraft must be “practically capable” of being used as a means of transportation on the water.

Holmes v. Atlantic Sounding Co., as reported at 429 F.3^d 174, 2005 AMC 2612 (5th Cir. 2005), originally held that not all floating craft that are not permanently removed from navigation are “vessels”: non-traditional craft and other work platforms which do not designed to or do not transport cargo other than the craft’s own equipment or personnel across navigable waters are not “vessels” for purposes of their crews being Jones Act seamen. Specifically, the original *Holmes* opinion broadly ruled that a quarters barge, which the court described as a “floating dormitory”, is not a “vessel” for Jones Act purposes. The original *Holmes* opinion held that *Stewart* did not affect the test expressed in *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3^d 344, 1998 AMC 1390 (5th Cir. 1998), for attributes common to “non-vessels”:

- (1) The structure was constructed to be used primarily as a work platform;
- (2) the structure is moored or otherwise secured at the time of the accident; and
- (3) although the platform is capable of movement, and is sometimes moved across navigable waters in the course of normal operations, any transportation function is merely incidental to the platform’s primary purpose.

See also *Gremillion v. Gulf Coast Catering Co.*, 904 F.2^d 290, 1991 AMC 506 (5th Cir. 1990), which *Holmes* stated remained viable as precedent. In an unusual procedure, the same panel of judges withdrew the original opinion and substituted an opinion that held that the quarters barge “is a vessel for Jones Act purposes”, holding that *Stewart* requires overruling of *Gremillion* in that *Stewart*’s holding that “a ‘vessel’ is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment” requires a holding that the quarters barge, which does transport the attached (but presumably detachable) quarters modules, sleeping and eating “equipment” and supplies for members of the crews of the dredges it served during its frequent moves (14 in the eight months preceding the plaintiff’s injury) is a “vessel”. *Holmes v. Atlantic Sounding Co.*, 437 F.3^d 441, 2006 AMC 182 (5th Cir. 2006). It remains to be resolved whether any part of the test of a “vessel” stated in *Ruddiman v. A Scow Platform*, 38 Fed. 158 (D. N.Y. 1889), remains: that to be a “vessel” floating structures that are capable of being moved must meet *some* of three tests: (1) be designed *or* used for the purpose of navigation; (2) be engaged in the uses of commerce; (3) be engaged in the transportation of persons or cargo, and that structures that are by nature, build, design and use are not so engaged are not “vessels”, such structures including “drydocks, floating saloons, bath-houses, floating bethels [places of worship for seamen], floating boat-houses, and floating bridges, all of which have been held not to be vessels within the maritime law.” *Jordan v. Shell Offshore Inc.*, 2007 U.S. Dist. Lexis 2192 (S.D. Tx. 2007), considered the distinctions between *Gremillion* and *Holmes* in determining

2.4.2 Vessel is “In Navigation”. “A vessel is in navigation when ‘engaged as an instrument of commerce and transportation on navigable waters.’”⁶² The “in navigation” test has two parts: first, the vessel must be “in navigation” (*e.g.*, has been placed in navigation after construction and has not been “withdrawn from navigation”), and, second, is in operation afloat on “navigable waters”.

2.4.3 On navigable waters. *Stanfield v. Shellmaker, Inc.*⁶³ held that a worker on a dredge employed only on artificial irrigation canals was not a “seaman” in that the “vessel” on which he was employed was not involved in “navigation”, in that it did not move on navigable waters. *Gault v. Modern Continental/Roadway Construction Co.*⁶⁴ reversed a summary judgment and remanded for determination by a jury the issue whether a flood control channel where navigation was forbidden by regulation was “navigable”, on the evidence that the barge got there by navigation. *Thompkins v. Lake Chelan Recreation, Inc.*⁶⁵ held that a crewmember on a passenger carrying commercial vessel that operated on Lake Chelan, a 70 Mile-long lake located entirely within the State of Washington and which is used in commercial carriage of passengers and cargo, was not a Jones Act seaman, as the lake is not within admiralty jurisdiction as it is not unified with other waters that form a highway for interstate or foreign commerce by water (it is connected to the Columbia River by a four mile long tunnel which is not navigable).

2.4.4 Vessel is afloat. A drilling platform permanently affixed to the bottom is not a “vessel”.⁶⁶ *Johnson v. Odeco Oil & Gas Co.*⁶⁷ held that an ocean drilling facility was not a “vessel” where it had been in place over 24 years and its owner had no intention of moving it. A vehicle that moved through the water but did not float was held to be a “vessel” in *Lee v. Great Lakes Dredge & Dock Co.*, 2007 U.S. Dist. Lexis 84452 (S.D. N.Y. 2007): a “Coastal Research Amphibious Buggy” (a three-wheeled vehicle amphibious vehicle that moves by the rotation of its rubber tires on the sea bottom or on land. and does not float but, rather, rolls on its wheels over the bottom) was held to be a “vessel” for purposes of its operator being a Jones Act seaman.

2.4.5 Vessel has been commissioned. The second part requires that the vessel has been commissioned to navigate (*e.g.*, has been placed in service or is available to be placed in service after completion of building or reconstruction). *Reynolds v. Ingalls Shipbuilding Div.*⁶⁸ held that a ship on sea trials was not yet a “vessel”, thus those working aboard during sea trials were not “seamen”. *Williams v. Avondale Shipyards, Inc.*⁶⁹ held that a new ship undergoing sea trials to determine what additional work was required was not yet an “instrumentality of commerce” and hence was not yet a “vessel in

that a “floating offshore installation” inspected by the Coast Guard, used as a quarters barge at an oil well, was a “vessel” in that it was expected to be towed to another location for use upon expiration of the production life of the well to which it was moored. *Lee v. Great Lakes Dredge & Dock Co.*, 2007 U.S. Dist. Lexis 84452 (S.D. N.Y. 2007), held that a “Coastal Research Amphibious Buggy” (a three-wheeled vehicle amphibious vehicle that moves by the rotation of its rubber tires on the sea bottom or on land. and does not float but, rather, rolls on its wheels over the bottom) was a “vessel” for purposes of its operator being a Jones Act seaman.

⁶² *McKinley v. All-Alaskan Seafoods, Inc.*, 980 F.2^d 507, 1993 AMC 305, 308 (9th Cir. 1992), quoting *Caruso v. Sterling Yacht & Shipbuilders, Inc.*, 828 F.2^d 14, 1988 AMC 2407 (11th Cir. 1987).

⁶³ 869 F.2^d 521 (9th Cir. 1989).

⁶⁴ 2002 AMC 1881 (Cal. App. 2002).

⁶⁵ 1995 AMC 2311 (E.D. Wa. 1995).

⁶⁶ *Thompson v. Crown Petroleum Corp.*, 418 F.2^d 239, noted at 1972 AMC 2420 (5th Cir. 1969).

⁶⁷ 864 F.2^d 40, 1990 AMC 35 (5th Cir. 1989).

⁶⁸ 788 F.2^d 264 (5th Cir. 1986).

⁶⁹ 452 F.2^d 955, 1971 AMC 2124 (5th Cir. 1971). See also *Caruso v. Sterling Yacht & Shipbuilders, Inc.*, 828 F.2^d 14, 1988 AMC 2407 (11th Cir. 1987); *Slaydon v. Sonat Offshore Drilling Inc.*, 818 F.Supp. 1009 (S.D. Tx. 1993).

navigation”. *Leonard v. Transoceanic Sedco Forex*⁷⁰ held that a drilling rig that was constructed in Korea, where it underwent sea trials, but was transported from Korea to the Gulf of Mexico on board a “piggy back” ship, and there was undergoing final fitting out and provisioning for its initial assignment was not yet a “vessel” in navigation. *Garret v. Dean Shank Drilling Co., Inc.*⁷¹ held that a barge being fitted as a drilling rig was not yet in navigation during outfitting, before it was fitted out for its intended purpose. *Lee v. Searex Manufacturing*⁷² denied summary judgment on the issue whether a new ship was a “vessel” where it had been launched and completed sea trials (though “punchlist” items remained to be completed), but the certificate of inspection issued by the Coast Guard was not issued until the following day: the court held the issue should go to the jury or finder of fact.

A new craft which is still undergoing final fitting out for its designed purpose but which has been used for other water-borne transportation purposes is a “vessel”.⁷³

2.4.6 Vessel not navigating though still “in navigation”. *Greer v. Continental Gaming Co.*⁷⁴ affirmed a determination by the trial court that as a matter of law a gambling riverboat was not removed from navigation during a period of four months that it was moored to the dock because of low water on the Missouri River. During that period wire mooring cables replaced the usual nylon mooring lines, but the ship maintained a crew which met Coast Guard licensing requirements at all times “passengers” [gaming customers] were aboard and the vessel, but for not leaving its berth for four months, functioned as an active vessel.

2.4.7 Vessel is not removed from navigation for conversion or extensive repairs. Generally, a vessel will be considered “in navigation” though it is in port, possibly in dry dock, under routine repairs, or preparing for a voyage, so long as it is not laid up or withdrawn from navigation. *Senko v. LaCross Dredging Corp.*⁷⁵ in dictum, stated “Even a transatlantic liner may be confined to its berth for lengthy periods, and while there the ship is kept in repair by its ‘crew’. There can be no doubt that its crew would be covered by the Jones Act during this period.”⁷⁶

⁷⁰ 89 F.Supp.2^d 627 (S.D. Tx. 2002).

⁷¹ 799 F.2^d 1007 (5th Cir. 1986).

⁷² 166 F.Supp. 2^d 507 (E.D. La. 2001).

⁷³ *Cain v. Transocean Offshore Deep Water Drilling, Inc.*, 2007 AMC 992 (W.D. La. 2005). In *Cain*, following initial construction and sea trials in Singapore, the vessel sailed under its own power with tug assistance to the Gulf of Mexico and at the time of injury to the plaintiff was capable of drilling for oil and gas, although certain deck equipment for handling pipe during adverse weather conditions had not yet been installed.

⁷⁴ 5 S.W.3^d 559 (Mo. Ap. 1999).

⁷⁵ 352 U.S. 370, 373 (1957).

⁷⁶ See also *First Bank & Trust v. Knachel*, 999 F.2^d 107, 1994 AMC 864 (5th Cir. 1993); *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2^d 31, 1975 AMC 2527 (3rd Cir. 1975); *Waganer v. Sea-Land Service, Inc.*, 486 F.2^d 955, 1973 AMC 2627 (5th Cir. 1973); *Estate of Rainsford v. Washington Island Ferry Line, Inc.*, 702 F.Supp. 718 (E.D. Wis. 1988). The *Rainsford* decision was based on a determination that a vessel is not necessarily “withdrawn from navigation” though it might be laid up for a season, hence its crewmembers serving aboard the vessel during the layup period might retain status as seamen. *Rainsford* appears to conflict with a number of more recent cases, that have looked to the nature of the repair work being done and the intention of the owner as to whether the vessel is withdrawn from navigation.

Several cases hold that indefinite lay-up, restoration or renovation can result in the vessel being considered removed from navigation. *West v. United States*, 361 U.S. 118, 1960 AMC 15 (1959), established that a ship may be taken out of navigation for renovations or extensive repairs. *Wixom v. Bolen Marine & Mfg. Co., Inc.*, 614 F.2^d 956, 1980 AMC 2792 (5th Cir. 1980), established that a vessel may be removed from navigation during reconstruction of the vessel. *Taylor v. McManigal*, 89 F.2^d 583, 1937 AMC 919 (4th Cir. 1937), held that an employee involved in making repairs that required several weeks and were necessary before the vessel could be placed in service who expected to become a member of the crew at the time of sailing was not a seaman, as the vessel was not yet returned to navigation. *McLendon v. OMI Offshore Marine Service*, 807 F.Supp. 1266, 1993 AMC 1786 (E.D. Tx. 1992), held that a tug that was in drydock undergoing extensive repairs

*Chandris, Inc. v. Latsis*⁷⁷ discussed but did not decide whether the cruise ship that was drydocked in a shipyard for extensive upgrading and repairs was “removed from navigation” during the repairs. *Weeks Marine, Inc. v. Salinas*⁷⁸ affirmed a jury finding that a dredge remained in navigation during repairs, discussing precedents.

2.4.8 Permanently moored “vessels”. Employees serving aboard vessels that may be documented and are capable of being moved by water are not “seamen” for purposes of the Jones Act,

was temporarily withdrawn from navigation, and thus a former crewmember who was living on the vessel and who had some duties during repairs could not be considered a seaman”. *Union Oil Co. v. Pillsbury*, 63 F.2^d 925, 1933 AMC 533 (9th Cir. 1933), held that a seaman who was paid off upon the vessel's layup for a brief overhaul, but who remained on board as a watchman, was not a “seaman”. “Even though he was permitted to occupy the quarters he used while he was an officer, his employment as such had ended.” *Boyd v. Ford Motor Co.*, 948 F.2^d 283, 1992 AMC 706 (6th Cir. 1991), upheld a finding that personnel who had been members of a vessel's crew during the navigating season but who remained employed aboard during winter months to perform maintenance on the vessel were not “seamen” during the lay-up period, because the vessel was withdrawn from navigation during the lay-up period. *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 1952 AMC 12 (1952), denied a deceased employee seaman status in a case involving a death of a worker which would have been a crewmember of one of several laid up vessels which occurred in preparing the laid up vessels for an upcoming season. Despite the fact that the employee was hired as an “able seaman”, he was not employed on a vessel “in navigation” where his injury occurred more than a month before any of the several vessels were to have been launched from dry storage, and only a skeleton crew was assigned to the fleet, whose efforts at the time of injury were to get the vessels into seaworthy condition.

