

ESCAPE FROM THE LABYRINTH: CALL FOR THE ADMIRALTY JUDGES OF THE SUPREME COURT TO RECONSIDER SEAMAN STATUS

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I. ROLE OF ADMIRALTY JUDGES¹

There is only one grant of jurisdiction in Article III of the Constitution that encompasses an area of substantive law—the power to hear “all Cases of admiralty and maritime Jurisdiction.”²

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1. John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?* 24 J. Mar. L. & Com. 257, 257 (1993) (explaining that the Justices of the Supreme Court “are admiralty judges when they hear admiralty appeals.”).

² U.S. CONST. art. III, § 2 (listing the scope of the judiciary’s jurisdiction, with admiralty and maritime law being the only areas of substantive law specifically referenced).

That jurisdiction was conferred on the federal courts “without controversy,”³ and its importance was explained by Alexander Hamilton in the ratification debate: “The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes.”⁴ Accordingly, the “duty of the judicial department to say what the law is”⁵ has no greater application than with the obligation to enunciate uniform principles of admiralty and maritime law pursuant to Article III.⁶

Although Article I of the Constitution contains no express grant of authority to Congress to legislate on admiralty law, the Supreme Court has recognized that the Commerce Clause⁷ comprehends navigation, permitting Congress to legislate on maritime matters.⁸ However, when Congress does exercise its authority to amend or revise maritime law, its legislation must conform to the uniformity required by Article III: “The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union.”⁹

In striking down a Congressional enactment providing for the application of state workers’ compensation remedies for maritime workers, the Supreme Court reasoned that “the manifest purpose” of the statute “was to permit any State to alter the maritime law and thereby introduce conflicting requirements.”¹⁰ As the subject of maritime injuries is “national,” the Court held that the federal legislation was unconstitutional, stating: “Local

³ Harrington Putnam, *How the Federal Courts Were Given Their Admiralty Jurisdiction*, 10 CORNELL L.Q. 460, 469 (1925).

⁴ THE FEDERALIST NO. 80, at 502 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

⁵ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

⁶ *Brown*, *supra* note 1, at 251 (“When admiralty judges declare the governing principles of admiralty and maritime law they are doing more than carrying out their Constitutional duty. The admiralty law that they declare carries the authority of the very Constitution itself.”).

⁷ U.S. CONST. art. I, § 8, cl. 3.

⁸ See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190–91 (1824) (explaining that the word “commerce” inherently includes the regulation of navigation).

⁹ *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920).

¹⁰ *Wash. v. W.C. Dawson & Co.*, 264 U.S. 219, 228 (1924).

interests must yield to the common welfare. The Constitution is supreme.”¹¹ The role of the Supreme Court in insuring application of uniform principles of maritime law in state and federal courts across the nation is now at issue in the jurisprudence determining who is a seaman under the Jones Act¹² and general maritime law.

As Congress has legislated on maritime subjects, the role of admiralty judges has evolved so that they “not only steer through channels of precedent that were charted by the leading admiralty jurists of the past, but they must also consider increasing numbers of federal and state regulations and legislation.”¹³ Interpreting federal statutes and incorporating them into the general maritime law does not render admiralty judges “flotsam on the sea of maritime law.”¹⁴ However, the navigation by admiralty judges between statutes and general maritime law is “even more difficult” when the Supreme Court “defer[s] the formulation of general maritime law principles” to the lower courts.¹⁵

The law of seaman status—determining which maritime workers are entitled to recover under the Jones Act—went through a period of decades of what the Supreme Court described as “wayward case law”¹⁶ that “led the lower courts to a myriad of standards and lack of uniformity in administering the elements of seaman status.”¹⁷ Finally, after allowing the lower courts to flounder for thirty-three years, the Supreme Court issued a series of decisions¹⁸ to “find our way out” of the “labyrinth” in which the

¹¹ *Id.*

¹² 46 U.S.C. §§ 30104–30105.

¹³ W. Eugene Davis, *Admiralty Law Institute Symposium: A Sea Chest for Sea Lawyers: The Role of Federal Courts in Admiralty: The Challenges Facing the Admiralty Judges of the Lower Federal Courts*, 75 TUL. L. REV. 1355, 1356–57 (2001) (footnotes omitted).

¹⁴ *Id.* at 1356 (quoting Brown, *supra* note 1, at 249).

¹⁵ *Id.* at 1357 (explaining the Supreme Court’s tendency to defer formulating maritime principles to the federal circuit courts).

¹⁶ *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 353 (1991).

¹⁷ *Id.* (quoting Kenneth G. Engerrand & Jeffrey R. Bale, *Seaman Status Reconsidered*, 24 S. TEX. L.J. 431, 494 (1983)).

¹⁸ *See Wilander* (holding that a person “need not aid in navigation of vessel in order to qualify as a ‘seaman’ under Jones Act.”); *Chandris, Inc. v. Latsis*, 515 U.S. 347, 347 (1995) (setting forth the test to apply in deciding whether an employee qualifies as a “seaman”); *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 548 (1997) (refining the elements of the test enunciated in *Chandris*).

courts had become “lost.”¹⁹

After the Supreme Court endeavored to find the way out of the labyrinth with three important decisions between 1991 and 1997, the lower courts began constructing a new “maze”²⁰ of conflicting decisions that have brought a lack of uniformity back to the seaman status inquiry.²¹ While the Supreme Court has declined to hear conflicting cases from both seamen and employers,²² some lower courts have extended the labyrinth to the point of declining to apply the elements of the test enunciated by the Supreme Court.²³

When the cases reach the point that lower courts no longer apply the test set forth by the Supreme Court, leading to conflicts across the country and decisions reaching the opposite result in state and federal courts within the same state,²⁴ it is time for the

¹⁹ *Wilander*, 498 U.S. at 353 (quoting *Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054, 1060 (7th Cir. 1984)).

²⁰ *Presley v. Healy Tibbits Constr. Co.*, 646 F. Supp. 203, 205 (D. Md. 1986) (addressing the series of Jones Act cases that have failed to clarify whether a plaintiff was a harbor worker or a seaman).

²¹ *See Papai*, 520 U.S. at 555 (emphasizing the importance of whether the employee’s duties take him to sea in the distinction between land-based and sea-based employees). *Compare Dize v. Ass’n of Md. Pilots*, 77 A.3d 1016, 1028–29 (Md. App. 2013) (holding that a worker who spent between 42% and 50% of his time performing maintenance on vessels at the dock did not satisfy the nature test because he was not engaged in sea-based work) *with Naquin v. Elevating Boats, L.L.C.*, 744 F.3d 927, 933, 935 (5th Cir. 2014) (holding that a worker who spent the majority of his time repairing, cleaning, and maintaining dockside vessels secured in a shipyard canal satisfied the nature test even though his duties did not literally take him to sea).

²² *See Dize v. Ass’n of Md. Pilots*, 135 S. Ct. 56, 56 (2014) (pet. filed Apr. 18, 2014) (receiving a denial of petition for certiorari); *Elevating Boats, L.L.C. v. Naquin*, 135 S. Ct. 1397, 1397 (2015) (pet. filed Sept. 10, 2014) (receiving a denial of petition for certiorari); *See also* Pet. for Reh’g, *Dize v. Ass’n of Md. Pilots*, No. 13-1268, 2014 WL 5359794, at *3 (bringing to the Court’s attention “the conflict among the state and federal courts” and the pending petition in the *Naquin* decision).

²³ *See, e.g., Guidry v. ABC Ins. Co.*, 206 So.3d 378, 383 (La. App. 3 Cir. 2016) (declining to apply the requirement that a worker’s duties take him to sea to satisfy the nature element of the seaman status test and the requirement that a worker’s duties must be determined in the context of his entire employment to satisfy the duration element of the seaman status test), *aff’d in part, vacated on other grounds*, 209 So.3d 90, 90 (La. 2017); *See also Tanner Servs., LLC v. Guidry*, 137 S. Ct. 2248 (2017) (receiving a denial of petition for certiorari).

²⁴ *Compare Becker v. Tidewater, Inc.*, 335 F.3d 376, 389–93 (5th Cir. 2003) (serving an assignment on a vessel does not alter a worker’s status determined from his entire employment with his employer or it would violate the Supreme Court’s rejection of a voyage test for seamen status) *with Guidry*, 206 So.3d at 383 (“We see no reason to limit the seaman status inquiry, [as Defendant contends], exclusively to an examination of the overall course of a worker’s service with a particular employer.”).

admiralty judges of the Supreme Court to give relief from the “bewildering array of decisions”²⁵ and to restore uniformity to the general maritime law and the interpretation of the Jones Act.

II. DEVELOPMENT OF THE LABYRINTH

A. *Enactment of the Jones Act and LHWCA*

Since the beginning of the nation, the remedies available to maritime workers have differed depending on the status of the worker.²⁶ The maritime law has treated land-based workers like their shoreside brethren, affording them a negligence remedy against their employer;²⁷ however, maritime law has provided crew members of vessels with remedies of unseaworthiness and maintenance and cure but not a negligence remedy against their employer.²⁸ Congress’ efforts to modify maritime remedies have led to a century of confusion.

During and after World War I, Congress discussed a number of maritime matters, including the working conditions for seamen.²⁹ Without debate on the granting of the remedy, Congress added a section to major shipping legislation in 1915 and 1920³⁰ to establish a negligence remedy for seamen. The second enactment, known as the Jones Act, which was necessitated by the insufficiency of the 1915 statute,³¹ granted to a “seaman” the negligence action that was unavailable under the general maritime law.³²

²⁵ *Dize*, 77 A.3d at 1025.

²⁶ See *Black v. The Louisiana*, 3 F. Cas. 503, 503 (D. Pa. 1804) (No. 1,461) (“Although the cook and steward are authorized to sue in the admiralty court, . . . yet I have distinguished their cases, as their duties are distinct from those mariners employed in navigating the ship.”).

²⁷ See *Atl. Transp. Co. v. Imbrovek*, 234 U.S. 52, 62–63 (1914) (affording a negligence remedy to a land-based worker injured on a vessel).

²⁸ See *The Osceola*, 189 U.S. 158, 175 (1903) (setting forth the remedies available to seamen).

²⁹ See generally Henry W. Farnam, *The Seamen’s Act of 1915*, S. Doc. No. 333, 64th Cong., (1st Sess. 1916).

³⁰ Pub. L. No. 63-302, 38 Stat. 1164, 1185 (1915); Act of June 5, 1920, ch. 250, § 33, 41 Stat. 988, 1007.

³¹ See *Chelentis v. Luckenbach S.S. Co.*, 247 U.S. 372, 384 (1918) (explaining that the 1915 statute abolished the fellow-servant rule as a defense but it did not affirmatively establish a negligence remedy, so the Court held that “the statute is irrelevant”).