James v. Wards Cove Packing Co., 2005 AMC 1478 (W.D. Wa. 2005), involved different facts than *Desper*, but reached the same result. *James* involved the claims of an employee of a seafood company who worked as a seaman assigned to one of the vessels during the summer fishing seasons, but who worked as a maintenance worker on the fleet during winter in-water lay-up. It was determined that the vessels were not “in navigation” during the winter lay-up season, thus, (and because his work assignment was changed during the off-season lay-up to a maintenance worker rather than a seaman) the former and future crewmember was not a “seaman” at the time of his injury. The fact that the vessels were moved around the employer's repair yard during the off-season maintenance and repair was not sufficient to find that they were “in navigation” during that period. On appeal, the Ninth Circuit reversed on this issue and remanded for determination of factual issues whether the vessels were “in navigation”, citing to *Martinez v. Signature Seafoods, Inc.*, 303 F.3d 1132 (9th Cir. 2002)(vessel that had been laid up for five years not out of navigation as a matter of law). *James v. Wards Cove Packing Co.*, 2007 AMC 897 (9th Cir. 2006). *Weeks Marine, Inc. v. Salinas*, 2007 Tex. App. Lexis 866 (2007), affirmed a jury finding that a dredge remained in navigation during repairs, discussing precedents. *McKinley v. All-Alaskan Seafoods, Inc.*, 980 F.2^d 507, 1993 AMC 305 (9th Cir. 1992), affirmed that a vessel that had been under conversion and had not yet been issued a stability letter was not “in navigation”, even though it had navigated under its own power from the conversion shipyard in Louisiana to Tacoma where outfitting as a seafood processing vessel was being completed. Presumably, the crew which navigated the vessel during that transit would be considered seamen. See also *Reynolds v. Ingalls Shipbuilding*, 788 F.2^d 264, 1986 AMC 2839 (5th Cir. 1986); *Bohlinger v. Allied Tankships, Inc.*, 613 F.Supp. 161, 1986 AMC 1396 (D. Va. 1985). *Wixom and Warner v. Fish Meal Co.*, 548 F.2^d 1193 (5th Cir. 1977), provides rules for determining when a vessel is considered removed from navigation for major repairs or reconstruction. *McKinley* reinterpreted the *Wixom* criteria relative to turnover to a repair contractor as applying to repairs, not to conversion of the vessel to a new purpose. *Abshire v. Seacoast Products, Inc.*, 668 F.2^d 832 (5th Cir. 1982); *Rogers v. United States*, 452 F.2^d 1149, 1972 AMC 1211 (5th Cir. 1971); and *McCown v. Humble Oil & Refining Co.*, 293 F.Supp. 444, 1968 AMC 961 (E.D. Va. 1967), aff'd 405 F.2^d 596 (4th Cir. 1968), also considered the issue whether vessels undergoing repairs were removed from navigation to the extent that workers assigned to them would not be considered “seamen” or “seamen *pro hac vice*”. The ability of the vessel to actually navigate and the intention of its owners determine “removal from navigation”: the fact that the vessel did not actually navigate during the period in issue is not determinative. *First Bank & Trust v. Knachel*, 999 F.2^d 107, 1994 AMC 864 (5th Cir. 1993), affirmed a finding that personnel who assisted in repairing a vessel and in moving it from repair facility to repair facility in preparation for a voyage were seamen, though the anticipated voyage did not take place due to the owner's insolvency.

⁷⁷ 515 U.S. 347, 1995 AMC 1840 (1995).

⁷⁸ 2007 Tex. App. Lexis 866 (2007).

unseaworthiness doctrine, and maintenance and cure if the vessel is permanently moored. This rule applies to floating restaurants and hotels, fixed seafood processing ships, floating museums, etc.⁷⁹

2.5 “Seamen Pro Hac Vice” — Tort Liability to Some Non-Seamen for Unseaworthiness

Some workers who perform duties traditionally performed by seamen may be entitled to bring suit against the vessel and vessel operator for breach of the warranty of seaworthiness though the workers do not meet the test of more-or-less permanent connection with the vessel, if the workers are not subject to federal LHWCA coverage. *Seas Shipping Corp. v. Sieracki*⁸⁰ extended the duty to provide a seaworthy vessel to harborworkers who were not permanently assigned to a vessel, so long as they performed the duties traditionally performed by seamen, recognizing such workers as seamen *pro hac vice*. The 1972 amendment to 33 USC § 905(b) eliminated any unseaworthiness cause of action for longshore and harbor workers subject to the LHWCA.⁸¹ Thus, if the nature of the work subjects the worker to LHWCA jurisdiction, the worker cannot be a “seaman pro hac vice” entitled to a tort remedy for unseaworthiness. This is true even if the individual is self-employed and thus is not entitled to LHWCA benefits.⁸² Courts remain divided whether self-employed pilots are covered under the LHWCA and thus are denied a warranty of seaworthiness.⁸³ As to other workers who are exempted from LHWCA

⁷⁹ See, e.g., *Pavone v. Ketzel*, 52 F.2d 560, 1995 AMC 2038 (5th Cir. 1995); *Hayford v. Dousony*, 32 F.2d 605 (5th Cir. 1920); *Kathriner v. Unisea, Inc.*, 975 F.2d 657, 1994 AMC 2787 (9th Cir. 1992); *Garcia v. Universal Seafoods, Inc.*, 459 F.Supp. 463, 1980 AMC 2654 (W.D. Wash. 1978); *New England Fish Co. v. Sonja*, 332 F.Supp. 463, 1972 AMC 130 (D. Ak. 1971), held that permanently moored restaurants, floating casinos and fish processing plants are not “vessels” for purposes of determining whether bartenders, waiters and employees on processing vessels are “seamen”, where they have no crew for navigation, though they may be registered as vessels with the Coast Guard and are capable of being moved across the water. Two cases point out the importance of the intent of the owner whether an indefinitely-moored vessel will be returned to operation as a vessel in navigation. *Booten v. Argosy Gaming Co.*, 2007 AMC 1006 (II. App. 2006), similarly found that a casino ship that was moored with the owner intending to continue to moor it indefinitely remained “in navigation” because she retained her Coast Guard certificate of inspection, had a full crew, and could be unmoored and operated under her own power within five to seven minutes in an emergency. *Earls v. Belterra Resort, Indiana, LLC*, 439 F. Supp.2d 884, 2007 AMC 1100 (S.D. In. 2006), reached the opposite result on nearly similar facts: the facts that the vessel retained its Coast Guard certificate of inspection, retained a reduced crew, had her engines ready to use, and could be operated under her own power within five minutes in an emergency were not determining where the owner intended to continue to moor the vessel indefinitely, and had kept the vessel moored for two and a half years before an employee suffered an injury and claimed seaman status.

⁸⁰ 328 U.S. 85, 1946 AMC 698 (1948).

⁸¹ See *Normile v. Maritime Co. of the Philippines*, 643 F.2d 1380, 1981 AMC 2470 (9th Cir. 1981).

⁸² *Ghotra v. Bandila Shipping, Inc.*, 113 F.3d 1050, 1997 AMC 1936 (9th Cir. 1997), held that self-employed individuals who are employed on navigable waters (such as surveyors and other independent contractors who supervise or perform loading, unloading, or repair operations) who meet the status and situs tests for LHWCA coverage are within the coverage of the LHWCA, though they may not be insured for compensation because they are self-employed, thus are precluded from making claim as *Sieracki* seamen.

⁸³ *Bach v. Trident Shipping Co., Inc.*, 1989 AMC 460 (E.D. La. 1988), found that a compulsory pilot, who was self-incorporated and a partner in a pilots’ association which assigned him to the vessel, must be within LHWCA coverage as he was “engaged in maritime employment” yet was not a member of the crew of any vessel, within the meaning of 33 USC § 902(3). *Bach* was affirmed at 920 F.2d 322, 1991 AMC 928 (5th Cir. 1991). The Supreme Court remanded *Bach* for further consideration of whether such pilots may be “seamen” in the light of *McDermott International, Inc. v. Wilander*, 498 U.S. 112, 1991 AMC 913. 500 U.S. 949, 1991 AMC 2701 (1991). On remand, the Fifth Circuit determined that Bach was not a “seaman” as he lacked the requisite permanent assignment to a vessel or a fleet of vessels. On the finding of the trial court that the ladder which allegedly caused his heart attack was not defective, there was no basis for an unseaworthiness cause of action, so the issue whether he was a “seaman *pro hac vice*” was not addressed. 947 F.2d 1290, 1992 AMC 643 (5th Cir. 1991). *Harwood v. Partredereith AF*, 944 F.2d 1187, 1992 AMC 375 (4th Cir. 1992), held that a pilot is covered under the LHWCA. *Clark v. Solomon Navigation, Ltd.*, 631 F.Supp. 1275, 1986 AMC 2141 (S.D. N.Y. 1986), held that a pilot is excluded from LHWCA coverage. *Ringerling v. Compania Maritima De La Mancha*, 670 F.Supp. 301, 1987 AMC 1935 (D. Or. 1987)), aff’d 848 F.2d 1243, 1988 AMC 2408 (9th Cir. 1988), held that a river pilot was a “seaman” entitled to a warranty

coverage, there is a line of cases, including several recent cases, that hold they are entitled to “Sieracki seaman” status and tort damages for injury caused by unseaworthiness.⁸⁴

3. LONGSHORE & HARBOR WORKERS: FEDERAL WORKERS' COMPENSATION TO MARITIME WORKERS

3.1 History and General

The federal Longshore and Harbor Workers' Compensation Act (the “LHWCA”), 33 USC §§ 901 - 950, like other workers' compensation acts, is a statutory compromise between an employer's exposure to injured employees' claims for common law tort damages and the employees' risks to receiving no compensation where no causative negligence attributable to the employer can be established, the compromise providing to workers injured on the job compensation regardless of any fault of their employer while eliminating their common law rights to sue their employer for damages resulting from negligence (or, in the case of longshoremen and harborworkers performing duties traditionally performed by seamen, for unseaworthiness). The LHWCA, as amended, dates from 1927, the original act being passed in response to *Washington v. W. C. Dawson & Co.*,⁸⁵ which held unconstitutional earlier legislation which attempted to allow application of state workers' compensation legislation to maritime workers on navigable waters.

The LHWCA initially provided coverage for injury or death occurring only on navigable waters. Its coverage began and ended at the gangways of ships and floating drydocks. As most of its workers engaged in work-related activities both on board ships and other floating work areas and on piers and

of seaworthiness. The issue was revisited in *Blancq v. Hapag-Lloyd A.G.*, 986 F.Supp. 376, 1998 AMC 1440 (E.D. La. 1997), which held that a compulsory river pilot lacks the requisite substantial connection to a vessel and thus is not a “seaman”, but as he is performing a seaman's duties and is not within the coverage of the LHWCA, he is a *Sieracki* seaman owed the duty of seaworthiness.

⁸⁴ *Cormier v. Oceanic Contractors, Inc.*, 696 F.2^d 1112 (5th Cir. 1983); *Aparicio v. Swan Lake*, 642 F.2^d 1109, 1981 AMC 1887 (5th Cir. 1981); and *Bergeron v. Atlantic Pacific Marine*, 894 F.Supp. 1544 (W.D. La. 1993), held that workers not governed by the LHWCA still are entitled to “*Sieracki* seaman status”. *Aparicio* stated:

In *Sieracki* and *Ryan* the Supreme Court formulated remedies to deal with the peculiar perils faced by maritime workers based on policy considerations it determined to be controlling given those conditions of maritime work. Until Congress abrogates the remedies created by the Supreme Court as they apply to maritime workers not covered by the LHWCA, those workers remain entitled to relief and their employers and vessel owners remain bound by the *Sieracki-Ryan* doctrine.

In re Complaint of Garda Marine, Inc., 1991 AMC 1307 (S.D. Fl. 1991), held that municipal police officers responding to a call for emergency assistance on a vessel, because they were not employees within coverage of the LHWCA, were seamen *pro hac vice* entitled to a warranty of seaworthiness. *Cavin v. State of Alaska*, 3 P.3^d 323 (Ak. 2000), held that a state police trooper whose assignments included serving on enforcement vessels could be a *Sieracki* seaman entitled to a warranty of seaworthiness if the jury determined that his service time on the vessels was not sufficient to make him a Jones Act seaman, as the trooper was not a worker covered by the LHWCA, expressly adopting the *Aparicio* rule. *Green v. Vermilion Corp.*, 144 F.3^d 332, 1998 AMC 2328 (5th Cir. 1998), involved injury to a cook/watchman of a duck hunting camp being transported to the camp. He boarded a small vessel bringing supplies to the camp to assist in unloading, and was injured when he slipped on the deck. It was held he was not a LHWCA employee, under the club/camp/recreational operation exception of 33 USC § 902(3)(B). Because he was not subject to the LHWCA but was performing duties traditionally performed by seamen, the Fifth Circuit held that he was a *Sieracki* seaman *pro hac vice*, entitled to a warranty of seaworthiness as well as a general maritime law negligence duty to protect his safety. *Freeze v. Lost Isle Partners*, 2002 AMC 842 (Ca. App. 2002), followed *Green* on similar facts: an employee of a recreational camp suffered injuries while operating a vessel used to ferry water and other supplies to the camp. The jury found she was not a “seaman”, but, as she was not a LHWCA employee because of the camp exception but was performing duties traditionally performed by seamen, the court of appeals found she was a seaman *pro hac vice* entitled to a warranty of seaworthiness.

⁸⁵ 264 U.S. 219 (1924).

warehouses, they walked into and out of LHWCA coverage numerous times a day. The LHWCA was substantially amended in 1972 to extend its coverage to workers engaged in maritime activities in adjacent shoreside areas where maritime employments are being performed.⁸⁶

3.2 Coverage of LHWCA

The Act states that it shall be construed broadly to effectuate its purpose. 33 USC § 920. In defining coverage of provisions of the Act, 33 USC § 903 states:

(a) **Disability or death; injuries occurring upon navigable waters of United States.** Except as otherwise provided in this section, compensation shall be payable under this chapter 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).

Exclusions from coverage are limited. Subsection 920(b), (c) and (d) state the limited statutory exclusions:

(b) **Government officers and employees.** No compensation shall be payable in respect of the disability or death of an officer of the United States, or any agency thereof, or of any State or foreign government, or any subdivision thereof.

(c) **Intoxication; willful intention to kill.** No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

(d) **Small vessels.**

(1) No compensation shall be payable to an employee employed at a facility of an employer if, as certified by the Secretary, the facility is engaged in the business of building, repairing, or dismantling exclusively small vessels (as defined in paragraph (3) of this subsection), unless the injury occurs while upon the navigable waters of the United States or while upon any adjoining pier, wharf, dock, facility over land for launching vessels, or facility over land for hauling, lifting, or drydocking vessels.