³² See 46 U.S.C. § 30104 (providing: “A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect

The absence of discussion about the enactment of the negligence remedy in the Jones Act contrasts with the extensive debate in Congress over the decisions of the Supreme Court between 1917 and 1926 addressing the remedies available when land-based maritime workers are injured or killed on navigable waters.³³ Congress responded to each of the Supreme Court's rulings with legislation designed to provide a workers' compensation remedy for the land-based maritime workers.³⁴

In *Southern Pacific Co. v. Jensen*, the Supreme Court held that it was unconstitutional for the state of New York to grant Marie Jensen a state workers' compensation remedy for the death of her husband, Christen Jensen, a longshore worker who was killed while driving a small electric freight truck loaded with cargo onto the gangway of a vessel.³⁵ In order to overturn the decision in *Jensen*, Congress amended the Admiralty Jurisdiction Statute³⁶ so that the statute would save "to claimants the rights

to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.")

³³ See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 205 (1917) (addressing the unconstitutionality of the application of a state workers' compensation statute to the death of a longshore worker on navigable waters); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 149 (1920) (permitting the application of state workers' compensation for claims arising from the injury or death of workers on navigable waters); *Wash. v. W.C. Dawson & Co.*, 264 U.S. 219, 219 (1924) (addressing the unconstitutionality of the Act of June 10, 1922, which sought to permit the application of state workers' compensation for claims arising from the injury or death of non-seamen on navigable waters); *Int'l Stevedoring Co. v. Haverty*, 272 U.S. 50, 50 (1926) (holding that the word "seaman" in the Jones Act includes "stevedores employed in maritime work on navigable waters"); 68 Cong. Rec. 5411 (1927) (statements of Reps. Bland and LaGuardia) (commenting that the land-based workers sought legislation because they faced the defenses of contributory negligence, the fellow servant doctrine, and assumption of risk).

³⁴ See Act of Oct. 6, 1917, ch. 97, 40 Stat. 395 (seeking to amend the Judicial Code as it relates to "claimants rights and remedies under the workmen's compensation law of any State."); Act of June 10, 1922, ch. 216, 42 Stat. 634 (providing that the rights and remedies of non-seamen for compensation for injuries or death relating to admiralty or maritime jurisdiction are to be sought under the worker's compensation laws of their respective jurisdiction); Act of Mar. 4, 1927, ch. 509, 44 Stat. 1424, codified as the Longshore & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 [hereinafter LHWCA] (providing "compensation for disability or death resulting from injury to employees in certain maritime employments, and for other purposes").

³⁵ See *S. Pac. Co.*, 244 U.S. at 208, 217-18 (elaborating on the exclusive jurisdiction of federal district courts to consider all civil cases of admiralty and maritime jurisdiction, save where there is a common-law remedy competent to give it).

³⁶ 28 U.S.C. § 1333(1) (providing that district courts have original jurisdiction of any civil case of admiralty or maritime jurisdiction).

and remedies under the workmen's compensation law of any State."³⁷ Congress made no distinction in that legislation between land-based and sea-based workers, saving to both classes a state workers' compensation remedy.³⁸

Employing reasoning similar to the analysis in *Jensen*, the Supreme Court struck down Congress' attempt to legislate a state workers' compensation remedy for land-based and sea based workers, stating: "To say that because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the states to do so, as they might desire, is false reasoning."³⁹ The Court held that the statute was "beyond the power of Congress⁴⁰ as it would "destroy the harmony and uniformity which the Constitution not only contemplated, but actually established."⁴¹

Congress did not give up on its effort "to permit the application of the workmen's compensation laws of the several states to injuries within the admiralty and maritime jurisdiction."⁴² In its second attempt to legislate a workers' compensation remedy, Congress recognized the difference between "port workmen" or "local workers"⁴³ and "sailors"⁴⁴ or "seamen,"⁴⁵ stating that it "has always in legislating distinguished between these port workers and seamen. It has assumed full control over the relation of master and servant at sea."⁴⁶ The goal of the legislation was to treat the "peripatetic" workers who travel from port to port with the vessel under "a uniform Federal statute," while the local workers would be subject to "State laws."⁴⁷ The basis for the distinction was that "seamen in their normal life are migratory. They pass from port

³⁷ Act of Oct. 6, 1917, *supra* note 34.

³⁸ See S. REP. No. 94, 67th Cong. 1st Sess. 1,2 (1921) (stating that the legislation was intended to permit the extension of the State workmen's compensation laws to seamen and other workers on or in connection with ships).

³⁹ *Knickerbocker Ice*, 253 U.S. at 164.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² H.R. REP. No. 1190, 69th Cong, 1st Sess. 2 (1926).

⁴³ H.R. REP. No. 639, 67th Cong, 2nd Sess. 2 (1922).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ H.R. REP. No. 639, *supra* note 43, at 4.

⁴⁷ *Id.* at 2.

to port, from State to State, from country to country.”⁴⁸ However, land-based workers “are not migratory but local; their wages, their conditions of living are governed by local standards.”⁴⁹

Congress believed that uniform laws throughout the country were essential for the seaman as they travel from port to port:

To permit in their case the application of the varying laws of the several States in respect to injuries suffered in the course of their employment would be unfair both to the ship and to the seamen. Under these laws a seaman might be entitled to different amounts of compensation for different periods, different medical attention, depending upon whether an accident happened in the port of New York or the port of Philadelphia, or in New Orleans. The owner would be compelled to insure against an uncertain liability for he could never tell when his ship started out under what law he might be required to pay compensation.⁵⁰

Consequently, Congress amended the Admiralty Jurisdiction Statute in 1922 by saving “to claimants for compensation for

⁴⁸ S. REP. No. 94, *supra* note 38, at 2.

⁴⁹ *Id.* at 2–3.

⁵⁰ *Id.* at 2. The Senate Judiciary Committee explained the reason that the law of the sea does not apply to land-based workers:

The characteristic law of the sea is not involved in the relations between these workmen and their employer, when, as will unusually happen, the employers are not ships or shipowners, and even where they are ships and shipowners. The characteristic rules of the law of the sea affect seamen and do not affect these land workers.

Id. at 7; *see also* 62 Cong. Rec. 7754 (1922) (statement of Rep. Volstead):

“It seems to me, as to the people who live in the community and are a part and parcel of the citizenship of that community, that they ought not to be subject to a different rule from any other citizen of that community. I can see very readily that a different rule ought to apply to the sailors that may not belong to that community at all. If a nonresident sailor comes inside of a harbor and is injured while there, there is reason why he should not come under the compensation laws of the State and be entitled to compensation.”

injuries to or death of persons other than the master or members of the crew of a vessel their rights and remedies under the workmen's compensation law of any State."⁵¹

Applying the principles enunciated in its prior decisions, the Supreme Court declared the 1922 statute unconstitutional in *Washington v. W.C. Dawson & Co.* as the statute "permit[ted] application of Workmen's Compensation Laws of the several States to injuries within the admiralty and maritime jurisdiction."⁵² In *Washington*, however, the Court advised Congress that it had the "power to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment,"⁵³ and this power "would permit enactment of a general employers' liability law, or general provisions for compensating injured employees; but it may not be delegated to the several states."⁵⁴

While Congress was debating its response to the decision in *Washington*, invalidating the 1922 legislation for land-based workers, the Supreme Court provided the impetus for Congress to act in *International Stevedoring Co. v. Haverty*. Haverty was injured while performing longshore work in the hold of a vessel in Seattle.⁵⁵ The Washington Supreme Court declined to find that Haverty was a seaman under the Jones Act, but upheld his award based on the negligence remedy available to land-based maritime workers under the general maritime law.⁵⁶ Taking a different approach than Congress, the United States Supreme Court focused on the duties of the worker rather than his connection to a land-based or sea-based employer. Considering longshore work to be "a maritime service formerly rendered by the ship's crew,"⁵⁷ the Court affirmed the verdict for Haverty as a seaman under the Jones Act.⁵⁸

Congress immediately sought to overturn the decision in

⁵¹ Act of June 10, 1922, *supra* note 34.

⁵² *Washington*, 264 U.S. at 225.

⁵³ *Id.* at 227.

⁵⁴ *Id.*

⁵⁵ See *Haverty*, 272 U.S. 50–51.

⁵⁶ See *Haverty v. Int'l Stevedoring Co.*, 134 Wash. 235, 239, 241, 244 (Wash. 1925) (holding that seamen who rely on a master of the duty for his protection should be entitled to recover for claims of negligence).

⁵⁷ *Haverty*, 272 U.S. at 52.

⁵⁸ See *id.*

Haverty by enacting a federal workers' compensation statute, which raised the question whether the statute should apply only to land-based workers or whether seamen should also be included.⁵⁹ "[I]t was felt that perhaps the very bill might be imperiled if it did not have uniformity."⁶⁰ Hearings on the legislation elicited testimony that supported different remedies for land-based and sea-based workers based on the distinction between land-based workers and "those who sail before the mast."⁶¹ Testimony from the seamen's union analogized a crewmember to "a soldier in the front line of a battle."⁶² "The fundamental principle of all sea life, of all discipline on board of a vessel, is obedience; and more than that, it is that the individual seaman is there by virtue of his calling to give his life, if necessary, in order that others may live."⁶³ Unlike a land-based worker, a crewmember "can not take off his overalls and quit."⁶⁴ Moreover, land-based workers, who are part of the local community, are "at home or with friends and the commission is near and accessible; but the seaman is away from country, home, and friends."⁶⁵

In enacting the LHWCA in 1927,⁶⁶ Congress did distinguish the local workers, who are subject to the relationship of master

⁵⁹ See, e.g., Hr'g on S. 3170 before the House Comm. on the Judiciary to Provide Compensation for Employers Injured and Dependents of Employees Killed in Certain Maritime Employments, 69th Cong., 1st Sess., 202, 216 (1926); Hr'g on H.R. 9498 before the House Comm. on the Judiciary to Provide Compensation for Employees Injured and Dependents Killed in Certain Maritime Employments, 69th Cong., 1st Sess., 50, 58, 101, 153, 195 (1926) [hereinafter House Hr'g on H.R. 9498].

The Supreme Court did not learn its lesson from the rejection by Congress of its expansive interpretation of the workers covered under the Jones Act. In *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 85 (1946), the Court used reasoning "remarkably similar to that in *Haverty*," *Wilander*, 498 U.S. at 347, and allowed a longshoreman to bring a seaman's unseaworthiness action against a vessel "because he is doing a seaman's work and incurring a seaman's hazards." *Sieracki*, 328 U.S. at 99. Congress then overturned that reasoning in the 1972 Amendments to the LHWCA, 33 U.S.C. § 905(b), by eliminating the right of workers who are not crewmembers to bring an unseaworthiness action against the vessel, *Wilander*, 498 U.S. at 348, and the Supreme Court recognized Congress's limitation on seaman's remedies, stating that "[s]eaman status is not coextensive with seamen's risks." *Chandris*, 515 U.S. at 361.

⁶⁰ 68 Cong. Rec. 5410 (1927) (statement of Rep. Graham).

⁶¹ House Hr'g on H.R. 9498, *supra* note 59, at 103; see also *id.* at 104.

⁶² *Id.* at 104.

⁶³ *Id.*

⁶⁴ *Id.* at 111.

⁶⁵ *Id.* at 112.

⁶⁶ See LHWCA, *supra* note 34.

and servant on land, from the migratory seamen who are subject to “the relationship of master and servant at sea,”⁶⁷ by establishing a federal compensation remedy for injuries to workers occurring on navigable waters but excluding from its coverage “a master or member of a crew of any vessel.”⁶⁸ Thus, the LHWCA serves as a limitation on the broad definition of the term “seaman” in the Jones Act so as “to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the [LHWCA].”⁶⁹

B. Judicial Response to the Statutory Remedies

After the enactment of the LHWCA, the Supreme Court was presented with cases questioning whether workers were covered by the Jones Act or the LHWCA. None of the initial decisions issued by the Court attempted to articulate a test for the lower courts to apply in determining whether a worker was a crewmember under the Jones Act. In *South Chicago Coal & Dock Co. v. Bassett*, the Court held that the crewmember exception in the LHWCA excluded “those employees on the vessel who are naturally and primarily on board to aid in her navigation.”⁷⁰ In *Norton v. Warner Co.*, the Court stated that a boatman on a barge had “that permanent attachment to the vessel which commonly characterizes a crew.”⁷¹ In *Desper v. Starved Rock Ferry Co.*, the Court addressed the death of a worker who was preparing sightseeing vessels in winter storage for the coming season and stated that “there was no vessel engaged in navigation at the time of the decedent’s death.”⁷² Without better guidance from the

⁶⁷ H.R. REP. No. 639, *supra* note 43, at 5, 7.

⁶⁸ 33 U.S.C. § 902(3)(G).

⁶⁹ *Wilander*, 498 U.S. at 347 (quoting *Swanson v. Marra Bros., Inc.*, 328 U.S. 1, 7 (1946)).

⁷⁰ See *S. Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 260 (1940) (reasoning that “[t]his Act, as we have seen, was to provide compensation for a class of employees at work on a vessel in navigable waters who, although they might be classed as seamen, were still regarded as distinct from members of a ‘crew’”); *id.* (citing *Haverty*, 272 U.S. at 52).

⁷¹ *Norton v. Warner*, 321 U.S. 565, 573 (1944).

⁷² *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 191 (1952).

Supreme Court, most of the federal appellate courts⁷³ adopted the test for crewmember status enunciated in *Carumbo v. Cape Cod S.S. Co.*, that there be a vessel in navigation; that the worker have a more or less permanent connection with the vessel; and that the worker be aboard the vessel primarily in aid of its navigation.⁷⁴

The test adopted by the lower courts was called into question when the Supreme Court issued four decisions between 1955 and 1958 that permitted a finding of seaman status for a member of the drilling crew of a submersible barge,⁷⁵ a handyman on an anchored dredge,⁷⁶ a pile driver on a permanently anchored Texas Tower,⁷⁷ and a worker who had cleaned the boilers on a tug that had not been in operation during the year in which the worker was injured.⁷⁸ The decisions were bereft of reasoning explaining how these workers satisfied any requirements for seaman status.⁷⁹ However, one thing was apparent. The conclusions that a driller on a submersible drilling barge, a handyman on a dredge, a pile driver on a Texas Tower, and a worker who had cleaned the boilers on a tug were seamen would “not lie with any rational

⁷³ See, e.g., *Harney v. William M. Moore Bldg. Corp.*, 359 F.2d 649, 654 (2d Cir. 1966); *Zientek v. Reading Co.*, 220 F.2d 183, 185 (3d Cir. 1955); *Whittington v. Sewer Constr. Co.*, 541 F.2d 427, 436 (4th Cir. 1976); *McKie v. Diamond Marine Co.*, 204 F.2d 132, 136 (5th Cir. 1953); *Wilkes v. Miss. River and Sand Gravel Co.*, 202 F.2d 383, 388 (6th Cir. 1953); *Puget Sound Freight Lines v. Marshall*, 125 F.2d 876, 879 (9th Cir. 1942).

⁷⁴ *Carumbo v. Cape Cod S.S. Co.*, 123 F.2d 991, 995 (1st Cir. 1941).

⁷⁵ See *Gianfala v. Tex. Co.*, 350 U.S. 879, 879 (1955), *rev'g Tex. Co. v. Gianfala*, 222 F.2d 382, 387 (5th Cir. 1955) (holding that the worker was not a seaman, stating that “the vessel was not in navigation, nor was Martin aboard it in the aid of navigation. On the contrary, he was aboard it, not as a member of a ship’s crew but as a member of a drilling crew.”).

⁷⁶ See *Senko v. LaCrosse Dredging Corp.*, 352 U.S. 370, 374 (1957) (“his duty was primarily to maintain the dredge during its anchorage and for its future trips”).

⁷⁷ See *Grimes v. Raymond Concrete Pile Co.*, 356 U.S. 252, 252 (1958) (noting that a Texas Tower is “a triangular metal platform superimposed some 60 feet above the surface of the sea on supports permanently affixed to the floor of the ocean by three caissons, and utilized to operate a radar warning station.”). *Id.* at 254 (Harlan & Whittaker, J.J. dissenting).

⁷⁸ See *Butler v. Whiteman*, 356 U.S. 271, 271 (1958) (detailing that the worker was a laborer who performed odd jobs around his employer’s wharf on the Mississippi River, including cleaning the boiler of a tug that had been inoperable for at least nine months and that was lashed to a barge that was moored to the wharf. The worker, who drowned in the river, was last seen alive running across the barge to the tug); *Id.* at 272 (Harlan & Whittaker, J.J., dissenting).

⁷⁹ *Johnson v. Beasley*, 742 F.2d 1054, 1059 (7th Cir. 1984) (opining that “[a] brief review of the later Supreme Court cases demonstrates that there are few clues as to what the critical factors are in determining crew status.”).

conception of a requirement that the worker's duties must "aid in navigation."⁸⁰ After reviewing these opinions, the Seventh Circuit commented: "Diderot may very well have had the previous Supreme Court cases in mind when he wrote, 'We have made a labyrinth and got lost in it. We must find our way out.'"⁸¹

Despite engendering such confusion that the lower courts termed the jurisprudence a labyrinth, the Supreme Court declined to address the test for seaman status for more than thirty years. Consequently, the lower courts were left to find their way in the uncertainty created by the Supreme Court. As the *Carumbo* test could no longer be reconciled with the decisions of the Supreme Court between 1955 and 1958, the Fifth Circuit made an attempt to make sense of the decisions and revised its test for seaman status in 1959 in *Offshore Co. v. Robison*:

[T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.⁸²

One year later the Fifth Circuit decided whether a "member of a crew of any vessel," as used in the LHWCA to limit the workers covered by the Jones Act, could include employees who worked on more than one vessel. In *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*,⁸³ two workers were employed to provide maintenance and repair work for a company that owned and operated ferries in New Orleans.⁸⁴ They drowned while making

⁸⁰ *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 353 (1991).

⁸¹ *Johnson*, 742 F.2d at 1060.

⁸² *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959).

⁸³ *Braniff v. Jackson Ave.-Gretna Ferry, Inc.*, 280 F.2d 523 (5th Cir. 1960).

⁸⁴ *Id.* at 525.

repairs to a ferry in the Mississippi River.⁸⁵ Although neither worker was assigned to a single ferry, the Fifth Circuit concluded that there was nothing in the “expanding concept” of seaman status “to limit it mechanically to a single ship.”⁸⁶ The court did, however, endeavor to limit its concept for multiple vessels, stating that the connection to the vessels “must not be spasmodic and the relationship between the individual and the several identifiable ships must be substantial in point of time and work.”⁸⁷

Judge Hutcheson dissented in *Braniff*, stating that he was “in complete disagreement with what I regard as an insupportable result and with the bewardling by which the majority opinion seeks to rationalize it,” hoping that “at least one of my brethren will repent and turn away from the error of his way.”⁸⁸ He accused the majority of “muddying the waters,”⁸⁹ and “plumping, as it does, for the general idea that a jury must, in any case where a longshoreman claimed to be a seaman, have submitted it for decision, without legal guide or compass as to its course, in effect does the jury think that the plaintiff does or does not come under the Jones Act.”⁹⁰

The waters became muddier in *Bertrand v. International Mooring & Marine, Inc.*⁹¹ Tenneco engaged International Mooring & Marine to supply an anchor handling crew for a vessel that Tenneco chartered to assist in moving an offshore drilling rig. The missions performed by the anchor handling crew lasted from several hours to nineteen days. The average job lasted four to five days, and the Tenneco job lasted seven days. At the end of the Tenneco job, one of the employees was killed and three were injured in a traffic accident in their employer’s van.⁹²

International Mooring did not own any vessels, and its anchor-handling crews normally worked on special purpose vessels equipped to lift heavy anchors from the ocean floor. “[T]he vessels were generally

⁸⁵ *See id.*

⁸⁶ *Id.* at 528.

⁸⁷ *Id.*

⁸⁸ *Id.* at 529 (Hutcheson, J., dissenting).

⁸⁹ *Id.* at 530.

⁹⁰ *Id.* at 531.

⁹¹ *Bertrand v. Int’l Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983).

⁹² *Id.*

chartered by [International Mooring's] customer, but at times, [International Mooring] acted as a broker for the customer and did, on occasion, charter vessels directly for their own use and then bill the customer for the cost."⁹³

Concluding that "one cannot be a member of a crew of numerous vessels, which have no common ownership and control,"⁹⁴ the district court held that the anchor handlers were not seaman. The panel of the Fifth Circuit in *Bertrand* did not agree with the district court's interpretation and rejected the requirement that the vessels on which the workers labored must be under common control or ownership in order to constitute a fleet.⁹⁵ The panel did not believe that the absence of ownership by the workers' employer of any of the vessels should preclude a finding of seaman status: "[W]e will not allow employers to deny Jones Act coverage to seamen by arrangements with third parties regarding the vessel's operation or by the manner in which work is assigned."⁹⁶ The court gave no guidance, in its expansion of the fleet to vessels that are not under any common ownership or control, other than to caution that, as "the number of vessels increases or the period of service decreases, the claimant's relationship with the vessels tends to become more tenuous and transitory."⁹⁷

After adding to the confusion in *Bertrand*, the Fifth Circuit did not wait for the Supreme Court to begin leading the courts out of the labyrinth, granting *en banc* rehearing in *Barrett v. Chevron, U.S.A., Inc.*, to decide whether to modify the test for seaman

⁹³ *Id.*

⁹⁴ *Id.* at 347.

⁹⁵ See *Bertrand*, 700 F.2d at 245 (holding that "in the context of the single vessel, the employer need not be the owner or operator of the vessel for the Jones Act liability to attach").