(2) Notwithstanding paragraph (1), compensation shall be payable to an employee-

(A) who is at a facility which is used in the business of building, repairing, or dismantling small vessels if such facility receives Federal maritime subsidies; or

(B) if the employee is not subject to coverage under a State workers' compensation law.

(3) For purposes of this subsection, a small vessel means-

(A) a commercial barge which is under 900 lightship displacement tons; or

(B) a commercial tugboat, towboat, crew boat, supply boat, fishing vessel, or other work vessel which is under 1,600 tons gross as measured under [46 USC §§ 14502 or 14302].

Section 902 contains definitions of terms used in the Act. Important definitions for determining coverage issues are “injury,” “employee” and “employer.”

When used in this chapter-

(1) The term “person” means individual, partnership, corporation, or association.

(2) The term “injury” means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes any injury caused by the willful act of a third person directed against an employee because of his employment.

⁸⁶ The 1972 Amendments also eliminated the three-way actions whereby longshoremen injured aboard ships or adjacent docks as a result of unseaworthy conditions created by their stevedore employers or other longshoremen could recover tort damages from the vessels. In pre-1972 three way actions, the vessel interests could then in turn recover indemnity for damages paid and attorney fees from the stevedores, in effect circumventing the intent of the statute that the employers' exposures would be limited in exchange for limited but certain recovery for the injured workers.

(3) 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) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;

(B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;

(C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

(D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;

(E) aquaculture workers;

(F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet length;

(G) a master or member of a crew of any vessel; or

(H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

(4) The term “employer” means 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, dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

3.2.1 Covered Employments and Employees. To be covered under the LHWCA, an employee must meet both the “situs” and the “status” requirements imposed by the 1972 amendments to the Act.⁸⁷ As explained below, generally both tests are met if the worker is injured in the course of employment while actually on navigable waters. The provision of § 903(a) of application to employments to “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)” raises the issue whether the Act applies to all employments on piers, wharves, dry docks, marine ways, or other adjoining areas used for maritime purposes.

3.2.1.1 Situs test. By 33 USC § 902(4), coverage under the LHWCA extends to employers whose employees are employed in “maritime employment” in whole or in part upon the navigable waters of the United States, including adjoining piers, wharves, drydocks, terminals, building ways, “or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel.”⁸⁸

3.2.1.1.1 Employment on navigable waters. Generally, workers who are injured while they are engaged in employment activities while they are actually on navigable waters are within LHWCA coverage, unless their employments are specifically excluded by the Act.

3.2.1.1.2 High seas. Though the coverage provisions of the LHWCA refer to employments “on the navigable waters of the United States”, 33 USC § 903(a), the reference in 33 USC § 939(b) to “high seas” has been interpreted as extending the Act extraterritorially to the high seas, and thus shipboard injuries of repair workers that occur on the high seas are covered by the Act.⁸⁹

⁸⁷ *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 1989 AMC 2965 (1989).

⁸⁸ Section 903.

⁸⁹ *Kollias v. D & G Marine Maintenance*, 29 F.3d 67, 1995 AMC 609 (2nd Cir. 1994); *Reynolds v. Ingalls Shipbuilding Division, Litton Systems, Inc.*, 788 F.2d 264, 1986 AMC 2839 (5th Cir. 1986); *Cove Tankers Corp. v. United Ship Repair, Inc.*, 683 F.2d 38, 1982 AMC 2113 (2nd Cir. 1982). But see *Marroquinn v. American Trading & Transp. Co.*, 711 F.Supp. 1165

3.2.1.1.3 Non-“navigable” waters. Activities on non-navigable lakes and other waterways are not subject to LHWCA coverage.⁹⁰

3.2.1.1.4 Employments on “piers” and other structures over navigable waters. Application of the LHWCA generally is satisfied if the worker is injured while on a pier over navigable waters in the course of his employment.⁹¹

3.2.1.1.5 Employments on “piers” and other structures over navigable waters not related to vessel activities. A split of authority between the circuits has developed whether employments on “piers” and other structures over navigable waters are subject to LHWCA jurisdiction, irrespective whether the structure is “customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel”. The Ninth and Second circuits hold that the LHWCA applies from the fact that a structure is over navigable waters, irrespective of the use of the structure, so long as it is a “pier”.⁹² *Tibodeaux v. Grasso Production Management, Inc.*⁹³ refused to follow the Second and Ninth Circuits, and required that the structures involved be used for building, repairing, loading or unloading vessels. *Tibodeaux* held that employment on an oil production platform built on pilings over a marsh is not covered under the Act, as the structure was not used for any maritime purpose such as loading, unloading, building or repairing vessels: “the term ‘pier’ in § 903(a) does not include every conceivable structure built on pilings over land and water, but rather only those serving some maritime purpose. Even in the Ninth Circuit the general rule has some nuances: *McGray Construction Co. v. Director,*

(E.D. N.Y. 1989), which held that the LHWCA does not apply to injuries on the high seas where the presence of the vessel on the high seas is more than a “minor deviation” or a fortuitous occurrence.

⁹⁰ *Williams v. Director, OWCP*, 825 F.2^d 246 (9th Cir. 1987).

⁹¹ *Randall v. Chevron, U.S.A., Inc.*, 13 F.3^d 888, 1994 AMC 1217 (5th Cir. 1994). *Randall* held that workers injured while transiently or fortuitously on navigable waters are covered employees, irrespective of their duties at the time of injury. *Randall* was expressly overruled in *Bienvenu v. Texaco, Inc.*, 164 F.3^d 901, 1999 AMC 1255 (5th Cir. 1999), to the extent that *Randall* stood for the proposition that a worker who is only fortuitously or transiently over navigable waters satisfies the status test. *Bienvenu* held that with respect to workers whose activities were not an integral or essential part of loading or unloading a vessel, there is a threshold that the employee's presence on navigable waters must be more than merely commuting from shore to work by boat – the employee must have “meaningful job responsibilities” while on navigable waters to be considered a “maritime employee” subject to the LHWCA. In *Bienvenu*, it was held that a employee who actually performed some of his employment responsibilities while commuting between shore and fixed platforms met the test of having “meaningful job responsibilities” while on navigable waters, even though he worked aboard vessels only about 8.3% of his total employment time, the balance being spent on shore on the fixed platforms. See also *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 1983 AMC 609 (1983); *Fontenot v. AWI, Inc.*, 923 F.2^d 1127 (5th Cir. 1991). *Miller v. Golden Star Maritime, Inc.*, 1997 AMC 1837 (E.D. La. 1997), found that a boarding agent employed by a ships' local husbanding agency who was injured while aboard a vessel was a LHWCA employee. *Schwabenland v. Sanger Boats, Inc.*, 683 F.2^d 309, 1983 AMC 1503 (9th Cir. 1982), ruled that the LHWCA applies to the recreational boating industry, in holding that a sales manager for a boat manufacturer who was injured while testing new vessels is within LHWCA coverage. *Zapata-Haynie Corp. v. Barnard*, 933 F.2^d 256, 1991 AMC 2775 (4th Cir. 1991); and *Ward v. Director, OWCP*, 684 F.2^d 1114, 1983 AMC 2952 (5th Cir. 1982), held that aircraft pilots employed as fish spotters in fishing operations were engaged in maritime employment and hence their deaths were subject to coverage under the LHWCA, as they were not members of the crew of any vessel.

⁹² See, e.g., *McGray Construction Co. v. Director, OWCP*, 112 F.3^d 1025, 1997 AMC 2058 (9th Cir. 1997), which affirmed a determination that a worker hired for day work on a pier used to process oil, which was not used for mooring, loading or unloading, or repairing vessels, was within the status test for coverage because of this overall employment history, 90% of which was involved in diving, even though he was not engaged in maritime employment on the day of his injury and although the diving assignments were for other employers. *Hurston v. Director, OWCP*, 989 F.2^d 1547, 1993 AMC 2477 (9th Cir. 1993), held that employment on a similar fixed oil production platform on pilings over navigable waters was within LHWCA coverage, as it was on a “pier”: If it appears to be a pier, if it is built like a pier and adjoins navigable waters, it's a pier.” *Hurston* held that the term “pier” is not qualified by the phrase “customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel” – that phrase applies only to “other adjoining area”, not to a “pier”. See also *Fleischmann v. Director OWCP*, 137 F.3^d 131 (2nd Cir. 1998).

⁹³ 2004 AMC 1694 (5th Cir. 2004).

OWCP⁹⁴ determined that a work site which “looked like a pier” but “was not used to dock ships” and which did not reach water except at high tide was an “adjoining pier” subject to LHWCA coverage. The “pier” housed machinery utilized to separate oil from water and gas transmitted from a pipeline from an off-shore well to the pier. The oil then was stored in tanks on the “pier” and periodically was pumped into another pipeline which transported the oil to offshore barges.

3.2.1.1.6 “Situs” test applies to “other adjoining areas”. The LHWCA applies not only to navigable waters, but a pier, wharf, building way, marine railway, and “other adjoining area customarily used by the an employer in loading, unloading, repairing, dismantling, or building a vessel”. *Brooker v. Durocher*⁹⁵ determined that a seawall on which a worker employed in reconstructing it fell and was injured was not a pier or wharf or “other adjoining area customarily used by an employer in loading, unloading repairing or building a vessel”, irrespective that two barges were moored to buoys near to the seawall, on the basis that the seawall existed to protect an electric plant and not for any vessel-related activity. There have been inconsistent decisions whether the term “adjoining area” does not necessarily require that the area directly abut on navigable waters.⁹⁶ Another issue is whether, if part of an industrial plant abuts on navigable waters and is used for maritime purposes, the entire facility would be considered a covered “situs”. The position that the entire plant should be considered a LHWCA situs was rejected in *Bianco v. Georgia Pacific Corp.*⁹⁷ *Bianco* held that a worker who was injured while employed in a gypsum board production plant which arguably adjoined a pier used to unload gypsum did not qualify for LHWCA coverage as the area of her employment was not customarily used by the employer for loading, unloading, repairing, dismantling or building a vessel. *Jonathan Corp. v. Brickhouse*⁹⁸ held that workers employed at manufacturing facilities which were adjacent to navigable waters which were used for manufacturing parts which, when completed, were shipped by truck or barge to other facilities where they were incorporated in the construction and repair of ships did not meet the situs test for LHWCA coverage.

⁹⁴ 181 F.3^d 1008, 2001 AMC 1422 (9th Cir. 1999).

⁹⁵ 133 F.3^d 1390, 1998 AMC 1314 (11th Cir. 1998), appeal to the Supreme Court dismissed after settlement.

⁹⁶ See e.g., *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2^d 167 (4th Cir. 1978), and *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2^d 176 (5th Cir. 1977), which discussed precedents in the context of accident sites 1200 to 3000 feet from navigable water within shipyards which do abut the water. *Sidwell v. Express Container Services, Inc.*, 71 F.3^d 1134, 1996 AMC 995 (4th Cir. 1995), and *Parker v. Director, OWCP*, 1996 AMC 972 (4th Cir. 1996), reexamined the definition of covered situs of § 903(a) that limits coverage to:

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 or building a vessel).

Sidwell followed the *Brady-Hamilton* rule, 568 F.2^d 137 (9th Cir. 1978), that “the phrase ‘adjoining area’ should be read to describe a functional relationship that does not in all cases depend upon physical contiguity,” requiring an examination of four factors: “(1) the particular suitability of the site for the maritime uses referred to in the statute; (2) whether adjoining properties are devoted primarily to uses in maritime commerce; (3) the proximity of the site to the waterway; and (4) whether the site is as close to the waterway as is feasible given all of the circumstances of the case.” *Sidwell* refused to follow Third and Fifth Circuit precedents that *Sidwell* found effectively eliminated the situs requirement that affords coverage to employments so long as there is some connection with the waterfront, and held the definition requires that the situs actually “adjoin” navigable waters, not be merely in the proximity of the waterfront: it must be contiguous with or otherwise touch navigable waters, and an “other area” must be a discrete shoreside structure of facility “customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel” like a “pier”, “wharf”, “dry dock”, “terminal”, “building way” or “marine railway”. *Parker* similarly found that a container repair facility which is neither contiguous with navigable waters and is not within the boundaries of a shipping terminal is not within the definition of a covered situs, but a concurring opinion criticized *Sidwell* as being “on shaky ground”.

⁹⁷ 2002 AMC 2343 (11th Cir. 2002).

⁹⁸ 142 F.3^d 217 (4th Cir. 1998);, 142 F.3^d 217 (4th Cir. 1998).

3.2.1.2 Status test. In addition to being employed in sites adjacent to navigable waters used for loading, unloading, repairing, building or breaking ships, the nature of the workers' duties must meet the language of the LHWCA requiring that the employment be maritime in nature, in that it directly contributes to loading, unloading, repair, building or breaking ships. Employments such as cleaning a loading dock or shipyard repair area may be covered, whether or not they are on floating drydock, piers or other adjoining areas, but similar duties of a janitor in adjacent office areas might not be considered to have the direct nexus to maritime activities. The LHWCA applies only to employees engaged in "maritime employment" and only to employers whose employees are engaged in "maritime employment," in whole or in part on navigable waters. Section 902(3) specifically includes in the term "maritime employment" any person who is engaged in longshore operations, any harbor worker including a ship repairman, ship builder and ship breaker, and lists a number of excluded employments, but otherwise is vague as to what constitutes "maritime employment".

3.2.1.2.1 Workers on navigable waters. *Bienvenu v. Texaco, Inc.*⁹⁹ held that an oil-field pumping machinery repairman was a maritime worker entitled to LHWCA coverage because he worked on and over navigable waters. He traveled between his quarters and the pumping stations on which the machinery was located by boat, and worked on the machinery both on the platforms and on the afterdeck of the boat. The Fifth Circuit held in essence that he was engaged in "maritime employment" in whole or in part on the navigable waters of the United States because some of his duties were on the vessel that transported him to and from the platforms. *Lockheed Martin Corp. v. Morganti*¹⁰⁰ held that a person on any object floating on navigable waters must be considered to be on navigable waters: a floating platform is considered to meet the maritime employment test.