⁹⁶ *Id.*

⁹⁷ *Id.* at 246. The Fifth Circuit continued the muddying of the fleet rule in *Wallace v. Oceaneering, Int'l*, 727 F.2d 427, 427 (5th Cir. 1984). Wallace was a diver who, like the workers in *Bertrand*, was injured on a vessel provided by another party. Wallace was injured on his first assignment, and, after the initial assignment, he would not have followed the vessel to another job. See *id.* at 432–33. Expanding the fleet rule even beyond *Bertrand*, the Fifth Circuit held: "It is the inherently maritime nature of the tasks performed and perils faced by his profession, and not the fortuity of his tenure on the vessel from which he makes the particular dive on which he was injured, that makes Wallace a seaman." *Id.*

status that the court had enunciated in *Robison*.⁹⁸ Rejecting the almost limitless fleet in *Bertrand*, the Fifth Circuit stated: “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.”⁹⁹ The court also limited seaman status in the situation in which an employee’s assignments “require him to divide his time between vessel and land (or platform), holding that a worker’s “status as a crewmember is determined ‘in the context of his entire employment’ with his current employer.”¹⁰⁰

With its decision in *Barrett*, the Fifth Circuit had begun to correct the muddying of the waters in decisions such as *Bertrand*. However, there was no uniformity among the circuits. Some courts continued to “start with the three-prong test,” enunciated in *Carumbo*, and did “not apply the liberal construction given to all parts of that test by *Robison*.”¹⁰¹ The Seventh Circuit steered a third course in *Johnson v. John F. Beasley Construction Co.*, holding that “it is the employee’s relation to the transportation function of the vessel, *i.e.*, whether the employee contributes to the maintenance, operation, or navigation of the vessel as a means of transport on water, that is critical for Jones Act purposes.”¹⁰² Thus, the lower courts had three different versions for the third element of the seaman status test: 1) that the worker be aboard primarily in aid of navigation; 2) that the worker’s duties contribute to the function of the vessel or the accomplishment of its mission; and 3) that the worker’s duties make a significant contribution to the transportation function of the vessel.

⁹⁸ *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1068 (5th Cir. 1986) (en banc).

⁹⁹ *Id.* at 1074 (citing WEBSTER’S NEW WORLD DICTIONARY 533 (2d College ed. 1979); Kenneth G. Engerrand and Jeffrey R. Bale, *Seaman Status Reconsidered*, 24 S. TEX. L.J. 431, 490–91 (1983)).

¹⁰⁰ *Barrett*, 781 F.2d at 1075 (quoting *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1347 (5th Cir. 1980)).

¹⁰¹ *Johnson*, 742 F.2d at 1060 (citing *Simko v. C&C Marine Maint. Co.*, 594 F.2d 960, 964–65 (3d Cir. 1979); *Griffith v. Wheeling Pittsburgh Steel Corp.*, 521 F.2d 31, 36–38 (3d Cir. 1975)).

¹⁰² *Johnson*, 742 F.2d at 1061.

III. INTERVENTION OF THE SUPREME COURT AFTER 33 YEARS

After allowing the lower courts to struggle for 33 years in the labyrinth that it created, the Supreme Court took the first step to lead the way out in *McDermott International, Inc. v. Wilander*.¹⁰³ Writing for the unanimous Court, Justice O'Connor provided a comprehensive review of the judicial and legislative history of the seaman status inquiry and concluded: "With the passage of the LHWCA, Congress established a clear distinction between land-based and sea-based maritime workers. The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seamen."¹⁰⁴ In view of the fact that Congress twice overturned¹⁰⁵ the Supreme Court's extension of seamen's remedies to those doing seamen's work and incurring a seaman's hazards—by the enactment of the LHWCA and its amendment in 1972—Justice O'Connor concluded: "Whether under the Jones Act or general maritime law, seamen do not include land-based workers."¹⁰⁶

Justice O'Connor addressed the conflicting tests used by the lower courts. Finding "no indication in the Jones Act, the LHWCA, or elsewhere, that Congress has excluded from Jones Act remedies those traditional seamen who owe allegiance to a vessel at sea, but who do not aid in navigation,"¹⁰⁷ she concluded that "the time has come to jettison the aid in navigation language."¹⁰⁸ However, Justice O'Connor did believe that "a seaman must be doing the ship's work."¹⁰⁹ Therefore, she stated: "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."¹¹⁰

The Supreme Court was not called upon in *Wilander* to define the elements of the test for seaman status, but Justice O'Connor did state: "It is not the employee's particular job that is

¹⁰³ *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 337 (1991).

¹⁰⁴ *Id.* at 347 (adding "[w]hether under the Jones Act or general maritime law, seamen do not include land-based workers"); *id.* at 348.

¹⁰⁵ See House Hr'g on H.R. 9498, *supra* note 59.

¹⁰⁶ *Wilander*, 498 U.S. at 348.

¹⁰⁷ *Id.* at 354.

¹⁰⁸ *Id.* at 353.

¹⁰⁹ *Id.* at 355.

¹¹⁰ *Wilander*, 498 U.S. at 355 (quoting *Robison*, 266 F.2d at 779).

determinative, but the employee's connection to a vessel.”¹¹¹ In order to give effect to the land-based/sea-based distinction, the Court “believe[d] the better rule is to define ‘master or member of a crew’ under the LHWCA, and therefore ‘seaman’ under the Jones Act, solely in terms of the employee’ connection to a vessel in navigation.”¹¹² She noted that the connection requirement was consistent with “Congress’ land-based/sea-based distinction,” explaining: “All who work at sea in the service of a ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed.”¹¹³

Four years after *Wilander*, in *Chandris, Inc. v. Latsis*, the Court was asked to define the connection requirement and to “determine what *relationship* a worker must have to the vessel, regardless of the specific tasks the worker undertakes, in order to obtain seaman status.”¹¹⁴ Antonio Latsis was one of two supervising engineers who oversaw the engineering department for a company with a fleet of six passenger cruise ships.¹¹⁵ Latsis developed a detached retina while sailing with one of the vessels, and the delay in providing him medical care caused him a partial loss of vision.¹¹⁶

The argument presented by Latsis focused on “the protection of those who are exposed to the perils of the sea” so that “anyone working on board a vessel for the duration of a ‘voyage’ in furtherance of the vessel’s mission has the necessary employment-related connection to qualify as a seaman.”¹¹⁷ Writing again for the Court, Justice O’Connor rejected Latsis’ contention because it “would run counter to [the Court’s] prior decisions and our understanding of the remedial scheme Congress has established for injured maritime workers.”¹¹⁸ Justice O’Connor reasoned that “[i]n evaluating the employment-

¹¹¹ *Id.* at 354.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Chandris, Inc. v. Latsis*, 515 U.S. 347, 350 (1995) (emphasis in original).

¹¹⁵ *See id.* (“overseeing the vessels’ engineering departments, which required him to take a number of voyages” and “planning and directing ship maintenance from the shore”).

¹¹⁶ *See id.* at 350–51. (explaining that the doctor diagnosed a suspected detached retina, but failed to follow standard medical procedure).

¹¹⁷ *Id.* at 358.

¹¹⁸ *Id.*

related connection of a maritime worker to a vessel in navigation, courts should not employ ‘a “snapshot” test for seaman status, inspecting only the situation as it exists at the instance of injury; a more enduring relationship is contemplated in the jurisprudence.’”¹¹⁹ She emphasized that “a worker may not oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the worker was engaged while injured.”¹²⁰

Latsis’ support for a “voyage test” was the statement in *Wilander* “that the Jones Act was designed to protect maritime workers who are exposed to the ‘special hazards’ and ‘particular perils’ characteristic of work on vessels at sea.”¹²¹ However, Justice O’Connor answered that the enactment of the LHWCA specifically eliminated the use of seamen’s duties and hazards as the basis for seaman status.¹²² Consequently, as “[s]eaman status is not coextensive with seamen’s risks,”¹²³ “some workers who unmistakably confront the perils of the sea, often in extreme form, are thereby left out of the seamen’s protections.”¹²⁴

Recognizing that “the ultimate inquiry is whether the worker in question is a member of the vessel’s crew or simply a land-based employee who happens to be working on the vessel at a

¹¹⁹ *Chandris*, 515 U.S. at 363 (quoting *Easley v. S. Shipbuilding Corp.*, 965 F.2d 1, 5 (5th Cir. 1992)).

¹²⁰ *Id.*

¹²¹ *Id.* at 361 (contending that the worker’s activities at the time of the injury would be controlling). While recognizing that the “distinction between land-based and sea-based maritime workers” “precludes application of a voyage test for seaman status,” Justice O’Connor added that it is not necessary “that a maritime employee must work *only* on board a vessel to qualify as a seaman under the Jones Act.” *Id.* at 363 (emphasis in original). However, she emphasized the importance of work at sea to the connection requirement: “[T]he Jones Act remedy may be available to maritime workers who are employed by a shipyard and who spend a portion of their time working on shore but spend the rest of their time at sea.” *Id.* at 364.

¹²² *See id.* at 361:

The difficulty with respondent’s argument, as the foregoing discussion makes clear, is that the LHWCA repudiated the *Haverty* line of cases and established that a worker is no longer considered to be a seaman simply because he is doing a seaman’s work at the time of the injury. Seaman status is not coextensive with seamen’s risks.

¹²³ *Id.*

¹²⁴ *Chandris*, 515 U.S. at 361–62 (footnote omitted by the Court) (quoting David W. Robertson, *A New Approach to Determining Seaman Status*, 64 TEX. L. REV. 79, 93 (1985)).

given time,”¹²⁵ Justice O’Connor defined the connection test with two elements: “[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.”¹²⁶ Although she did not define what was necessary to satisfy the nature element or the identifiable group of vessels, Justice O’Connor did discuss the duration element, noting that “the total circumstances of an individual’s employment must be weighed.”¹²⁷ This requirement is subject to an exception, enunciated by the Fifth Circuit:¹²⁸ “If a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position.”¹²⁹ Justice O’Connor also approved the “rule of thumb for the ordinary case” that was developed by the Fifth Circuit: “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.”¹³⁰

In *Harbor Tug & Barge Co. v. Papai*,¹³¹ the Supreme Court provided more detail on the elements it had not addressed in *Chandris*—what is necessary to satisfy the nature element of the connection test and what constitutes an identifiable fleet of vessels. Papai was injured while painting the housing of a tug, operated by Harbor Tug and Barge Co.¹³² Harbor Tug was one of three tugboat operators for San Francisco Bay who obtained workers through a union hiring hall.¹³³ Papai performed

¹²⁵ *Id.* at 370.

¹²⁶ *Id.* at 368.

¹²⁷ *Id.* at 370 (quoting *Wallace*, 727 F.2d at 432). Justice O’Connor also quoted the Fifth Circuit’s decisions in *Barrett*, 781 F.2d at 1075 (“his status as a crewmember is determined ‘in the context of his entire employment’ with his current employer”), and *Longmire*, 610 F.2d at 1347 (“a worker’s seaman status ‘should be addressed with reference to the nature and location of his occupation taken as a whole’”). *Chandris*, 515 U.S. at 366–67.

¹²⁸ *See Barrett*, 781 F.2d at 1075–76 (outlining the exception).

¹²⁹ *Chandris*, 515 U.S. at 372.

¹³⁰ *Id.* at 371.

¹³¹ *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997).

¹³² *See id.* at 551 (explaining that the ladder from which he was painting moved causing him to fall and injure his knee).

¹³³ *See id.* at 555 (detailing that he worked through the IBU hiring hall in the two and a quarter years prior to his injury).

deckhand, maintenance, and longshoring work on the tugs. The vessel on which he was injured was located at dockside, and Papai was not going to sail with the vessel after he finished the painting assignment.¹³⁴

Papai brought suit against Harbor Tug under the Jones Act, and the Ninth Circuit concluded that there was a basis for a finding of seaman status, stating that there was “no reason that a group of employers who join together to obtain a common labor pool on which they draw by means of a union hiring hall . . . should not be treated as a common employer for purposes of determining a maritime worker’s seaman status.”¹³⁵

In order for the nature element to perform its function of distinguishing between land-based and sea-based workers, the Supreme Court in *Papai* focused “on whether the employee’s duties take him to sea.”

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 to the duration and nature of the employee’s connection to the vessel and be helpful in distinguishing land-based from sea-based employees.¹³⁶

Considering whether Papai’s employment satisfied the nature element, the Court stated: “His actual duty on the *Pt. Barrow* throughout the employment in question did not include any seagoing activity; he was hired for one day to paint the vessel at dockside and he was not going to sail with the vessel after he finished painting it.”¹³⁷

Papai contended that “the group of vessels [he] worked on through the IBU hiring hall constitutes ‘an identifiable group of . . . vessels’ to which he had a ‘substantial connection.’”¹³⁸ The Court addressed the argument that Papai’s status should be

¹³⁴ *Id.* at 559

¹³⁵ *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203, 206 (9th Cir. 1995), *rev’d*, 520 U.S. 548 (1997).

¹³⁶ *Papai*, 520 U.S. at 555.

¹³⁷ *Id.* at 559.

¹³⁸ *Id.* at 555 (quoting *Chandris*, 515 U.S. at 368).

evaluated in connection with his other employments on tugs owned by Harbor Tug, but those assignments did not help Papai satisfy the nature element. “Each of these engagements involved only maintenance work while the tug was docked. The nature of Papai’s connection to the *Pt. Barrow* was no more substantial for seaman-status purposes by virtue of these engagements than the one during which he was injured.”¹³⁹ His work on the docked vessel was not “of a seagoing nature.”¹⁴⁰

The Supreme Court also rejected a broad definition for the fleet of vessels that can support a finding of seaman status. Papai argued that the vessels to which he was assigned through the union hiring hall constituted an identifiable group of vessels.¹⁴¹ However, the Court disagreed that vessels owned and operated by the three companies using the union hiring hall were an identifiable fleet, stating: “In deciding whether there is an identifiable group of vessels of relevance for a Jones Act seaman status determination, the question is whether the vessels are subject to common ownership or control.”¹⁴² As the vessels were not “subject to unitary ownership and control,”¹⁴³ even though the assignments came from a single union hiring hall “from the same pool of employees,” Papai was unable to establish a connection to an identifiable group of vessels.¹⁴⁴

IV. RETURN OF THE LABYRINTH

A. *Nature Element of the Connection Test*

The Supreme Court in *Chandris* held that a seaman must establish an employment-related connection that is substantial both in nature and duration. Consequently, a worker may spend more than half of his time on vessels but still fail to achieve seaman status because his work is not substantial in nature.¹⁴⁵

¹³⁹ *Id.* at 559.

¹⁴⁰ *Id.* at 560.

¹⁴¹ *Papai*, 520 U.S. at 560 (quoting *Chandris*, 515 U.S. at 368).

¹⁴² *Id.* at 557.

¹⁴³ *See id.* (reasoning that “each employer was free to hire, assign, and direct workers for whatever tasks and time period they each determined”).

¹⁴⁴ *Id.*

¹⁴⁵ *See, e.g., O’Hara v. Weeks Marine, Inc.*, 294 F.3d 55, 64 (2d Cir. 2002) (reasoning that he is not qualified despite spending more than half of his working hours aboard the

Despite the painstaking effort undertaken by the Supreme Court in *Wilander*, *Chandris* and *Papai* to give effect to the distinction drawn by Congress between land-based and sea-based maritime workers in defining the test for seaman status, the lower courts continue to be presented with arguments that inland marine workers whose duties do not take them to sea are seamen.

In *In re Endeavor Marine, Inc.*,¹⁴⁶ a crane operator assigned to a derrick barge was injured while attempting to moor the derrick barge to a cargo vessel in the Mississippi River when a mooring cable on a nearby vessel snagged, snapped, and struck the plaintiff. Finding that the crane operator's "duties do not take him to sea," the district court held that the worker was not a seaman.¹⁴⁷ It was undisputed in *Endeavor Marine* that the crane operator had a connection to the derrick barge that was substantial in duration. Therefore, the district court considered the issue to be whether his connection was substantial in nature. Based on the clarity of the directive from *Papai*, the district court found that the plaintiff's connection to the derrick barge "was not substantial in nature because 'it did not take him to sea. His work brought him aboard the barge only after the vessel was moored or in the process of mooring.'"¹⁴⁸

The Fifth Circuit agreed that the district court's "application of the 'going to sea' test has an intuitive appeal," but the court did "not believe that the Supreme Court intended to create such a singular rule for determining seaman status."¹⁴⁹ Instead of focusing on Congress' distinction between land-based and sea-based employees, the court believed that the "going to sea" language used by the Supreme Court in *Papai* was "a shorthand way of saying that the employee's connection to the vessel regularly exposes him 'to the perils of the sea.'"¹⁵⁰ Therefore, the

barges); *Richard v. Mike Hooks, Inc.*, 799 So.2d 462, 466–67 (La. 2001) ("thirty percent is not a magic number").

¹⁴⁶ 234 F.3d 287, 287 (5th Cir. 2000).

¹⁴⁷ *Id.* at 288, 290 ("The district court thus understandably surmised that the 'linchpin' of the substantial connection test is whether the claimant's duties carry him to sea.").

¹⁴⁸ *Id.* at 291.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* (quoting *Papai*, 520 U.S. at 544–45 (quoting *Chandris*, 515 U.S. at 368)). The Fifth Circuit curiously found support from the language in *Chandris*: "The Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them

Fifth Circuit held that the district court was incorrect in concluding that the plaintiff “is not a Jones Act seaman merely because his duties do not literally carry him to sea.”¹⁵¹ As his duties regularly exposed him to the perils of the brown waters of the Mississippi River, where “his primary responsibility was to operate the cranes on board a vessel whose sole purpose is to load and unload cargo vessels,” the court concluded that the worker was a seaman.¹⁵²

Although the Fifth Circuit declined to apply the requirement that a worker’s duties take him to sea in the same manner as the Supreme Court did in *Papai*, the court did temper its broad interpretation of the nature element of the connection test by requiring that the work be performed not just in service of a vessel

to “the special hazards and disadvantages to which they who go down to the sea in ships are subjected.” *In re Endeavor Marine*, 234 F.3d at 291 (quoting *Chandris*, 515 U.S. at 370 (quoting *Sieracki*, 328 U.S. at 104 (Stone, C.J., dissenting))).

¹⁵¹ *In re Endeavor Marine*, 234 F.3d at 292. Just because the court finds that a land-based worker presents a fact question of seaman status does not mean that the jury will agree that the worker is a seaman. See *Clark v. W&M Kraft, Inc.*, No. 1:05-CV-00725, 2007 WL 120136, at *5 (S.D. Ohio Jan. 10, 2007), 2007 WL 2837901 (S.D. Ohio Sept. 26, 2007). Clark asserted that he was a member of the crew of the hundreds of barges that called at the terminal where he was employed. Although Clark’s work was all on barges that were located adjacent to mooring cells so that he could depart the barges at any time, the court agreed with Clark that he was subject to the perils of the sea because he had fallen overboard once and had been knocked to the deck of a barge when a vessel collided with it. *Clark*, 2007 WL 120136, at *5. The case was then submitted to a jury, which found that Clark was not a seaman. Believing that a reasonable jury could find against Clark, the court deferred to the jury’s denial of seaman status and denied his motion for a new trial. *Clark*, 2007 WL 2837901, at *5. The verdict was affirmed by the Sixth Circuit. See *Clark v. W&M Kraft, Inc.*, 476 Fed. Appx. 32, 32 (11th Cir. 2012).

¹⁵² *In re Endeavor Marine*, 234 F.3d at 292 & n.3. In *Gulasky v. Ingram Barge Co.*, No. 5:02-CV-173-R, 2006 WL 119381, at *3 (W.D. Kent. Jan. 10, 2006), the court described its role in evaluating the nature of the plaintiff’s seagoing duties:

Although Ingram would interpret the language of the Court to require an employee to go out to sea in order to be exposed to the perils of sea, the statement taken in its entirety does not put forth that requirement for an employee under the Jones Act. Rather, the Court agrees with Gulasky, in that the language reads that one of the factors that a Court should take into consideration when determining whether or not an employee is exposed to the perils of sea should include the seagoing nature of his/her duties.

but on the vessel.¹⁵³ In *Nunez v. B&B Dredging, Inc.*,¹⁵⁴ the worker was employed for two years by a dredging company. For the last eighteen months of his employment he was assigned to work for the Dredge Baton Rouge, first during its construction and then as a dredge dump foreman, overseeing the discharge of the dredge spoil. He was injured during a dredging operation in the Florida Intracoastal Waterway while trying to extricate himself from sinking into silt.¹⁵⁵

All of Nunez's work furthered the mission of the dredge, but he performed ninety percent of that work on land.¹⁵⁶ The Fifth Circuit quoted the requirement from *Chandris* that both the nature and duration of the connection must be examined:

“The duration of a worker's connection to a vessel and the nature of the worker's activities, taken together, determine whether a maritime employee is a seaman because the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time.”¹⁵⁷

Nunez argued that because he was permanently assigned to the dredge, contributing to the function or mission of the dredge, he had a sufficient connection to the vessel. However, the Fifth Circuit rejected Nunez' argument as it “would introduce a host of land-based employees as potential Jones Act seamen simply because their work supports the vessel's mission.”¹⁵⁸ The court added: “If we were to accept Nunez's argument, we would expand

¹⁵³ The argument is rooted in Justice O'Connor's statements in *Chandris*: “If it can be shown that the employee performed a significant part of his work on board the vessel on which he was injured, with at least some degree of regularity and continuity, the test for seaman status will be satisfied.” *Chandris*, 515 U.S. at 368–69 (quoting 1B A. Jenner, *BENEDICT ON ADMIRALTY* § 11a, at 2-10.1 to 2.11 (7th ed. 1994)) (footnote omitted). “A maritime worker who spends only a small fraction of his working time on board a vessel is fundamentally land based and therefore not a member of the vessel's crew, regardless of what his duties are.” *Chandris*, 515 U.S. at 371. “A worker who spends less than about 30 percent of his time in the service of vessel in navigation should not qualify as a seaman under the Jones Act.” *Id.*

¹⁵⁴ *Nunez v. B&B Dredging, Inc.*, 288 F.3d 271, 271 (5th Cir. 2002).

¹⁵⁵ *See id.* at 274 (explaining he was performing duties as dump foreman when he began to sink into the silt).

¹⁵⁶ *Id.* at 274.

¹⁵⁷ *Id.* at 276 (quoting *Chandris*, 515 U.S. at 370).

¹⁵⁸ *Id.*

the ranks of potential Jones Act seamen to all land-based employees who further the mission or function of the vessel, from salesmen to payroll clerks to corporate executives,” a result that the court termed “bizarre.”¹⁵⁹ The court concluded: “For a worker such as Nunez who divides his work time between the shore and the vessel, he must demonstrate that he spends a substantial part of his work time aboard the vessel in order to demonstrate that he has the requisite connection to a vessel in order to qualify for seaman status.”¹⁶⁰ As Nunez spent only an insubstantial part of his work time onboard the vessel, ten percent, he was not a seaman as a matter of law.¹⁶¹

¹⁵⁹ *Id.* at 277.