3.2.1.2.2 Shoreside workers. If the worker was not on navigable waters at the time of his injury, a different standard for "status" under the LHWCA applies: the test for such a worker is whether he was engaged in an integral part of a maritime activity, such as the process of loading, unloading, repairing, building or breaking a ship.¹⁰¹ *Herb's Welding* stated that in enacting the maritime employment requirement:

Congress did not seek to cover all those who breathe salt air. Its purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading; it is "clear that person who are on the situs but not engaged in the overall process of loading or unloading vessels are not covered." While "maritime employment" is not limited to the occupations specifically mentioned in § 2(3), neither can it be read to eliminate any requirement of a connection with the loading or construction of ships. As we have said, the "maritime employment" requirement is "an occupational test that focuses on loading and unloading." The Amendments were not meant "to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity." We have never read "maritime employment" to extend so far beyond those actually involved in moving cargo between ship and land transportation.

*Columa v. Director, OWCP*¹⁰² held that actual involvement of the employee in the process of loading or unloading cargo (or repairing, building or breaking a ship) is required to meet the status test: a cook in a shoreside restaurant maintained by a shipowner to feed its seamen while its ships were in port did not meet the test. *Lennon v. Waterfront Transport*¹⁰³ held that employees engaged in cargo handling ashore are an integral part of the process of loading and unloading a ship: therefore a person who sorts, packs

⁹⁹ 164 F.3d 901, 1999 AMC 1255 (5th Cir. 1999).

¹⁰⁰ 412 F.3d 407, 2005 AMC 1655 (2nd Cir. 2005).

¹⁰¹ See, e.g., *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 1985 AMC 1700 (1985); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 1977 AMC 1037 (1977).

¹⁰² 897 F.2d 394, 1990 AMC 954 (9th Cir. 1990).

¹⁰³ 20 F.3d 658 (5th Cir. 1994).

and otherwise handles cargo destined to be loaded aboard a vessel satisfies the occupational status requirement for coverage. *Weyher/Livsey Constructors, Inc. v. Prevetire*¹⁰⁴ held that a pipe fitter employed in building a power plant in a shipyard does not meet the status test of maritime employment, since his trade is not inherently maritime and his activity was not an integral or essential part of loading, unloading or repairing ships, notwithstanding that the power plant being built eventually would provide steam and electricity to shipbuilding and ship-repair operations. A number of cases have held that to be covered by the LHWCA, the activities of a shore-side or pier-side worker must have a relationship to loading and unloading vessels, ship repair, ship-building and ship-breaking.¹⁰⁵ The Ninth Circuit is very liberal in this requirement.¹⁰⁶

3.2.4 Coverage for “amphibious” employees whose duties in part meet the situs and status requirements for coverage. Persons who spend only part of their working time in actual loading or unloading ships or other maritime employments covered under the Act are normally considered to be covered under the Act for all of their employment.¹⁰⁷ However, involvement with covered employment on only an “episodic basis” incident to non-maritime activities such as truck driving does not confer covered status to the entire employment. *Dorris v. Director, Office of Workers' Compensation Programs*¹⁰⁸ states the rule that maritime employment status may be found either where the employee was engaged in maritime activity at the time of the injury, or that he was engaged in maritime employment as a whole, though his activity at the time of his injury was not maritime. *Bienvenu v. Texaco, Inc.*¹⁰⁹ further defined the circumstances under which a worker who normally worked on land and fixed offshore platforms reached by boat was under the LHWCA for the periods he was on navigable waters being transported by the boat. *Chesapeake & Ohio Ry. Co. v. Schwalb*¹¹⁰ held that railroad employees who were injured while performing repair and maintenance of equipment used to load coal aboard vessels were within LHWCA coverage even though such work was not their full time employment.

3.2.5 Coverage for self-employed individuals. *Ghotra v. Bandila Shipping, Inc.*¹¹¹ held that self-employed individuals who meet the status and situs tests are within the coverage of the LHWCA, though they may not be insured for compensation. Thus they are entitled to bring “§ 905(b)”

¹⁰⁴ 27 F.3^d 985, 1995 AMC 94 (4th Cir. 1994).

¹⁰⁵ See, e.g., *McGray Construction Co. v. Director, OWCP*, 181 F.3^d 1008 (9th Cir. 1999), which held that “maritime employment” status does not extend to an employee the pier on which the claimant worked did not accommodate any vessels and was not used to load, unload, repair, build or break any vessel, but was used only to process and store oil from an offshore well and, periodically, to pump the stored oil into a pipeline which transported the oil to offshore barges. See also *Dravo Corp. v. Banks*, 567 F.2^d 593 (3rd Cir. 1977), which held that a shipyard worker engaged in spreading salt on walkways of the shipyard did not meet the status requirement, in that he was not directly engaged in ship-building or other covered employment.

¹⁰⁶ *Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3^d 1095, 2006 AMC 927 (9th Cir. 2006), held that a construction worker killed while engaged in digging a trench on shore to be used for utility lines for renovation of a submarine berth was engaged in maritime employment. The *Healy Tibbitts* court agreed that “specific job duties of some workers involved in the construction of a maritime facility may be so tangential as to exclude them from the Act’s coverage”, such as persons employed only to perform office work, and suppliers, transporters and vendors who are temporarily doing work on the employer’s premises, but held that employees directly involved in maritime work, including maritime facilities construction, are covered.

¹⁰⁷ *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 1979 AMC 2319 (1979); *Northwest Marine Terminal Co. v. Caputo*, 432 U.S. 249, 1977 AMC 1037 (1977); *Sea-Land Service, Inc. v. Director, OWCP*, 685 F.2^d 1121, 1985 AMC 606 (9th Cir. (1982).

¹⁰⁸ 808 F.2^d 1362, 1987 AMC 2730 (9th Cir. 1987). *Universal Fabricators, Inc. v. Smith*, 878 F.2^d 843 (5th Cir. 1989).

¹⁰⁹ 164 F.3^d 901, 1999 AMC 1255(5th Cir. 1999).

¹¹⁰ 493 U.S. 40, 1989 AMC 2965 (1989).

¹¹¹ 113 F.3^d 1050, 1997 AMC 1936 (9th Cir. 1997).

actions for negligence of the vessel. *Anastasiou v. M/T World Trust*¹¹² held that a self-employed radio technician who performed 70% of his work on vessels was an employee under the LHWCA. Though self-employed harbor workers may be § 902(3) “employees”, they are not “employers” of themselves, hence they are not required to secure insurance relative to their own employment under § 904.

3.2.6 Excluded employments. Irrespective of the situs of an employee’s work, a certain types of workers and workers in certain industries are excluded from LHWCA coverage. The LHWCA § 903(3) excludes from coverage some employees who otherwise may be engaged in maritime employment:

The term “employee” means any person engaged in maritime employment ... but does not include –

- (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;
- (B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
- (C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);
- (D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;
- (E) aquaculture workers;
- (F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet length;
- (G) a master or member of a crew of any vessel; or
- (H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;

if individuals described in clauses (A) through (F) are subject to coverage under a State workers’ compensation law.

3.2.6.1 “Member of the crew of any vessel” is excluded from coverage. The phrase “member of the crew of any vessel” normally is consistent with the definition of “seaman” for purposes of application of the Jones Act and maintenance and cure. Some precedents have stated that the terms “seamen” and “members of a crew” are used interchangeably.¹¹³ Until recently, precedents held that coverages under the Jones Act and the LHWCA are mutually exclusive: if a jury or court found that an individual is a seaman for purposes of Jones Act remedies, he was deemed a “member of the crew” of a vessel and hence is not entitled to LHWCA remedies, and vice-versa.¹¹⁴ *Gizoni v. Southwest Marine, Inc.*¹¹⁵ overruled those precedents, holding that employees that otherwise were covered under the LHWCA, if they meet the test of Jones Act coverage with respect to a vessel to which they may be assigned in performing their LHWCA employment duties, may also be “seamen”. There is some overlap in potential recovery under the LHWCA for persons who could be considered seamen.¹¹⁶ Though the Office of Workers’ Compensation Programs has tended to construe “member of the crew” narrowly to extend coverage under the LHWCA in close cases, the courts have held that persons permanently assigned to a vessel or fleet of vessels who have duties while the vessel is at sea remain members of the crew while the vessel is in port, even though they may be doing repair work.¹¹⁷ But where injuries occur at sea to an employee who is not a seaman, such as a “ride along” repairer who affects repairs while the

¹¹² 338 F. Supp. 2^d 406, 2005 AMC 685 (E.D. N.Y. 2004).

¹¹³ See, e.g., *Guidry v. South Louisiana Contractors, Inc.*, 614 F.2^d 497, 452, 1983 AMC 455 (5th Cir. 1983).

¹¹⁴ *Miller v. Patton-Tully Trans. Co., Inc.*, 851 F.2^d (8th Cir. 1988); *Pizzitolo v. Electro-Coal Transfer Corp.*, 812 F.2^d 977, 1988 AMC 769 (5th Cir. 1987); *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2^d 1067, 1986 AMC 2455 (5th Cir. 1986); *Duncanson-Harrelson Co. v. Director, OWCP*, 606 F.2^d 1336, 1984 AMC 1519 (9th Cir. 1982).

¹¹⁵ 590 U.S. 951, 1992 AMC 305 (1991).

¹¹⁶ *McDermott, Inc. v. Boudreaux*, 679 F.2^d 452 (5th Cir. 1982); *Young & Co. v. Shea*, 397 F.2^d 185 (5th Cir. 1968).

¹¹⁷ *J. McDermott, Inc. v. Boudreaux*, 679 F.2^d 452 (5th Cir. 1982).

vessel is underway between ports, the phrase “injury occurring upon the navigable waters of the United States” covers employees repairing ships on the high seas 135 miles offshore.¹¹⁸ *Marroquinn v. American Trading Transp. Co., Inc.*¹¹⁹ illustrates the overlap, finding that a similar “ride along” worker could be a “seaman” entitled to remedies seamen's remedies. *Uzdavines v. Weeks Marine, Inc.*¹²⁰ applied the broad definition of “vessel” established by *Stewart v. Dutra Construction Co.* to hold that a worker who was exposed to asbestos while working on a bucket dredge was a “seaman” on a vessel in navigation, thus was excluded from LHWCA coverage for his resulting death. The Seventh Circuit has commented that the increase in compensation awards under the LHWCA has removed some of the economic reasons for giving a broad interpretation to crewmember status.¹²¹

3.2.6.2 Recreational operations. *Boomtown Bell Casino v. Bazor*, 313 F.3^d 300, 2003 AMC 15 (5th Cir. 2002), interpreted the “recreational operation” exclusion to apply to a floating casino. *Boomtown* looked to the corporate purpose or structure of the employer rather than the nature of the assigned duties of the employee to determine application of the exemption.

3.2.6.3 Seafood workers excluded from coverage. The “aquaculture” exclusion applies to workers of seafood processors where the employers are engaged in the “controlled cultivation and harvest of aquatic plants and animals, including the cleaning, processing or canning of fish and fish products, the cultivation and harvesting of shellfish, and the controlled growing and harvesting of other aquatic species.” 20 CFR § 701.301(a)(12)(iii)(E). The exception applies irrespective that the individual worker may be engaged in loading or discharging a vessel which are not directly part of the process of cleaning, processing or canning seafood.¹²²

3.2.6.4 Data processing work exception. *Lockheed Martine Corp. v. Morganti*¹²³ held that the “data processing” exclusion means entering, processing, checking and correcting data, not to analyzing test results, identifying failures in the production of the data, and troubleshooting such failures.

3.2.6.5 Recreational boating employments. Pending legislation would exempt all workers in the recreational boating industry from application of the LHWCA. This author believes the proposed legislation should be carefully considered in view of the consequences that it would reduce benefits to workers suffering injury in the course of their employments, would result in competitive prejudice to vessel repair facilities that also build or repair commercial vessels as workers in such facilities would remain subject to the LHWCA and corresponding higher workers’ compensation insurance rates, and would result in competitive prejudice to recreational boat builders doing business in states with higher state workers’ compensation costs relative to those building vessels in states which have lower state workers’ compensation costs and benefits.

3.2.6.6 Retail outlets employees. 33 U.S.C. § 902(3)(b) excludes from application of the act employees of retail outlets. *Peru v. Sharpshooter Spectrum Venture LLC*¹²⁴ held that the retail outlet exception to the Act applied to the assistant manager of a photographer shop whose work involved photographing tourists touring the U.S.S. Missouri and developing the photos, as the retail

¹¹⁸ *Cove Tankers Corp. v. United Ship Repair, Inc.*, 683 F.2^d 38, 1982 AMC 2113 (2nd Cir. 1982).

¹¹⁹ 711 F.Supp. 1165, 1989 AMC 1730 (E.D. N.Y. 1988).

¹²⁰ 418 F.3^d 138, 2005 AMC 2024 (2nd Cir. 2005).

¹²¹ *Johnson v. J. F. Beasley Construction Co.*, 742 F.2^d 1054, 1985 AMC 369 (7th Cir. 1984).

¹²² *Alcala v. Director, OWCP*, 141 F.3^d 942, 1998 AMC 1659 (9th Cir. 1998).

¹²³ 412 F.3^d 407, 2005 AMC 1655 (2nd Cir. 2005).

¹²⁴ 2007 AMC 1547 (9th Cir. 2007).

sales of the photos was a significant portion of his work, and there was no part of the activities of either the employer or the employee to traditional maritime activities.

3.2.6.7 Employees not covered by state workers' compensation laws. 33 U.S.C. § 902(3) exclusions from the definition of "employee" do not apply to such employees who are not subject to state workers' compensation laws.¹²⁵

3.2.7 "Twilight Zone" and "Maritime But Local" Cases. In a vaguely defined area of semi-maritime employment situations, a claimant may have the option of making claim under the LHWCA or under state compensation acts. The "twilight zone" was largely eliminated by the 1972 amendments to the LHWCA, which enlarged and better defined what employees and employments were covered by the LHWCA,¹²⁶ in part extending LHWCA coverage to employees on docks and other adjacent areas. These employees may also be covered by state workers' compensation programs: there is overlapping coverage for LHWCA employees engaged in covered employments *on land* adjoining navigable waters; application of state law is not preempted by the LHWCA relative to employments that may be subject to state compensation schemes, so a worker who meets the coverage criteria of both a state plan and the LHWCA may file under both, concurrently or successively.¹²⁷ The "maritime but local" doctrine allows application of local law with respect to local activities which occur on navigable waters but do not involve traditional maritime interests. Typical "local activities" involve construction workers building bridges, fixed piers, fixed drilling and pumping platforms, and other fixtures considered to be extensions of land. Though some courts have extended the "maritime but local" doctrine to seamen, it appears that these decisions are not soundly based on the underlying principles of the doctrines of federal preemption of law relative to matters within admiralty jurisdiction, especially the doctrine of federal supersession of local law to the extent it conflicts with recognized federal law (in the case of seamen, the Jones Act and the remedies of maintenance and cure and the unseaworthiness doctrine), and the doctrine of federal preemption of local law to the extent that it contravenes a "characteristic feature" of maritime law. Though some have argued that extending state remedies to local seamen merely "supplements" their federal remedies, and does not replace them, this argument ignores the other half of the equation: that application of state law does directly conflict with and replace the limited aspects of the employers' liabilities, including certain complete defenses to liability and, with respect to liability for negligence and unseaworthiness, the partial defense of comparative negligence of the seaman.