¹⁶⁰ *Id.* (noting that 10% of work time aboard vessel is insubstantial); *but see* Ryan v. United States, 331 F. Supp. 2d 371, 377–78 (D. Md. 2004) (considering shoreside work related to the function or mission of the vessel).

¹⁶¹ *See Nunez*, 288 F.3d at 277 (reasoning he must show that he spends a substantial part of his work time aboard the vessel); *see also* Zertuche v. Great Lakes Dredge & Dock Co., No. M-07-31, 2007 WL 2539056, at *1 (S.D. Tex. Aug. 30, 2007), in which a dump foreman was injured while temporarily assigned as a deckhand on a dredge. In denying seaman status the court stated:

In light of Plaintiff’s initial assignment as a Dump Foreman, the opportunity to work as a deckhand, the temporary status of his work as a deckhand, and the pay he received while working as a deckhand, Plaintiff’s status during the time of injury “does not constitute the kind of regular or continuous commitment of his labor to the service of [the dredge] that regularly exposed him to the perils of the sea within the meaning of Chandris.”

Id. at *3 (quoting Becker v. Tidewater, Inc., 335 F.3d 376, 391 (5th Cir. 2003)).

In *Encarnacion v. BP Exploration & Prod., Inc.*, No. 10-4336, 2013 WL 968138 (E.D. La. Mar. 12, 2013), the court addressed the claim for seaman status of Garibaldi Encarnacion, a worker who was involved in oil-spill-cleanup operations. After his initial assignment to a vessel for skimming oil and laying oil-absorbing boom, the worker was assigned to land-based beach cleanup. Encarnacion attended daily safety meetings on the F/V Floatel One, ate and slept on the vessel, and was ferried between the vessel and beaches for cleaning by crew boats. Encarnacion asserted that his time on the Floatel One and on crew boats should count to establish his connection to a vessel or fleet of vessels, but the court held that time as a passenger or eating and sleeping on vessels would not satisfy the test. Similarly, his attendance at safety meetings did not “further[] the vessel’s function of ‘provid[ing] operational facilities’ to oil spill cleanup workers.” *Id.* at *4. Encarnacion’s “assigned job duties as a land-based beach cleanup worker” did not establish his status as a seaman. *Id.*

The decision of the Third Circuit in *Shade v. Great Lakes Dredge & Dock Co.*, 154 F.3d 143, 143 (3rd Cir. 1998) contains analysis that varies from *Nunez* and *Encarnacion*. John Shade received work assignments from his union on projects with different dredging companies. He was injured while working for Great Lakes on a project to dredge and renourish the beach at Cape May, New Jersey. Sand was removed from the ocean floor

Other courts have given a more substantial interpretation to the requirement that a worker's duties must take him to sea in order to satisfy the nature element of the connection test.¹⁶² The

and transferred to the beach through 6600 feet of pipe. A hole developed in the pipe, and Shade assisted in repair of the pipe from an anchor barge. During bad weather, Shade assisted welders and waited on standby on the beach or worked in the harbor constructing another pipeline and repairing the buoy where the dredge transferred sand to the pipe. When the dredge pumped sand to the beach, Shade assisted in securing the line, operating the "Y" valve to direct the discharge of sand, and put fuel in welding machines. Shade did not dispute that he primarily worked on the beach when the dredge was operating. *See id.* at 146. The district court allowed evidence of work performed by Shade for Great Lakes during prior employments, for which the Third Circuit reversed the jury verdict that Shade was a seaman. *See id.* at 154. However, the appellate court affirmed the denial of Great Lakes' motion for judgment as a matter of law based on the time Shade spent on the anchor barge repairing the submersible line and as a deckhand on a vessel. The Third Circuit stated: "Additionally, even Shade's duties on the beach were not unrelated to the work of a vessel in navigation; instead, they contributed to the purpose of the dredging operation." *Id.* at 150.

¹⁶² *See, e.g., Scheuring v. Traylor Bros., Inc.*, 476 F.3d 781, 781 (9th Cir. 2007) (reasoning that the movements of the vessel and the sea-based duties of plaintiff raise genuine issues of material fact). Scheuring was a crane operator on a derrick barge used in constructing a dock. "His primary job while employed with Traylor Brothers on the [derrick barge] was to operate the crane to lift pile, hold the leads that captured the pile and start the hammer that drives the pile." *Id.* at 783. The derrick barge was towed at least three times to new locations with Scheuring aboard where it "was secured to the shore by multiple permanent lines." *Id.* at 784. Scheuring was injured while trying to lift a ramp leading to a float from which he would take a skiff to the barge. Scheuring contended that the Ninth Circuit should "rely solely on the plaintiff's account of surges, tides and swells to classify him as a seaman," but the court of appeals "reject[ed] this approach as it would render the second requirement—that the employee have a substantial connection to the vessel both in terms of duration and nature meaningless." *Id.* at 787. Citing *Papai's* instruction "that courts should 'concentrate on whether the employee's duties take him to sea,'" the court "examine[d] the vessel's movements in light of the plaintiff's duties in order to assess whether the plaintiff has presented evidence that would allow a jury to find a substantial connection to the vessel both in terms of duration and nature." *Id.* (quoting *Papai*, 520 U.S. at 555). As the plaintiff cited to "sea-based duties" during movement of the vessel, "such as handling lines, weighing and dropping anchors, standing lookout, monitoring the marine band radio, and splicing wire and rope," the court of appeals found "a fact dispute whether the plaintiff's employment was land-based or sea-based." *Id. Compare Scheuring with Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289, 1293 (9th Cir. 1997) (affirming conclusion that "a land-based crane operator who happened to be assigned to a project which required him to work aboard Barge 538" was not a seaman) and *Heise v. Fishing Co. of Alaska, Inc.*, 79 F.3d 903, 905 (9th Cir. 1996) (affirming conclusion that temporary laborer performing repairs on docked vessel was not a seaman because the "undisputed facts established that Heise was hired for land-based work, not sea-based maritime work").

In *Milligan v. Crux Subsurface, Inc.*, Milligan was hired by Crux as a temporary laborer in connection with the construction of a transmission tower in a remote area of Alaska. Crux connected four barges (barge raft) to serve as a staging area for the inland construction. 2012 AMC 2970, 2970 (D. Alaska 2012). Each of the barges had a separate function: one was a living quarters; one was a helipad; one was for fuel storage; and one

Louisiana Supreme Court examined the nature of an employee's connection to vessels in a land-based context in *Richard v. Mike Hooks, Inc.*¹⁶³ Richard was employed as a tracker/welder's helper in a dockside yard that Mike Hooks used to repair vessels and equipment for its dredging operations. Richard was not assigned to any specific project, but instead he performed general work in the yard, such as picking up scrap iron, unhooking pipe, loading barges, and fabricating items for vessels. He did, however, spend "in excess of thirty percent of his time performing direct repair and maintenance to Hooks's vessels including changing out decks, replacing pipes, changing out cables, replacing mufflers and, occasionally repairing engines."¹⁶⁴ The vessels on which he

held equipment (materials barge). *Id.* at 2971. Milligan mixed grout and distributed materials from the materials barge and from a grout-mixing station that was set up on land. *Id.* He also loaded barges from docks before traveling to the barge raft and helped tighten the mooring lines of the materials barge. *Id.* The barge raft was moved twice during the project. *Id.* Milligan was injured on the materials barge. He spent over 85% of his time during the project on the barge raft. *Id.*

It was not disputed that Milligan spent a substantial amount of time on the materials barge, that it was a vessel in navigation, and that his duties contributed to the accomplishment of the barge's mission. *Id.* at 2972. The question was whether Milligan's connection to the materials barge was substantial in nature. *Id.* To answer the question, the court cited the instruction from *Chandris* that the court "should emphasize that the Jones Act was intended to protect sea-based maritime workers, *who owe their allegiance to a vessel*, and not land-based employees, who do not." *Id.* at 2975 (quoting *Chandris*, 515 U.S. at 376) (emphasis added by the court in *Milligan*). The court found the answer in Milligan's testimony that "all of my jobs are union. All I have to do is just call the hall, and they have something for me." *Id.* at 2975-76. Thus, his allegiance was "to his union, not to the materials barge or the barge raft." *Id.* at 2976. The court also analyzed the *Cabral*, *Scheuring*, and *Heise* decisions from the Ninth Circuit and found *Heise* to be "directly applicable to this case." *Id.* at 2978. The court reasoned:

Like Mr. Heise, Mr. Milligan was hired as a temporary worker to work aboard a vessel that was stationary. He had not worked on the barge raft prior to its mooring near the construction site, and was not expected to continue working aboard the barge raft when it had completed its term near the site. Like Mr. Heise, Mr. Milligan's connection to the barge raft was limited to the time that the barge raft was moored in the bay near the construction site.

Id. at 2978-79 (footnotes omitted). The court rejected Milligan's assertion that "isolated incidents outside his regular duties," such as holding mooring lines, should "transform the nature of his responsibilities from land-based to sea-based." *Id.* at 2979. Consequently, lacking "the requisite connection to a vessel," Milligan was not a seaman. *Id.*

¹⁶³ 799 So.2d 462, 464 (La. 2001).

¹⁶⁴ See *id.* (describing the land-based duties in which Richard was engaged).

worked were either dockside or partially on land, except that approximately once a month Richard rode in a small boat to assist in moving dredge pipe along a canal that was adjacent to Hook's yard. Richard was injured on land while offloading pipe from a truck.¹⁶⁵

The district court held that Richard was a seaman, and the court of appeal agreed that he had a sufficient connection to Hooks' vessels:

[T]he court of appeal found that Richard did have a connection to Hooks's vessels that was substantial in duration and nature because, in considering the totality of the circumstances, Richard's work was of a seagoing nature that exposed him to the perils of the sea. The court noted that Richard spent over thirty percent of his time aboard defendant's vessels, that his work contributed to the function of the vessels, and that he was exposed to the perils of the sea in performing those duties. The court referred to the testimony of a marine expert who stated that Richard faced the "perils of the sea" such as "hazards of cargo operations, ship's cranes/booms, slippery decks, sinking vessel, fire hazards, etc."¹⁶⁶

Although Richard performed in excess of thirty percent of his work on the defendant's vessels, the Louisiana Supreme Court did not believe that this percentage would "in and of itself, make him a seaman. Thirty percent is not a magic number automatically rendering an individual's connection with a vessel substantial in duration and nature. Thirty percent is a guideline, a minimum below which an individual generally does not qualify as a seaman."¹⁶⁷ The court added that mere exposure to perils

¹⁶⁵ See *id.* (recounting the injury that Richard sustained).

¹⁶⁶ *Id.* at 466 (internal citation omitted).