3.3 Absolute but Exclusive Liability for Statutory Benefits

Section 904(b) states that "compensation shall be paid irrespective of fault as a cause of the injury." The only defenses to liability for benefits are if the injury was caused solely by intoxication of the injured employee or by his willful intent to kill or injure himself or another. Section 903(b). Section 905 states the exclusiveness of the statutory remedy with respect to the employer, and eliminates the pre-1972 triangle of three party suits and indemnity that frequently circumvented the intended exclusivity:

(a) Employer liability; failure of employer to secure payment of compensation

The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this

¹²⁵ *Peru v. Sharpshooter Spectrum Venture LLC*, 2007 AMC 1547 (9th Cir. 2007).

¹²⁶ *Sun Ship, Inc. v. Pennsylvania*, 477 U.S. 715, 1980 AMC 1930 (1980).

¹²⁷ 33 USC § 903(e); *Sun Ship; Landry v. Carlson Mooring Service*, 643 F.2d 1080 (5th Cir. 1981); *Logan v. Louisiana Dock Co., Inc.*, 541 So.2d 182, 1990 AMC 2625 (La. 1989); *Norfolk Shipbuilding & D. D. Co. v. Lathey*, 380 S.E. 665, 8 Va. Ap. 306, 1990 AMC 997 (Va. Ap. 1989).

chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee. For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

(b) Negligence of vessel

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 in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. 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. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. 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.

The exclusivity provisions bar any action by a third party tortfeasor for contribution against the employer.

33 U.S.C. §905(a) provides the exclusive remedy for covered workers and embodies Congress' intention for employers to provide no-fault compensation in return for immunity from tort liability:

“(a) Employer liability; failure of employer to secure payment of compensation. The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter or to maintain an action at law or admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

33 U.S.C. §902(2) of the LHWCA provides that “‘injury’ means accidental injury or death arising out and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.” There are two recognized exceptions to immunity of the employer. The first exception is statutory: 33 U.S.C. § 904(a) provides that an employer forfeits the statutory exception from tort liability if it fails to secure payment of statutory benefits with an authorized employer. The second, that “‘intentional injury” committed by the employer is not “accidental injury”, is recognized by some courts. See, e.g., *Talik v. Federal Marine Terminals, Inc.*¹²⁸

3.4 Tort Liability to LHWCA Employees: Third Party §§ 905(b) and 933 Actions for Negligence of the “Vessel”; and the *Scindia* Doctrine

The LHWCA is consistent with most other workers' compensation schemes in allowing an injured worker to seek full tort damages from parties other than his employer who tortiously caused his injury. Under 33 USC § 905(b), claimants may sue vessel operators whose negligence caused their

¹²⁸ 2006 Ohio App. Lexis 3965 (Oh. App. 2006).

injury or death. *Romero v. Cajun Stabilizing Boats, Inc.*¹²⁹ colorfully describes the provisions of the LHWCA for third party actions:

Under the [LHWCA], if a maritime employee is injured during the course and scope of his employment due to the negligence of a vessel, he may bring an action against the vessel owner to recover damages. 33 U.S.C. § 905(b). However, the Fifth Circuit has stated that, “[a]n injured longshoreman must navigate the channels of the LHWCA before he can drop anchor in the vessel owner's pocketbook and claim his booty.” ... To guide in this navigation, the United States Supreme Court has provided a treasure map of sorts, outlining the three duties owed by the vessel owner to workers. These duties are: (1) the “Turnover Duty,” (2) the “Active Control Duty,” and (3) the “Duty to Intervene.” See *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S. Ct. 1614, 68 L. Ed. 2d 1 (1981); *Howlett v. Birckdale Shipping Co., S.A.*, 512 U.S. 92, 114 S. Ct. 2057, 129 L. Ed. 2d 78 (1994).

The remedies against negligent shipowners who are also employers differ between longshore workers and ship repair workers: longshore workers may recover tort damages against an employer who is negligent as a shipowner; but harbor workers do not have any remedy against a shipowner if the shipowner is their employer. Under 33 USC § 933, an injured harborworker can bring third party actions against other interests, such as an equipment manufacturer, on negligence or other tort grounds, such as strict product liability, for which the third party is “liable in damages” under tort law.¹³⁰ Section 905(b) specifically limits such actions against “a vessel” to actions based on “negligence”. The major issues presented by § 905(b) are (1) what is the standard of care to which a shipowner is held in determining what conduct is “negligent”, (2) what are the harbor worker's rights where his employer is also the shipowner, and (3) who is the employer in the case of an employee of a subcontractor. For purposes of § 905(b), a time charterer of a vessel is considered a “vessel”.¹³¹

3.4.1 Standard of care/shipowner negligence. *Scindia Steam Navigation Co. v. de los Santos*¹³² rejected plaintiff's counsel's arguments that the maritime law placed on shipowners the “highest duty of care” to longshore and harbor workers, and any breach of that duty amounted to “negligence.” *Scindia* and most subsequent precedents refer to “stevedores” and “longshore worker”, but the doctrine also applies to repair contractors and repair workers.¹³³ *Scindia* held that Congress intended that shipowners owed to longshore workers only a duty to exercise reasonable care:

- (a) to have the ship and its equipment in such condition that an experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons or property [the “turnover” duty];
- (b) to warn the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known by the exercise of reasonable care that would not be known by the stevedore and would not be obvious to or anticipated by him if reasonably competent [the “duty to warn at turnover”];
- (c) that once the stevedore begins his work, the shipowner has no general duty to supervise the work or inspect the areas assigned to the stevedore [the “active operations” duty]; but

¹²⁹ 2007 U.S. Dist. Lexis 59119 (W. D. La. 2007).

¹³⁰ See, e.g., *Borel v. Fiberboard Paper Products, Corp.*, 493 F.2d 1076 (5th Cir. 1973) (products liability claim against a manufacturer); *Devlin v. Johns-Mansville Corp.*, 495 A.2d 495 (N.J. Sup. 1985) (product liability claim against supplier); *Handle v. PPG Industries*, 65 FRD 566 (E.D. Tx. 1974) (claims against parent, subsidiary or affiliated company); *Bonce v. L & M Const. Chemicals*, 518 F.Supp. 375 (E.D. Tenn. 1981) (successor corporation); *Sevens v. Kimmel*, 394 N.E. 2d 232 (In. App. 1979); and *Heinrich v. Goodyear Tire & Rubber Co.*, 532 F.Supp. 1348 (D. Md. 1982) (company-retained medical and safety personnel).

¹³¹ *Luria Bros & Co. v. Alliance Ins. Co., Ltd.*, 780 F.2d 1082, 1986 AMC 1539 (2nd Cir. 1986); *Irby v. Tokai Lines*, 1990 AMC 1042 (E.D. Pa. 1990).

¹³² 451 U.S. 156, 1981 AMC 601 (1981).

¹³³ *Lormand v. The Superior Oil Co.*, 845 F.2d 536, 1988 AMC 2362 (5th Cir. 1987); *Cook v. Exxon Shipping Co.*, 762 F.2d 750 (9th Cir. 1985); *Bates v. Merritt Seafood, Inc.*, 663 F.Supp. 915, 1989 AMC 81 (D. S.C. 1987); *Crowsert v. Crowley Maritime Corp.*, 101 Wn. 2d 402, 680 P.2d 46, 1985 AMC 170 (1984).

(d) the shipowner has a duty to protect longshoremen after cargo operations have commenced if the shipowner becomes aware that the ship or its gear pose a danger to the longshoremen or that the stevedore is acting unreasonably in failing to protect longshoremen against danger ["duty to intervene"].

Scindia has been interpreted to impose § 905 liability on shipowners for breach of four duties: (1) the "turnover duty"; (2) the "duty to warn" of hidden hazards; (3) the duty to exercise reasonable care with respect to the safety of longshore workers relative to any equipment or area of the ship that remains within the "active operations" control of the shipowner; and (4) the duty to intervene in the operations of the stevedore, all as described in the above quotation. Some precedents refer only to the general duties: "turnover", "active control", and "intervention".¹³⁴ Due to space limitations, this paper does not discuss in detail court interpretations of these duties.

3.4.2 Shipowner as the employer: the *Yaka* doctrine. The LHWCA was intended to protect employers from tort liabilities, but not where they were negligent in their capacity as shipowners or charterers. The 1984 amendments to the Act removed tort exposure to shipowner employers of shipbuilders, ship repairers and shipbreakers, but not to longshore workers. 33 USC § 904(b).

3.4.2.1 Shipowners as employers of longshore workers. Under the "*Yaka*" doctrine, when shipowners wear two hats, one as shipowner and the other as employer of longshore workers, they can be sued for negligence in their shipowner capacity.¹³⁵ *Taylor v. Ins. Co. of North America*¹³⁶ followed *Yaka* and held that the 1974 amendments to the LHWCA evidenced an intent that longshore workers employed directly by the vessel should be treated the same as those employed by independent stevedores, and that the vessel should be regarded as a third party, distinct from her owner.¹³⁷ Where the alleged negligence of a dual-capacity shipowners it attributable to their stevedoring capacity, their liability for LHWCA benefits is the exclusive remedy of claimants. "[A] vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence in its 'stevedore' capacity."¹³⁸ *Gravatt v. The City of New York*¹³⁹ refined the rule that the employer is liable only to the extent that the employer was negligent in its capacity as a "vessel". With respect to non-longshore harbor workers, it stated:

Thus, under the 1984 Amendments, maritime workers engaged directly by a vessel owner to provide shipbuilding, repairing or breaking services cannot sue the dual-capacity employer for injuries caused by the negligence of the vessel or its employees, no matter what were the work activities of the negligent employees.

With respect to longshore workers, it followed the rule of *Morehead v. Atkinson-Kiewit, J/V*,¹⁴⁰ which it restated as:

Liability in vessel negligence under section 905(b) will lie where the dual-capacity defendant breached its duties of care while acting in its capacity as vessel owner. The negligent action of a dual-capacity defendant's employees must be analyzed to determine whether they were undertaken in pursuance of the defendant's role as vessel owner or as employer. The negligence of the employer's agents, acting in takes constituting harbor-work employment, may not be imputed to their employer in its capacity as vessel owner.

¹³⁴ See, e.g., *Reed v. ULS Corp.*, 178 F.3^d 988 (8th Cir. 1999).

¹³⁵ *Reed v. The Yaka*, 373 U.S. 410, 1963 AMC 1373 (1963); *Scindia* at 451; *Pichoff v. Bisso Towboat Co.*, 748 F.2^d 300, 1986 AMC 1080 (5th Cir. 1984).

¹³⁶ 845 F.2^d 1323, 1988 AMC 2610 (5th Cir. 1988).

¹³⁷ See also *Smith v. Eastern Seaboard Pile Driving Co.*, 604 F.2^d 789, 1979 AMC 2021 (2nd Cir. 1979); *White v. Cooper/T. Smith Corp.*, 690 F.Supp. 535 (E. D. La. 1988); *Ducреpont v. Baton Rouge Marine Enterprises, Inc.*, 666 F.Supp. 882, 1988 AMC 1300 (E.D. La. 1987).

¹³⁸ *Jones & Loughlin Steel Corp. v. Pfiefer*, 462 U.S. 523, 531 n. 6, 1983 AMC 1881 (1983). See also *Dalleo v. River Construction, Inc.*, 2002 U.S. Dist. Lexis 19389 (E.D. La. 2002).

¹³⁹ 2000 AMC 2705 (2nd Cir. 2000).

¹⁴⁰ 97 F.3^d 603, 1996 AMC 2948 (1st Cir. 1996).

Smith looked to whether the particular employee in issue would have been employed an intermediate employer had the shipowner chosen to contract out that work. The dual capacity shipowner rule was examined in the context of vessel operators who directly employed harbor workers who performed construction tasks from their vessels in *Morehead*. *Morehead* rejected the rule of *Fenetti v. Hellenic Lines, Ltd.*¹⁴¹ and adopted the Fifth Circuit rule of *Castorina v. Lykes Bros S.S. Co.*,¹⁴² that in determining liability of a dual capacity employer, the court must regard the single defendant as a hypothetical independent employer and as an independent vessel operator, each with duties to longshore workers allocated under the *Scindia* rules, and examining which duties were breached, and that a dual capacity employer's liability as shipowner would not be enlarged over that of an independent shipowner. *Morehead* determined that the negligence that caused the injury was attributable to fellow harborworkers, thus there was no 905(b) liability of the employer as shipowner. *DiGiovanni v. Traylor Bros. Inc.*¹⁴³ expressly rejected the rule of *Castorina* and adopted the *Fenetti* rule, that a dual capacity employer has enhanced duties to harbor workers than does a shipowner who hires an independent stevedoring contractor to perform the harborworker functions. The immunity of a shipowner may apply where it is an “employer” under 33 USC § 904(a), where its subcontractor does not effect required security for compensation due its employees. The *Yaka* dual capacity liability of the employer is not recognized when the employer functions both as stevedore and a terminal operator: the company is immune from a third party suit for damages.¹⁴⁴

3.4.2.2 Shipowners as employers of repair workers. Section 905(b) prohibits persons employed as shipbuilders, repairers or ship breakers from bringing an action against their employers if their employers are also the owners of the vessel.¹⁴⁵ *Roach v. M/V Aqua Grace*¹⁴⁶ held that the 1984 amendments, which grant immunity to a “*Yaka*” shipowner who is also the employer of repairers, may permit a 905(b) action against the shipowner for negligence with respect to its wearing some third “hat” only if there is clear evidence that the liability of the shipowner defendant was based on some involvement more than just as the owner of the vessel and as the general contractor for the repair work being performed. *Jones v. Dutra Construction*¹⁴⁷ applied the bar despite the fact that the injured worker, who at the time of his injury was engaged in repairing a vessel, claimed to be only a temporary employee. *Feurtado v. Zapata Gulf Marine Corp.*¹⁴⁸ interpreted “repairs” narrowly to services “restore the vessel from inoperable condition” so as to not apply to a worker engaged in “maintenance” services on a vessel. *Feurtado* quoted *New v. Associated Painting Services, Inc.*:¹⁴⁹

“repair” in 905(b) must be given its ordinary meaning, “to restore to a sound or healthy state.” ... If [the worker] is hired to restore a vessel to safe operating condition, he has been hired to perform “repairing ...

¹⁴¹ 678 F.2^d 424, 428 (2nd Cir. 1982).

¹⁴² 758 F.2^d 1025, 1986 AMC 2683 (5th Cir. 1985).

¹⁴³ 959 F.2^d 1119, 1992 AMC 1521 (1st Cir. 1991).

¹⁴⁴ *Hapag-Lloyd, A.G. v. Lavino Shipping Co.*, 1990 AMC 969 (E.D. Pa. 1989)(an indemnity case in which a shipowner was seeking indemnity or contribution from the terminal operator for damages paid to an injured longshoreman).

¹⁴⁵ See, e.g., *Heise v. Fishing Co. of Alaska, Inc.*, 79 F.3^d 903 (9th Cir. 1996), which held that a laborer hired to provide repairing service has no action under § 905(b) against his employer.

¹⁴⁶ 857 F.2^d 1575 (11th Cir. 1988).

¹⁴⁷ 1998 AMC 73 (Cal. App. 1997).

¹⁴⁸ 751 So.2^d 379 (La. App. 2000).

¹⁴⁹ 863 F.2^d 1205, See *Easley v. Southern Shipbuilding Corp.*, 936 F.2^d 839, 1992 AMC 2104 (5th Cir. 1991), remanded 503 U.S. 930, 1992 AMC 2700 (1992), affirmed on remand 965 F.2^d 1, 1992 AMC 2533 (5th Cir. 1992), which looked to the entirety of the duties of the worker, not his duties during piecemeal time increments. 1210, 1990 AMC 1126, 1132 (5th Cir. 1989).

services” under § 905(b). If, however, he is hired to preserve the vessel's current condition, he is performing routine maintenance not covered by [§905(b)].

Feurtado, in affirming the finding that the plaintiff was engaged in “repairing activities”, rejected the argument that repair work must be the “principal duty” of the worker: a worker can be engaged in “repairing” a vessel if he did repair work “regularly”, even if “infrequently”. *Ralston v. San Juan Excursions, Inc.*¹⁵⁰ held that the term “repair” should be distinguished from workers performing routine maintenance.

3.4.2.3 Shipowners as employers of persons providing services other than stevedores, shipbuilding, ship repair and shipbreaking. § 905(b)'s provisions allowing a person employed in providing stevedoring services to bring a tort action for negligence of an employer committed in its function as a shipowner or charterer and prohibiting such actions by persons employed in shipbuilding and in providing repairing and shipbreaking services leaves unaddressed some harbor workers not included in either category. *Guilles v. Sea-Land Service, Inc.*¹⁵¹ held that a relief cook is entitled to bring a *Yaka* action against his employer for negligence in its shipowning capacity. *Bach v. Trident Shipping Co.*¹⁵² held that a harbor pilot may be a “harbor worker” though he was not employed in one of the classified services.

3.5 Third party actions against parties other than “vessels”. Third party actions may be brought against tortfeasors other than “vessels” under maritime common law, or, according to one line of cases, under state law. *Cammon v. City of New York*¹⁵³ determined that state law provisions for strict liability do not directly conflict with maritime law principles of liability only for negligence of third parties, thus state law strict liability can be applied in the case of a third party action by a harbor worker subject to LHWCA jurisdiction. There was a vigorous dissent on the issue.

3.6 The “borrowed servant doctrine” and third party actions against employers of fellow workers. The term “employer” in 33 USC § 905(a) has been interpreted to encompass both general employers and employers who “borrow” a servant from a general employer, and statutory LHWCA benefits are the exclusive remedies against both the general and the borrowing employer.¹⁵⁴ *Denton v. Yazoo & M. Valley R. Co.*¹⁵⁵ stated the definition of a borrowed servant:

When one person puts his servant at the disposal and under the control of another for the performance of a particular service to the latter, the servant, in respect of his acts in that service, is to be dealt with as the servant of the latter and not the former.

*Gaudet v. Exxon Corp.*¹⁵⁶ states nine factors to be considered and balanced in determining whether the borrowed servant doctrine is available as a defense:

¹⁵⁰ 2006 AMC 2758 (W.D. Wa. 2006).

¹⁵¹ 12 F.3d 381, 1995 AMC 1223 (2nd Cir. 1993).

¹⁵² 1989 AMC 460 (E.D. La. 1988), affirmed at 920 F.2d 322, 1991 AMC 928 (5th Cir. 1991), remanded 500 U.S. 906, 1991 AMC 2701 (1991).

¹⁵³ 2001 AMC 977 (N.Y. App. 2000).

¹⁵⁴ See, e.g., *White v. Bethlehem Steel Corp.*, 2000 AMC 2443 (4th Cir. 2000); *Parker v. Joe Lujan Enterprises, Inc.*, 848 F.2d 118 (9th Cir. 1988); See also *Perron v. Bell Maintenance & Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992); *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, 1990 AMC 2150 (3rd Cir. 1990); *Huff v. Marine Tank Testing Corp.*, 631 F.2d 1140, 1982 AMC 235 (4th Cir. 1980); *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969); *Rodriguez v. Barge Foss 343*, 1999 AMC 1593 (W.D. Wa. 1998); *Canty v. Bottacchi, S.A. de Navegacion*, 849 F.Supp. 1552, 1994 AMC 2152 (S.D. Fl. 1994); *Hardin v. Conoco, Inc.*, 712 F.2d 1240, 1990 AMC 526 (W.D. La. 1989); *Roche v. Mark Producing, Inc.*, 712 F.Supp. 1247, 1990 AMC 536 (W.D. La. 1988).

¹⁵⁵ 284 U.S. 305 (1932).

¹⁵⁶ 562 F.2d 351, 355, 1978 AMC 591, 594 (5th Cir. 1977).

1. Who has control over the employee and the work he is performing, beyond mere suggestion of details?
2. Whose work is being performed?
3. Was there an agreement, understanding or meeting of the minds between the original and the borrowing employer?
4. Did the employee acquiesce in the new work relationship with the employee?
5. Did the original employer terminate his relationship with the employee?
6. Who furnished the tools and place of performance?
7. Was the new employment over a considerable length of time?
8. Who had the right to discharge the employee?
9. Who had the obligation to pay the employee?

White discussed that the doctrine does not require that a borrowing employer extend to every incident of an employer-employee relationship; “it need only encompass the servant's performance of the particular work in which he is engaged at the time of the accident”. *White* determined that the *Gaudet* nine-part provides insufficient guidance to prospective litigants as to a standard, and adopted an “authoritative direction and control” over the employee in performing the particular act in which he is engaged at the time of the accident. Other courts have held that a vessel operator can avoid third-party liability to a “borrowed employee” under the doctrine.¹⁵⁷

3.7 Contractors' liabilities to employers of subcontractors. A contractor may have third party tort liability to an employee of a subcontractor for negligence attributable to the contractor.¹⁵⁸ Section 904 imposes liability to secure payment of compensation for employees of subcontractors on a contractor if the subcontractor does not secure payment. Where the general contractor procures workers' compensation insurance for the employees of its subcontractors, the general contractor may have tort claim immunity.¹⁵⁹ 33 USC § 905, as amended in 1984, makes it clear that a contractor enjoys such immunity only where the subcontractor fails to secure the compensation required by § 904, and the primary contractor provides such coverage. *Garvin v. Alumax*¹⁶⁰ held that state law may govern immunity of the contractor where the third party action against it is founded on state law.

4. WORKERS SUBJECT TO STATE WORKERS' COMPENSATION PROGRAMS

All states have workers' compensation statutes which, like the LHWCA, provide to workers who become injured in the course of employment medical treatment, temporary total disability payments of a portion of the average wage the worker was earning (subject to maximums and minimums), and, in cases of permanent disabilities, statutory benefits for loss of use of various body parts and functions, typically as awards of different numbers of weeks of average weekly wage payments. All such compensation schemes provide the benefits irrespective of fault of the employer, and irrespective of comparative fault of the worker. The remedies, generally, are the exclusive remedies of the employee and, in case of death, of the employee's survivors, against the employer, subject to tort remedies in cases of intentional misconduct on the part of the employer. The statutory schemes provide for third party tort actions where appropriate, with subrogated recovery by the employers/carriers of benefits paid from the third parties.

A number of states adopted workers' compensation regimes in the early 1900s, which did not exclude coverage for maritime workers. In 1917, the Supreme Court declared that states were

¹⁵⁷ See, e.g., *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2^d 935, 1990 AMC 2150 (3rd Cir. 1990); *Melancon v. Amoca Production Co.*, 834 F.2^d 1238 (5th Cir. 1988); *West v. Kerr-McGee Corp.*, 765 F.2^d 526, 1986 AMC 150 (5th Cir. 1985); *Huff v. Marine Testing Corp.*, 631 F.2^d 1140, 1982 AMC 235 (4th Cir. 1980).

¹⁵⁸ *Martin v. Ingalls Shipbuilding Co.*, 746 F.2^d 231, 1985 AMC 1845 (5th Cir. 1985).

¹⁵⁹ *Washington Metropolitan Transit Authority v. Johnson*, 467 U.S. 925 (1984).

¹⁶⁰ 787 F.2^d 910, 1987 AMC 402 (4th Cir. 1986).

constitutionally barred from applying their compensation systems to maritime injuries, and thus interfering with the overriding federal policy of a uniform maritime law.¹⁶¹ As discussed above, exceptions were recognized in “twilight zones” of potentially overlapping coverage where either the maritime nature of the employment was a “twilight zone”, or the employment was “maritime but local”.¹⁶² Consequently, most state workers' compensation programs expressly exclude coverage to seamen or members of the crew of vessels employed on navigable waters, and to other maritime workers employed on navigable waters.

California law does not appear to have a broad exclusion of coverage to maritime workers, including seamen.¹⁶³ This has resulted in a recent case where the California statute was applied to a seaman.¹⁶⁴

Alaska law has been interpreted as applying to seamen, and has been amended only fairly recently to exclude from coverage commercial fishermen. Alaska law still purports to apply to processing workers on seafood processing vessels.¹⁶⁵ This definition has left a controversy whether Alaska can exercise legislative jurisdiction to extend workers' compensation coverage to processing workers aboard vessels which process seafoods at sea, often on the high seas, which call at ports of the state. The Alaska Workers' Compensation Board has ruled that though a processing worker who served on a floating processor which processed seafoods in state territorial waters was a seaman”, there was sufficient state interest to justify extension of the state workers' compensation statute to a claim for

¹⁶¹ *Southern Pacific Ry. Co. v. Jensen*, 244 U.S. 205 (1917). See also *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920); *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 373, 382-84 (1918).

¹⁶² See, e.g., *Western Fuel Co. v. Garcia*, 257 U.S. 233 (1921).

¹⁶³ Cal. Labor Code §§ 3200-6149 makes no provision for exclusion of seamen, members of the crew of a vessel, or other employees engaged in maritime employment from its coverage. See §§ 3352-3352 for definitions of employees and excluded employments.

¹⁶⁴ *CNA Insurance Co. v. Workers' Compensation Appeals Board*, 58 Cal. App. 4th 211, 68 Cal. Rptr. 2d 115, 1998 AMC 534 (1997), involved injury to a crewmember on a passenger ferry on the Long Beach to Catalina Island run. At the Catalina terminal, she was going ashore to order soft drinks for the shipboard concession stand, tripped on the lower end of the gangway, and fell onto the floating dock, injuring her knee. She made recovery for her injuries under the Jones Act, settling with the P & I insurer, and under the LHWCA, settling with the LHWCA carrier, and a third party claim against the wharfinger. The P & I/LHWCA insurer then sought contribution from the state workers' compensation insurer on the basis that there was concurrent coverage for the injury. The California workers' compensation board, affirmed by the court of appeals, determined that irrespective whether the claimant was a seaman on a vessel in navigation, there was concurrent coverage for her injuries under the state act:

Here, Baker is a California resident, employed under a contract made within this state, and injured within territorial waters where the City of Avalon has control over the floating dock involved. All parties accept that the LHWCA and the state have concurrent jurisdiction where there is a showing of local interest. We conclude that Baker's contacts with California, coupled with the state's interest in the welfare of its citizens, conferred upon it concurrent jurisdiction with the Jones Act as well.

This author questions whether there is concurrent state and LHWCA jurisdiction relative to injuries to LHWCA workers which occur on navigable waters (as opposed to on land or on fixed piers, which are considered to be extensions of land). This author also believes this case is wrongly decided in that if in injured party is a “seaman” under the Jones Act and for purposes of maintenance and cure and the unseaworthiness doctrine, application of state law establishing liability of the employer beyond and inconsistent with liability imposed by federal maritime law conflicts with the employer's rights under maritime law, and interferes with “characteristic features” of maritime law. See, e.g., *American Dredging v. Miller*, 510 U.S. 443, 1994 AMC 913 (1994); *Green v. Vermilion Corp.*, 144 F. 3^d 332, 1998 AMC 2328 (5th Cir. 1998).