¹⁶⁷ *Id.* The Louisiana Court of Appeal applied the reasoning of *Richard* in *Reeves v. F. Miller & Sons, Inc.*, 967 So.2d 1178, 1178 (La. App. 3 Cir. 2007), *writ denied*, 976 So.2d 181, 181 (La. 2008). The court in *Reeves* agreed that a pile driver/operator who was injured on the deck of a pile driving barge was not a seaman. Although the plaintiff contended that "he spent approximately thirty-eight percent of his hours working 'as a crew member of the pile driving vessel, contributing to the mission and function of the vessel,'" the court considered that it was a misunderstanding of the test from *Chandris* to argue that time spent contributing to the mission and function of the vessel was sufficient.

does not qualify a worker as a seaman because “[s]eaman status is not co-extensive with seamen’s risks.”¹⁶⁸ Instead the court considered not just the time spent on Hooks’ vessels and the perils faced by Richard, but also these additional facts:

[A]ll of the vessels on which plaintiff worked were dockside; he was never more than a gangplank’s distance from shore when working on the vessels; some of the vessels were partially on land while being repaired; he never slept on the vessels; he did not eat on the vessels; he did not keep watch on vessels overnight; he was not a member of Hooks’s dredge crew that performed welding on dredges in operation; he never worked on a vessel while it was performing its primary mission; he took his orders from a land-based foreman; he was only aboard small moving vessels once every month, for short durations, where he assisted in moving dredge pipe along a canal adjacent to Hooks’s yard; and his repair duties did not take him to sea.¹⁶⁹

Considering all of these facts the court was convinced “that Richard was a land-based employee, not a seaman,”¹⁷⁰ stating: “The facts indicate that Richard is a land-based

Id. at 1183. The function or mission test is separate from the connection test. The court explained:

The record establishes all the vessels on which plaintiff worked were dockside; he did not sleep on the vessels; he did not eat on the vessels; he did not keep watch on the vessels overnight; and his pile driving duties did not take him to sea. While none of these individual facts alone prohibit an employee from attaining seaman status, a consideration of them together indicates the jury did not err in finding Plaintiff was a land-based employee, not a seaman.

Id.

¹⁶⁸ *Richard*, 799 So.2d at 466 (quoting *Chandris*, 515 U.S. at 361).

¹⁶⁹ *See id.* at 467, n.2 (footnote omitted) (highlighting that the court did not consider “Richard’s limited time spent aboard small boats in a waterway adjacent to Hooks’s yard” to “constitute ‘going to sea.’”).

¹⁷⁰ *See id.* (emphasizing that “whether an individual routinely goes to sea is a factor in determining whether he has a connection to a vessel that is substantial in nature and duration”).

employee who happens to spend some of his time working aboard defendant's vessels.¹⁷¹

Conflating exposure to marine perils with the performance of work that has an employment-related connection to a vessel that is substantial in nature is not only contrary to the Supreme Court's instruction that "[s]eaman status is not coextensive with seamen's risks,"¹⁷² but it would also transform many land-based workers (intended by Congress to be subject to workers' compensation remedies) into seamen. Facing the claim that a shore-based tankerman was a seaman because he worked on docked barges owned by his employer, the court in *Poole v. Kirby Inland Marine, L.P.* answered: "In theory all longshoremen could be transformed into Jones Act seamen, and this would be the result of Plaintiff's argument, taken to its logical conclusion. However, this position is not supported by federal statute or by case law."¹⁷³ Finding "[t]he nature of Plaintiff's connection with Defendants' barges was as a shoreside maritime worker," the court held that the tankerman was not a seaman.¹⁷⁴

Distinguishing between land-based and sea-based employment has resulted in the courts charting conflicting

¹⁷¹ *Id.* at 467.

¹⁷² *Chandris*, 515 U.S. at 361.

¹⁷³ No. G-05-651, 2006 WL 2052877, at *2 (S.D. Tex. July 21, 2006). *But see* Phillips v. Tidewater Barge Lines, Inc., No. CV 05-1157-ST 2006 WL 1704608, at *1 (D. Ore. June 16, 2006) (finding a fact question whether a tankerman was a seaman).

¹⁷⁴ *Poole*, 2006 WL 2052877, at *2.

courses¹⁷⁵ in *Naquin v. Elevating Boats, L.L.C.*¹⁷⁶ and *Dize v. Association of Maryland Pilots*.¹⁷⁷ Naquin was hired as a vessel

¹⁷⁵ The courts have reached widely differing results in addressing whether land-based workers have an employment connection that is substantial in nature. *Compare O'Hara*, 294 F.3d at 64 (dockbuilder assigned to crane barge for pier-reconstruction project is not a seaman because he does not "derive[] his livelihood from sea-based activities") (quoting *Fisher v. Nichols*, 81 F.3d 319, 322 (2d Cir. 1996)), and *Cockerham v. Great Lakes Dredge & Dock Co.*, No. 7:06-CV-184-F, 2008 WL 313607, at *1, *5 (E.D.N.C. Feb. 4, 2008) (heavy equipment operator of a "beach crew" on a beach renourishment project was not a seaman as he was a land-based worker who was not exposed to the "perils of the sea"), and *Bentley v. L&M Lignos Enter.*, No. 1:06-cv-1832, 2007 WL 2780987, at *1 (N.D. Ohio Sept. 21, 2007) (carpenter foreman setting forms for piers for the Fort Pitt Bridge over the Monongahela River who used a motor boat to travel to a barge, which he used as a transfer point to the bridge pier where he performed his carpentry duties, did not have a sufficient connection in terms of duration and nature to a vessel to be a seaman), and *Saienni v. Capital Marine Supply, Inc.*, No. 03-2509, 2005 WL 940558 at *1 (E.D. La. April 18, 2005) (work of a shoreside mechanic operator from a land-based fleeting facility and mechanic shop was not of a seagoing nature), and *Grennan v. Crowley Marine Servs., Inc.*, 128 Wash. App. 517, 116 P. 3d 1024, 1032 (Wash. App. 2005) (worker assigned to tug and two barges involved in transporting materials for construction of oil facilities, who lived on the tug and whose duties were to offload materials to a beached barge that served as a temporary dock, was not a seaman, "[r]egardless of the duration of [plaintiff's] connection with the vessel," because "the nature of his connection with the vessel was that of a land-based worker"), *with Baucom v. Sisco Stevedoring, LLC*, No. 06-0785-WS-B, 2008 WL 313174, at *6 (S.D. Ala. Feb. 1, 2008) (crane operator on a floating derrick crane in the Mobile River used to load and unload cargo from vessels has an employment-related connection to a vessel that is substantial in nature because the plaintiff "was regularly exposed to the perils of sea even though he was not actually 'at sea'"), and *Phelps v. Bulk III Inc.*, Nos. 06-0833, 05-2148, 2007 WL 3244723, at *1 (E.D. La. Nov. 1, 2007) (flagman/leadman who assisted in loading and unloading cargo using his employer's vessels in the Mississippi River presented a fact question of exposure to the perils of the sea), and *Pruitt v. Orion Marine Group*, No. G-06-263, 2007 WL 656253, at *2 (S.D. Tex. Feb. 27, 2007) (member of form crew building a dock in the Houston Ship Channel who claimed to have spent seventy to eighty percent of his work time on defendant's barges and tugs presented a fact question of seaman status as his duties exposed him to marine perils when he "helped prepare the vessels for movement, assisted in the maneuvering of the barges while they were traversing up and down the dock, sometimes jumped from tug to barge, often helped moor the vessels, searched for employees that had fallen in the water, and wore a life vest at all times").

¹⁷⁶ 744 F.3d 927, 927 (5th Cir. 2014). *See also Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 835 (9th Cir. 2012) (considering time spent in shipyard and in port in determining whether Tracy had a sufficient connection to a vessel); *Grab v. Boh Bros. Constr. Co.*, 506 Fed. Appx. 271, 271 (5th Cir. 2013) (land-based ironworkers involved in bridge construction, who worked from a crane barge and from the bridge to set bridge girders, erect work platforms around bridge pilings, set caps on pilings, and set pads, were seamen because the crane barge was exposed to maritime perils).

¹⁷⁷ 435 Md. 150, 77 A.3d 1016 (Md. App. 2013); *see also Clark v. Am. Marine & Salvage, LLC*, 494 Fed. Appx. 32, 32 (11th Cir. 2012). Clark was hired to operate the office and to perform diving, welding, and vessel repair work. Even though he was injured while climbing back onto a boat from a dive, the Eleventh Circuit affirmed summary judgment that he was not a seaman as the time he spent repairing the work barge did not count as

repair supervisor for Elevating Boats' lift boats at its shipyard in Houma, Louisiana. He performed approximately 70% of his work on the vessels, including work two or three times a week while a vessel was being moved in the canal and occasionally while a vessel was in open water. He performed approximately 30% of his work in the shipyard's fabrication shop or operating a land-based crane. He was injured when the land-based crane toppled over onto a nearby building. Elevated Boats argued that Naquin's connection to its fleet of lift boats was not substantial in nature and duration¹⁷⁸ because "his duties do not 'regularly expose [him] to the perils of the sea.'"¹⁷⁹ It asserted "that Naquin was rarely required to spend the night aboard a vessel, that the vessels he worked upon were ordinarily docked, and that he almost never ventured beyond the immediate canal area or onto open sea."¹⁸⁰

The Fifth Circuit rejected the "categorical assertion that workers who spend their time aboard vessels near the shore do not face maritime perils," stating: "While these near-shore workers may face fewer risks, they still remain exposed to the perils of a maritime work environment."¹⁸¹ The majority found *Endeavor Marine* to be indistinguishable:

Like the crane operator in that case, Naquin's primary job duties were performed doing the ship's work on vessels docked or at anchor in navigable water. In doing this work, Naquin faced precisely the same type and degree of maritime perils faced by the

"time performing Jones Act work." *Id.* at 34. The court reasoned: "Although the record establishes that the 159 hours during which Clark made repairs and improvements to the work barge contributed to its functionality, Clark performed most of the repair work on land or, at least while tethered to a land base, and that work was not of a seafaring nature." *Id.* at 34–35.

¹⁷⁸ The Fifth Circuit described the test: "Thus, a worker seeking seaman status must separately demonstrate that his connection to a vessel or fleet of vessels is, temporally, more than fleeting, and, substantively, more than incidental." *Naquin*, 744 F.3d at 933 (footnote omitted).

¹⁷⁹ *Id.* at 934 (quoting *Endeavor Marine*, 234 F.3d at 292).