¹⁶⁵ A.S. 23.30.230(5) and AS 16.05.940(4), expressly include “processing workers on floating fish processing vessels who do not operate fishing gear or engage in activities related to navigation or operation of the vessel”.

injuries, and that his activities were of such local interest that local law could be applied.¹⁶⁶ *Kwak v. Arctic Storm, Inc.*¹⁶⁷ held that there was no state jurisdiction with respect to a processing worker whose duties were similar to the processing worker in *Santamaria*, but were performed on a catcher processor which operated primarily outside state waters (though the injury occurred while the vessel was docked in state waters). *Lopez-Nieves v. Fishing Co. of Alaska*¹⁶⁸ reconfirmed the Board's position that there is dual federal and state jurisdiction over “local maritime injuries” involving substantial local state interest, but determined that there was no substantial state interest in view of the “nearly exclusive high seas work” of the vessel in issue, thus the processing employee claimant's work was primarily maritime and not local. but agency decisions have held there is no application to processors on vessels to the extent they process seafoods at sea.¹⁶⁹

I have not reviewed the workers’ compensation statutes of other states. I expect that some of them do not have specific exemptions for maritime workers, and others may define exemptions with terminology such as “members of the crew of any vessel” or “seamen”, or workers covered by a federal workers’ compensation statute. No doubt gaps in workers’ compensation act coverage and exposure to employers to tort claims varies from state to state. Accordingly, Marine Employers’ Liability exposures vary from state to state.

As discussed above, there is an intended overlap between potential state coverage and LHWCA coverage with respect to maritime workers injured on piers or “other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel”. Until the 1972 amendments to the LHWCA, the federal act applied only to employments on navigable waters – on vessels and floating drydocks, and did not apply to injuries which occurred on piers, which are considered extension of land. State programs provided coverage to longshoremen and harbor workers

¹⁶⁶ *Santamaria v. Arctic Enterprises, Ltd.*, AWC B D & O Nos. 618961, 609069, 609033, 1987 WL 95439 (1987).

¹⁶⁷ AWC B D & O No. 89333761, 1991 WL 333115 (1991).

¹⁶⁸ AWC B Dec. No. 98-0105.

¹⁶⁹ *Trident Seafoods Corp. v. Murray*, 2000 AMC 288 (Ak. Sup. Ct. 1999), held that a processor employee on a seafood processing vessel which normally did its processing while at anchor in Alaska waters was a seaman and, because of that status, application of the Alaska workers' compensation act to his injuries was superseded by federal seamen's remedies. The claimant initially had received workers' compensation benefits under the Alaska statute and then pursued his seaman's remedies in federal court through trial, which resulted in a determination that he was a Jones Act seaman and an award of damages. He subsequently applied to the workers' compensation board for an adjustment of his claim and the state agency concluded it had jurisdiction over the claim, concurrent with federal jurisdiction to provide seamen's remedies, under the “maritime but local” exception. On appeal of the agency's decision, the superior court limited application of the “maritime but local” doctrine to nonseamen. Relying on *Miles* and *Yamaha* for the rule that the Jones Act establishes a uniform system of tort law and the interests of national uniformity required that seamen's remedies be uniformly applied, the court stated:

Based on historical precedent, together with recent opinions from the United States Supreme Court and statutory construction, state workers' compensation statutes cannot apply to the injury of a Jones Act seaman when that injury occurs within the worker's scope of employment as a seaman. This is true, even if the vessel is engaged in local trade or, as in the present case, where the vessel is anchored at various locations offshore for the purpose of fish processing. ...

Hill v. Workmen's Compensation Appeal Board, 1998 AMC 351 (Pa. Com. Ct. 1997); and *Green v. The Industrial Commission*, 717 N.E.2^d 457 (Il. App. 1999), held that states workers' compensation statutes cannot validly apply to crewmember of local-voyage vessels. In *Hill*, the vessel was a sightseeing boat; in *Green*, the plaintiff was a performer on dinner cruises that typically lasted less than three hours. *Green* concluded that the “twilight zone” doctrine of concurrent jurisdiction “has no application to Jones Act seamen”, and “we conclude that where the employee is determined to be a seaman, the Jones Act preempts state law and constrains the seaman to its remedies.” *Cammon v. City of New York*, 2001 AMC 977 (N.Y. App. 2000), applied the “maritime but local” rule to hold that state law provisions for strict liability do not directly conflict with maritime law principles of negligence-based liability of third parties and state law strict liability can be applied in the case of a third party action by a harbor worker subject to LHWCA jurisdiction.

whose injuries occurred on piers and on land. Case law recognized some overlapping and concurrent jurisdiction with state and federal workers' compensation programs.¹⁷⁰ Even as to injuries which occurred on navigable waters, if the employment was “maritime but local”, there could be recovery under either state or federal law.¹⁷¹ In 1972, Congress extended the LHWCA coverage landward beyond the shoreline of the navigable waters of the United States. As to this extended coverage, *Sun Ship* recognized that there was concurrent coverage in which federal remedies supplement, rather than supplant, state compensation law. Under *Sun Ship, Inc. v. Pennsylvania*¹⁷² state workers' compensation statutes may also apply to harbor workers' land-based injuries, and may supplement LHWCA benefits if the state remedies are more generous than federal law. But, importantly, the concurrent jurisdiction recognized in *Sun Ship* does not involve any conflict between the state remedy and any federal law or any “characteristic feature” of maritime law: thus, though *Sun Ship* recognizes concurrent jurisdiction with respect to shoreside injuries of workers subject to the extended jurisdiction of the LHWCA, it is my belief that there is no sound basis in law for concurrent jurisdiction of state workers' compensation laws and seamen subject to the Jones Act and to the “characteristic features” of maritime law of the unseaworthiness doctrine and the doctrines of maintenance and cure, as well as the historic characteristic feature of the doctrine of comparative negligence.

In most cases, workers within the overlap prefer to make claims under the LHWCA, as the LHWCA generally has more generous benefits than state compensation plans. But, depending on the circumstances and issues, maritime workers who are injured on the shore-side of the demarcation line of “upon the navigable waters of the United States” and even workers injured on navigable waters while engaged in maritime but local activities, such as land-oriented construction, may elect to pursue recovery under state law.

5. EMPLOYER LIABILITY ISSUES RELATIVE TO SHIPS' PILOTS

Few employment-related tasks involve a greater chance of injury or death per repetition than boarding or disembarking a ship by a vertical-rope pilot ladder to or from the deck of a pilot boat pitching and surging in heavy swells common on the bars of the many pilotage districts of the nation. Possibly because the total number of pilots is small and most are self-employed, employer liability issues relative to pilots has not been well defined.

As stated, most pilots are self-employed contractors to the ships on which they serve. Typically, they are not employed by the pilots' associations that operate pilot stations and pilot vessels, through which the pilots are dispatched.¹⁷³ But some are employed by port districts or other municipal jurisdictions operating ports, and some are employed by the companies that provide the ship-assist tugs that dock and undock the ships. Despite the fact that some pilots are maritime employees, there is a dearth of jurisprudence on the basis of liability of their employers for their employment-related deaths and injuries.

¹⁷⁰ See, e.g., *Davis v. Dept. of Labor*, 317 U.S. 249, 1942 AMC 1653 (1942).

¹⁷¹ See, e.g., *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114, 1962 AMC 1413 (1962).

¹⁷² 447 U.S. 715, 1980 AMC 1930 (1980). See also *Landry v. Carlson Mooring Service*, 643 F.2d 1080 (5th Cir. 1981).

¹⁷³ See, generally, *Guy v. Donald*, 203 U.S. 399 (1906); *California v. M/S Ilice*, 534 F.2d 836, 1976 AMC 2290 (9th Cir. 1976), for a discussion of the rule that pilots are independent contractors. *Walsh v. Zusei Kaiun K. K.*, 606 F.2d 259, 1980 AMC 2788 (9th Cir. 1979), involved the issue of liability of the pilot-boat operating association for death of a pilot-member. It was there held that the negligence of a launch operator employed by the pilot's association was imputed to the pilot, to reduce his estate's recovery for his death by the relative comparative negligence of the launch operator.

Analysis of the status of pilots and basis of liability of their employers for death or injury to pilot-employees is complicated by federal statutory delegation of regulation of pilots while they are serving ships in international commerce to the states which delegates regulation of pilots serving vessels in international trade to the states, while reserving regulation of pilots serving vessels in domestic trade to the federal government.¹⁷⁴

As stated above, in 1917 the Supreme Court held that state workers' compensation statutes cannot constitutionally apply to maritime workers and in 1920 held that Congress cannot validly delegate authority to extend state workers' compensation remedies to the states.¹⁷⁵

Excepting of some pilots in trades such as the river systems of the United States and Southeast Alaska that who have long-term employment on the vessels they serve, most pilots board ships to provide only a few hours of service in docking, undocking, and transiting the harbor areas, rivers, estuaries, and bays to open waters. Lacking the substantial temporal employment connection with the vessels on which they serve, pilots providing only short-term services are not considered "seamen" or members of the crews of the vessels.¹⁷⁶ Docking masters provided by ship-assist tugs could be considered seamen of the tugs on which they serve. Ship and their operators do have potential liability to pilots for vessel-related negligence, but not as the employers of the pilots.¹⁷⁷

¹⁷⁴ 46 U.S.C. § 8501 provides that pilots on waters of the United States shall be regulated only in conformity with the laws of the states, except that the states may not adopt a regulation which requires a coastwise vessel to take a state licensed or authorized pilot. 46 U.S.C. § 8502 provides that all vessels not sailing on register (such as foreign-flag vessels or United States-flag vessels engaged in foreign trade and sailing on enrollment) be under the control of pilots licensed by the Coast Guard, when navigating in pilotage waters as designated by the Coast Guard. The predecessor statutes of §§ 8501 and 8502 when read together have been construed to give the federal government exclusive authority to regulate pilots on vessels licensed for coastwise and intercoastal trade and that they preclude a state from imposing its own pilotage requirements upon them. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 1978 AMC 527 (1978). The matter of constitutionality of state regulation of pilotage was first tested in *Cooley v. The Board of Wardens of the Port of Philadelphia*, 53 U.S. 299 (1851).

¹⁷⁵ *Southern Pacific Co. v. Jensen*, 244 U.S. 205, [retro] 1996 AMC 2076 (1917). *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920), which held that a prior enactment which delegated authority to the states to extend state workers' compensation remedies to maritime workers was beyond the power of Congress. The attempted amendment was unconstitutional because it was an unauthorized delegation of the legislative power of Congress. The Court concluded that U.S. Const. art. III, § 2, and art. I, § 8, empowered Congress to legislate matters of admiralty and maritime jurisdiction. The Court held that in order to maintain uniformity of the maritime law, Congress could not delegate that authority to the states. See also *Washington v. W. C. Dawson & Co.*, 264 U.S. 219 (1924), which held that states cannot compel employers to contribute to state workers' compensation plans for maritime employment.

¹⁷⁶ See, e.g., *Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187, 1992 AMC 374 (4th Cir. 1991), which held that a independent compulsory pilot cannot be a seaman entitled to Jones Act remedies because he lacks the requisite more or less permanent attachment to the vessel or an identifiable fleet of vessels under common operation.

¹⁷⁷ Pilots and other contractors are owed the same duties to not negligently injure them and to warn of known dangers as other visitors, *Kermarec v. Companie Generale Transatlantique*, 358 U.S. 625, 1959 AMC 597 (1959); *Clark v. Solomon Navigation Co.*, 631 F. Supp. 1275, 1986 AMC 2141 (S.D. N.Y. 1986), and to aid them when they are known to be in peril, *Walsh v. Zuisai Kaiun K. K.*, 46 U.S.C. §§ 2303, 2304.

Pilots are maritime workers so potentially are subject to LHWCA jurisdiction.¹⁷⁸ Self-employed pilots have no remedy under the LHWCA. Pilots employed by government entities such as port districts also are exempt from LHWCA coverage.¹⁷⁹

In summary, pilots who have long-term assignments to river towing vessels, cruise vessels in the inland waters of South East Alaska, and harbor-assist tugs that provide docking masters to the ships they assist may be considered “seamen” of the vessels to which they have long-term employment. There is no issue of employer liability to self-employed pilots: they are considered LHWCA “employees”, but have no employer liable for their death or injury. Pilots employed by port districts or port authorities that are entities of states similarly are exempt from LHWCA remedies. It may be that docking masters who are employed by ship-assist tug employers who do not have seaman status with respect to a specific tug and other pilots employed by non-governmental entities are LHWCA employees.

6. MARITIME EMPLOYMENT EXPOSURES FROM A LAWYER'S VIEWPOINT

Any employer whose employees go aboard vessels at any time in the course of employment should examine its insurance program to assure that it has necessary maritime employment coverage. In cases of employers who are engaged in ship loading and unloading, building, repair and breaking, even employees whose duties do not take them onto vessels but engage in employment on adjacent piers and other shoreside areas used for such endeavors may be entitled to LHWCA coverage. It is obvious that shipowners need P & I coverage with respect to liabilities covered by such insurance with respect to any vessels they own or operate. But if any of their employees perform maritime duties on ships in layup, or engage in maintenance and repair or loading and unloading other vessels than the vessel on which they are employed as “seamen”, shipowners may need LHWCA coverage. Shipowners may also need LHWCA coverage for non-seamen employees whose duties occasionally take them aboard ship. Similar exposures apply to charterers and other employers who engage in some aspect of vessel operation.

Stevedores obviously have LHWCA exposures for their employees engaged in loading and unloading vessels, whether the employees are employed on board the vessels or on piers and adjoining areas. But, with respect to periods their employees are not actually on navigable waters, the employees also may be subject to state workers' compensation laws. Employees who serve on board floating cranes and other floating equipment operated by the employer may also be considered “seamen” with respect to injuries incurred while working on such equipment.

Employers engaged in shipbuilding and ship repairing operations face similar exposures. To the extent their employees may become involved in vessel operations during extended sea trials of vessel in navigation, the employees may be considered “seamen”.

¹⁷⁸ *Ghotra v. Bandila Shipping, Inc.*, 113 F.3^d 1050, 1997 AMC 1936 (9th Cir. 1997)(a case involving death of a self-employed marine surveyor, not a pilot), held that self-employed individuals who meet the status and situs tests are within the coverage of the LHWCA, although they may not be insured for compensation. Thus, they are considered to be “seafarers” for purposes of determining whether their remedies are governed by state or federal law and they are entitled to bring “§ 905(b)” actions for negligence of the vessel. Although self-employed harbor workers may be § 902(3) “employees”, they are not “employers” of themselves, hence they are not required to secure insurance relative to their own employment under § 904.

¹⁷⁹ 46 U.S.C. § 920(b) provides:

(b) Government officers and employees. No compensation shall be payable in respect of the disability or death of an officer the United States, or any agency thereof, or of any State or foreign government, or any subdivision thereof.

Marine construction contractors face exposures similar to stevedores, but even employees working on navigable waters may be considered to be engaged in “maritime but local” activities, in essence giving them the option to make claims under maritime law as “seaman” if their employments meet the tests of substantial connection to a vessel in operation, as harbor workers under the LHWCA, or under state workers' compensation statutes.

Operators of marinas and wharves have employees who may be considered LHWCA employees. Sellers of vessel equipment and supplies, to the extent that their employees may go aboard vessels to install their equipment or stock supplies or to attend sea trials, may be LHWCA employers.

As mentioned above, diverse workers such as ships' agents whose duties require that they go aboard vessels have been deemed LHWCA employees. See *Miller v. Golden Star Maritime, Inc.*¹⁸⁰ Marine surveyors have been considered to be LHWCA employees. Investigators and adjusters may have the same status. Police officers, fire fighters and security personnel who serve aboard enforcement, security and fire-fighting vessels may be considered seamen.

Employers who operate vessels as vessel owners or charterers can insure their liabilities to “seamen” under standard P & I policies. But most such policies exclude, referring to the language of the SP 23 form, “liability under any Compensation Act to any employee of the Assured”. So if vessel crewmembers remain employed during periods their vessels are laid up for extended repairs or periods they are out of service, or assist in loading, unloading, repairing, or maintaining other vessels, they may be within LHWCA coverage relative to such activities. Claims by such workers LHWCA benefits typically would be covered under LHWCA insurance, but, if the workers are employed in “longshore” activities, they may be entitled to make a § 905(b) claim for tort damages against their “dual capacity” employer. Coverage for such third party “Yaka” claims usually is under the vessel operator’s P & I policy: the claim is for injury to a “visitor” for common law negligence, seeking tort damages, irrespective that it is allowed under the LHWCA. Most P & I forms have an exclusion for “any claim arising directly or indirectly under the Longshore and Harbor Workers' Compensation Act or any workers' compensation act of any state or nation” (language from SP-38 form), but my belief is that § 905(b) liabilities are deemed to arise under the general maritime law rather than the LHWCA, thus are covered by the vessel owners P & I policy.¹⁸¹

Although Section 905(b) eliminated the unseaworthiness cause of action for longshore workers, it allows third party actions for common law negligence under the general maritime law. The liability arises under the GML, not under the act. To the extent employments could be considered local, under California law and possibly the laws of other states that do not exempt from coverage members of the crew of any vessel, vessel crewmembers may be subject to state workers' compensation coverage.

Standard P & I insurance forms limit their coverage, using the SP 23 language, “all such loss and/or damage and/or expense as the Assured shall as owners of the vessel named herein have become liable to pay and shall pay on account of the liabilities, risks, events and/or happenings herein set forth”.

¹⁸⁰ 1997 AMC 1837 (E.D. La. 1997).

¹⁸¹ See, e.g., *Voison v. Ocean Protein, Inc.*, 321 F.Supp. 173, 1971 AMC 464, 467 (E.D. La. 1970):

The exclusionary phrase is inapplicable because the claim asserted by the employee arose not under any compensation act, but under the general maritime law pertaining to unseaworthiness, a decisional body of law which cannot be interpreted as a “Compensation Act” within the meaning of the exclusionary phrase. Thus the language of the P & I Policy clearly extends coverage to the case in question.

Harris v. Olympus Terminals & Transport Co., Inc., 516 F.2^d 922, 1975 AMC 2146 (5th Cir. 1975), overruled district court decisions to the contrary and followed *Voison*.

Many potential exposures of an employer to employees can arise from acts of the employer other than as “owner” of the named vessel. Such “other” liabilities are not insured under standard P & I forms.

Insuring LHWCA exposures is subject to statutory requirements. Some P & I insurances add LHWCA coverage by endorsement, and some yacht policies include LHWCA coverage. Such coverages might not meet statutory requirements of the LHWCA, which could result in serious consequences to the insureds (and their brokers). Section 932 of the LHWCA requires every employer to secure payment by either an authorized approved insurer or by pre-approved self insurance. Section 935 requires that any approved insurer assumes all liabilities of the employer (including obligations for record keeping and administration as well as payments of compensation). Section 936 requires that every approved policy provide that the insurer meets the requirements of § 935. If the insurer is not an “authorized insurer” accepted by the federal Office of Workers' Compensation Programs for such insurance, there is no exclusivity of the statutory remedies and the employee may elect to sue for whatever damages he can prove if the employer fails to secure payments with an approved insurer: Section 905(a) gives an injured employee or his representatives the election to avoid the limited compensation of the act if the employer fails to secure payment as required by the act, namely by an approved policy with an authorized insurer.¹⁸² If the policy is subject to policy limits, statutory requirements are not met. Failure of an employer to secure the payment of compensation (by insurance with an approved insurer or by approved self insurance) may result in a \$10,000 fine against the employer (if the employer is a corporation, also against the president, secretary and treasurer), and each are jointly and severally personally liable for any compensation due.

The situation of a vessel operator also employing longshore workers raises unique problems. Where an employer is liable in its vessel operator capacity under *The Yaka* doctrine, it may have coverage under such claims under either its employer's liability insurance or its vessel Protection and Indemnity insurance. *Taylor v. Ins. Co. of North America*,¹⁸³ allowed the worker's compensation carrier to collect its compensation lien against the vessel's P & I insurer, although the employer was also the vessel operator. *Harris v. Olympus Terminals & Transport Co., Inc.*¹⁸⁴ cited several lower court decisions finding coverage for such claims under “part B” coverage of standard employers' liability insurance forms. *Viger v. Geophysical Services, Inc.*¹⁸⁵ found that the employer's P & I insurance provided coverage for liabilities arising out of its ownership and operation of the vessel named in the policy, but for the fact of the existence of duplicate coverage. *Viger* resolved which of the two insurers bears the loss in such cases, finding that where there is duplicate coverage where either of two carriers would be liable except for the existence of the policy of the other, an employers' liability policy containing the standard “prorata clause” is primary to a P & I policy with an “escape” clause, which prevents coverage under the P & I policy from coming into existence.

Insuring liabilities to state workers' compensation employees also raises special problems in the maritime context. When a single insurer provides both state and LHWCA coverage, problems with overlap and apportionment of payrolls is reduced. But when separate insurers are involved, or when the state workers' compensation insurer is the Washington Department of Labor and Industries, apportionment and overlapping coverages can make administration very complicated.

¹⁸² See *Trussel v. Litton Systems, Inc.*, 753 F.2^d 366, 1985 AMC 2279 (5th Cir. 1984).

¹⁸³ 845 F.2^d 1323, 1988 AMC 2610 (5th Cir. 1988).

¹⁸⁴ 516 F.2^d 922, 1975 AMC 2146 (5th Cir. 1975). See also *Garcia v. Queen, Ltd.*, 487 F.2^d 625, 1973 AMC 2425 (5th Cir. 1973).

¹⁸⁵ 338 F.Supp. 808, 1872 AMC 2113 (W.D. La. 1972), *affirmed* 476 F.2^d 1288, 1973 AMC 1109 (5th Cir. 1973). See also *Boudreaux v. Shannon Marine, Inc.*, 875 F.2^d 511, 1989 AMC 2959 (5th Cir. 1989); *Layton v. Land & Marine Applicator, Inc.*, 522 F.Supp. 679 (E.D. La. 1981); and *Lodique v. Montegut Marine Service*, 1978 AMC 2272 (E.D. La. 1977).

Most workers' compensation insurances, including federal LHWCA coverage policies, effectively substitute the carrier for the employer so far as administration of the claim, so long as the carrier adequately performs the responsibilities of the employer. This is not the case with P & I insurance and some MEL policies. P & I insurance is written on an “indemnity basis”, with traditional policy language reading that the insurers shall indemnify the assured, as owner of the named vessel, for certain “loss, damage or expense” as the assured shall have become liable to pay and *shall have paid* on account of insured liabilities and expenses named in the policy. Some MEL policies are written on an indemnity basis, some on a liability basis. Under indemnity policies, the insureds may be required to conduct defense against claims, subject to the right to indemnification from the insurer and provisions in the policies and club rules as to the right of the insurer to appoint or approve defense counsel approved by the insurer.

Problems with indemnity policies often arise when the insured either becomes insolvent or does not have sufficient funding readily available to fund a covered liability or expense, to trigger the insurers obligation to provide prompt indemnity. Often, insurers will fund settlements and other indemnity disbursements either directly to claimants or simultaneous with the insureds making the required payments, but such simultaneous transactions usually are worked out with adjusters or claims administrators in advance: they are not required by the terms of typical policies. It is not unusual that in event of insolvency of an insured for a P & I insurer to distance itself from the claim and leave it to the claimants and, sometimes, mortgage lien holders of vessels subject to maritime liens by the claimants, to find means of funding payment of claims and expenses to fund payments to claimants that trigger indemnification.

Most P & I insurance and some MEL policies are subject to deductibles or self-insured retentions, sometimes very substantial. P & I policies typically are subject to policy limits, sometimes with layers of excess coverage for various policy limits. Most workers' compensation policies, including federal LHWCA policies, have no deductibles and do not permit policy limits.

As mentioned above, state workers' compensation policies usually are regulated by state insurance departments as to the terms of coverage. Federal LHWCA policies must be approved by the United States Department of Labor as to the terms of coverage and qualification of insurers. P & I policies, typically, are not subject to state or federal regulation, other than that some states require qualification so far as minimum capital and reserves and trust fund deposits as qualifications for issuing surplus lines policies issued in or covering risks in the regulating state. Typically, foreign surplus lines insurers are not regulated directly: rather, brokers placing policies in the regulating state or insuring risks in the regulating state are subject to state regulation as to the qualifications of security. Requirement of reserves is problematical for P & I clubs and for fixed-premium P & I policies issued by the clubs and their subsidiaries, as the mutual insurance clubs do not maintain substantial capitalization and reserves.

It is generally acknowledged that Jones Act “seamen” cannot contract away their Jones Act rights.¹⁸⁶ But it is possible by contractually defining a worker's duties to bring them within the definitions of a seaman to avoid ambiguous circumstances. For example, *Lara v. Harveys Iowa Management Co., Inc.*,¹⁸⁷ which held that a cocktail server on a casino ship was a seaman, placed substantial reliance on the fact that the employer's written employment policies qualified such employees as “seamen”. I have prepared crew employment contracts that use the following clauses to define

¹⁸⁶ Section 5 of FELA closely limits the ability of an employer to restrict its own liability by contract or other device: “Any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this chapter, shall to that extent be void.” 45 USC § 55. This section, as do other provisions of FELA, apply to seamen. See, e.g., *Brown v. State of Alaska*, 816 P.2d 1368 (1991).

¹⁸⁷ 2001 AMC 393 (S.D. Ia. 2000).

otherwise ambiguous status of crewmembers who continue employment as vessel maintenance workers during off seasons:

Job Description. Crewmember is hired as _____. His or her principal duties shall include but are not limited to the following: The normal duties at sea and in port of a person of crewmember's job description, including performing such services as are necessary or as may be required by the Vessel's master for the safety and security of the Vessel and its passengers; performing maintenance and repairs to the Vessel during periods that the Vessel is not actively engaged in carrying passengers for hire, including off-season and between voyage maintenance and security. It is expressly recognized and agreed that the duties of Crewmember at all times Crewmember is aboard the Vessel or on adjoining premises owned or controlled by Employer shall include being subject to the instructions and discipline of the Vessel's master. This duty shall apply not only to times when the vessel is at sea or preparing or returning from sea, but during off-hire periods when the Vessel is being maintained and being prepared for future seasons as may be required for the safety of the Vessel, for trials and drills, and for such short-term employment, including local tours and other employment, as may be obtained for the Vessel from time to time during off-seasons.

Illness and Injury. Crewmember acknowledges that he or she is employed under this agreement as a member of the crew of the Vessel, not only while serving aboard the Vessel during periods that the Vessel is engaged in carrying passengers in its usual service, but while staffing the Vessel while it is in port in its home port or otherwise to maintain, repair and keep the vessel in a state of readiness for trials, tests, drills, and short-term employment as well as its usual trade. As a member of the crew, he/she is entitled to certain rights and remedies available to seamen in the event of illness or injury occurring during his or her service as a Crewmember of the vessel under the general maritime law and under federal statutes, including the Jones Act, 46 U.S.C. § 688. Any maintenance which may become due Crewmember as a result of illness or injury while in the service of the vessel shall be paid at the rate of \$25.00 per day.

Similar ambiguity may be present when crewmembers of vessels assist in the loading and unloading of cargo not only to their own vessels, and, as is common in Alaska trades and construction work, crewmembers of towing vessels become involved in loading and unloading the barges they tow. In some cases, it may be possible to define the ambiguity by contract, but, in cases where crewmembers of a towing vessel load and unload the towed vessel, it may be appropriate to recognize that they have dual status under the *Gizoni* doctrine and insure employers' liabilities under both P & I policies and LHWCA insurance. Under the *CNA Insurance Co. v. Workers' Compensation Appeals Board* decision, if California operations are involved, it may also be necessary to insure California workers' compensation statute liabilities.

A final concern is claims for punitive damages under maritime law or state law. Though recent developments hold that seamen are not permitted to bring actions for punitive damages, at least against their employers, as mentioned above, some recent decisions have held that punitive damages can be asserted under maritime law in third party claims of longshore and harbor workers. Many P & I policies, by endorsement, expressly exclude coverage for claims of punitive damages. It is my understanding that California law precludes coverage for intentional injuries, and generally is interpreted as precluding coverage for punitive damages. This not only leaves vessel operators and other maritime businesses with potential exposures which are not insured, but creates fertile ground for plaintiffs' counsel to take advantage of the conflict between the interests of insurers and insureds when uninsured claims are asserted. When a claim is asserted for compensatory damages which are covered by insurance and for punitive damages which are excluded from coverage and a demand is made for settlement offering to waive claims for punitive damages, a perceptive defendant may demand that its insurer consider the uninsured exposures of its insured and accept the offer. Refusal to accept such an offer can expose the insurer to bad faith claims by its insured if the insurer fails to properly protect its insured from uninsured elements of the claim.