¹⁸⁰ *Id.*

¹⁸¹ *Id.* (footnote omitted). The adverse consequences of extending seamen's remedies to land-based workers was illustrated in the related insurance coverage litigation arising from Naquin's injury. See *Naquin v. Elevating Boats, L.L.C.*, 817 F.3d 235, 240 (5th Cir. 2016) (Elevating Boats' protection and indemnity policy did not afford coverage for the Jones Act claim because the accident "in no way arose out of [Elevating Boats'] conduct as 'owner of the Vessel.'").

port-bound derrick barge crane operator in *Endeavor Marine*.¹⁸²

The majority added that “we have dozens of cases finding oilfield workers and other ‘brown-water’ workers on drilling barges and other vessels qualified as seamen even though they spent all their time on these vessels submerged in quiet inland canals and waterways.”¹⁸³ Consequently, the majority “conclude[ed] that Naquin’s connection to [his employer’s] vessel fleet was substantial in terms of nature.”¹⁸⁴

¹⁸² *Naquin*, 744 F.3d at 935. Judge Jones dissented and expressed that Naquin did not satisfy either the duration or nature components of the test for seaman status. She did not believe that “Naquin’s work as a repair supervisor on vessels docked in a canal or in drydock counts as service of a vessel in navigation,” stating: “To allow Naquin to accrue the 30% minimum temporal connection while solely working on docked vessels under repair essentially removes the duration component for other land-based repairmen who are fortunate enough to work on vessels that do not require long-term repairs.” *Id.* at 942 (Jones, J., dissenting). With respect to the nature component, Judge Jones disagreed with the majority’s reliance on *Endeavor Marine*:

The *Endeavor Marine* plaintiff was a derrick barge crane operator who loaded and unloaded cargo vessels in the *Mississippi River* (not a canal). His job required him to travel over water to his worksite and exposed him to the uniquely maritime dangers that arose when his barge was moored to the cargo vessels that he was assigned to load or unload. He was injured, moreover, when struck by a mooring cable as he was handling the lines while waiting for his barge to be positioned alongside the cargo vessel. Naquin, on the other hand, spent nearly all of his time dockside, repairing boats that were secured in the shipyard canal, or operating a land-based crane, or working in the shipyard fabrication shop. His employment, in sum, was substantially similar to that of other land-based employees whose seamen status has been denied by federal and state courts.

Id. at 943–44 (emphasis supplied in the dissent) (footnote omitted) (citing *Endeavor Marine*, 234 F.3d at 288, 289; *Clark*, 494 Fed. Appx. at 32 (“affirming dismissal of Jones Act claim brought by crane operator who performed most of his repairs on land”); *Schultz v. La. Dock Co.*, 94 F. Supp. 2d 746, 746 (E.D. La. 2000) (“ruling that repairman who inspected and repaired mooring barges was not a seaman”); *Richard*, 799 So.2d 462 (“reversing lower courts and dismissing land-based repairman’s Jones Act claim”)).

¹⁸³ *Naquin*, 744 F.3d at 935 (footnote omitted). Judge Jones responded: “All of these cases, however, involve employees who performed their work while their vessel was operating on water.” *Id.* at 944 (Jones, J., dissenting) (footnote omitted).

¹⁸⁴ *Id.* at 935. See also *Lara v. Harvey’s Iowa Mgmt. Co.*, 109 F. Supp. 2d 1031, 1034 (S.D. Iowa 2000) (finding cocktail server and bartender on riverboat casino that made 3-mile excursions on the Missouri River, whose foot fell into an open floor drain behind the

William Dize was assistant station manager at the Solomons Island Transfer Station for the Association of Maryland Pilots. He spent “somewhat less than 20 percent of his time” as a launch boat operator, transporting pilots to and from vessels traveling on Chesapeake Bay, between 42 and 50 percent of his time performing maintenance, “such as painting; sanding; changing propellers, rotors, shafts, and rub rails; replacing zinc anodes; cleaning the boat interiors; and refueling,” between 3 and 5 percent “on overhaul and refits while the boats were out of the water,” and for the remaining time he “performed general maintenance on station buildings and property, ordered work supplies and groceries, unloaded trucks, installed rugs, mowed the law, and cleaned the docks.”¹⁸⁵ After being diagnosed with silicosis, Dize brought suit against his employer under the Jones Act, complaining of exposure to silica during the sandblasting of a vessel in dry dock. The circuit court granted the Association’s motion for summary judgment on the ground that “Mr. Dize did not have a connection with a fleet of vessels in navigation that was substantial in duration.”¹⁸⁶ Noting that the Supreme Court in *Chandris* had described the work necessary to satisfy the 30 percent rule as “aboard vessel” and “in the service of a vessel in navigation,”¹⁸⁷ the Maryland court concluded: “The Court thus apparently equated ‘in the service of a vessel in navigation’ with ‘aboard ship.’”¹⁸⁸

bar, fell into a “‘twilight zone’ between a purely land- and sea-based injury;” however, where the night-shift cocktail server worked only when the vessel was docked and did not work while the vessel was cruising, she did not satisfy the connection test); *Haas v. Beatty St. Props., Inc.*, No. 3:13-CV-302, 2014 WL 2932258, at *1 (S.D. Tex. June 27, 2014) (noting assistant port engineer who spent 90% of his time maintaining the mechanical systems on his employer’s vessels, mostly while docked but 40% of the time while the vessels were in motion faced the same perils that the Fifth Circuit held were sufficient to satisfy the nature element in *Naquin*); *Frederick v. Harvey’s Iowa Mgmt. Co.*, 177 F. Supp. 2d 933, 933 (S.D. Iowa 2001) (finding casino dealer on riverboat casino that makes gambling cruises on the Missouri River presented sufficient evidence to create an issue of seaman status); *Valcan v. Harvey’s Casino*, No. 1-98-CV-80067, 2000 U.S. Dist. LEXIS 12744, at *1 (S.D. Iowa June 15, 2000). *See also* *Marston v. Gen. Elec. Co.*, 121 A.D.3d 1457, 11457 (N.Y. App. Div. (3d Dept. 2014) (holding the status of a land-based archeologist who was assigned to perform archeological surveys in connection with a dredging project in the Hudson River, whose vessel lost power and was swept over a dam, may have converted to a seaman at the time of his accident).

¹⁸⁵ *Dize*, 77 A.3d at 1019.

¹⁸⁶ *Id.* at 1024.

¹⁸⁷ *Id.* at 1025 (quoting *Chandris*, 515 U.S. at 367, 371).

¹⁸⁸ *Id.*

To determine the meaning of “aboard ship,” the court found “useful clarification” from the Supreme Court’s *Papai* decision, stating: “To give ‘substance to the inquiry’ as to the nature and duration of the employee’s connection to the vessel and be helpful in distinguishing land-based from sea-based employees,’ a court must ‘concentrate on whether the employee’s duties take him to sea.’”¹⁸⁹ Although that could require “that the employee must spend at least 30 percent of the employee’s time actually at sea,” a rule that the court considered “straightforward,” “easy to apply,” and of “great appeal,” the court believed “it is somewhat at odds with the discussion of the ‘in navigation’ requirement in *Chandris* and of other courts’ analysis of the ‘substantial nature’ determination under [*Papai*].”¹⁹⁰ Consequently, the court reasoned that “‘sea-based’ duties’ that count for the purposes of the duration analysis are those that regularly expose the worker to seagoing perils.”¹⁹¹ The court cautioned, however: “This is not to say that only time aboard a ship in transit over the water counts. There may be a variety of other circumstances that involve sea-based duties that expose a worker to the ‘perils of the sea.’”¹⁹²

Applying the test described by the Maryland court presented the question “whether [Dize’s] dockside or onshore maintenance

¹⁸⁹ *Dize*, 77 A.3d at 1026 (quoting *Papai*, 520 U.S. at 555).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at 1028.

¹⁹² *Id.* The court gave examples:

E.g., *Navarre v. Kostmayer Construction Co.*, 52 So.3d 921, 930 (La.App. 2010) (employee who worked on off-shore barge entitled to trial on Jones Act claim); *In re Endeavor Marine*, 234 F.3d 287, 292 (5th Cir. 2000) (worker who spent 18 months on derrick barge regularly “exposed to the perils of the sea” entitled to trial on Jones Act claim); *Delange v. Dutra Construction Co.*, 183 F.3d 916, 920–21 (9th Cir. 1999) (carpenter who spent more than 80 percent of his time on board barge performing variety of seaman’s duties in addition to carpentry raised triable issue as to his status under Jones Act); *Roberts v. Cardinal Services, Inc.*, 266 F.3d 368, 376 (5th Cir. 2001) (affirming summary judgment in favor of employer but counting plaintiff’s duties on liftboats toward 30 percent threshold).

Dize, 77 A.3d at 1028.

of the boats—which he estimated as taking up to 50% of his time—was ‘sea-based’ work.”¹⁹³ The court’s analysis of the case law “reveal[ed] a widely shared conclusion that [p]erforming repairs and conducting inspections on vessels that are dockside hardly exposes the plaintiff to ‘the perils of the sea.’”¹⁹⁴ In holding that “Mr. Dize’s time spent maintaining the Association’s vessels while they were docked or onshore at the Solomons Island Transfer Station (as well as his time spent performing upkeep of the station property) does not count toward the 30 percent threshold,” the court explained:

[T]hese duties—performing overhauls and refits of vessels; painting; sanding; changing propellers, rotors, shafts, and rub rails; replacing zinc anodes; cleaning the boat interiors; and fueling—did not subject him to the “caprices of open water,” and, in the case of an emergency, “onshore assistance was never far away.” During his commission of this work, there would never be a “need to abandon ship” or “survive exposure to the elements until help arrives.” His proximity to shore meant that there was no danger of

¹⁹³ *Dize*, 77 A.3d at 1028.

¹⁹⁴ *Id.* (quoting *Casser v. McAllister Towing & Transp. Co.*, No. 10 CIV.1554 (JSR), 2010 WL 5065424, at *3 (S.D.N.Y. Dec. 7, 2010)). The court also quoted *Lara v. Arctic King, Ltd.*, 178 F. Supp. 2d 1178, 1182 (W.D. Wash. 2001), “another case involving a shipyard employee whose duties were similar to Mr. Dize’s” in which “the court also held that maintenance work on moored vessels did not subject the individual to the ‘special hazards and disadvantages’ of sea duty:”

The fact the vessel remained tied to a pier obviously eliminated many of the peculiar risks that seamen face, such as the need to fight fires without outside assistance, the need to abandon ship, and the need to survive exposure to the elements until help arrives. . . . Another seaman hazard or disadvantage that plaintiff did not face was potential delay or inconvenience in being transported to medical attention for injuries. . . . [Plaintiff could] depart his work place at any time. He therefore did not have any of the inconveniences, limitations and pressures encountered by seamen who are often stuck with their vessel and the control of its Master and operator for extended periods until the next port call.

Dize, 77 A.3d at 1029.

unusual “delay or inconvenience in being transported to medical attention for injuries.” This work plainly did not subject Mr. Dize to the perils of the sea, and therefore did not comprise sea-based activities that should have been counted in the Circuit Court’s duration analysis.¹⁹⁵

¹⁹⁵ *Id.* The application of the sea-based/land-based distinction to reject seaman status for land-based workers whose duties do not take them to sea is reflected in a wide variety of situations. See, e.g., *Peterson v. Reinauer Transp. Co.*, No. 94 Civ. 1851 (JFK), 1997 WL 706220, at *1 (S.D.N.Y. Nov. 12, 1997) (finding a worker engaged in repair of air conditioning units and installation of vapor recovery systems on his employer’s vessels while moored or in drydock was a land-based employee whose duties did not take him to sea or expose him to the perils of the sea); *Denson v. Ingram Barge Co.*, No. 5:07-cv-00084-R, 2009 WL 1033817, at *3 (W.D. Kent. Apr. 16, 2009) (holding that a barge cleaner of employer’s coal barges at employer’s facility at the Tennessee River did not have a connection to the barges that was substantial in nature as the hazards he faced, such as dangers from movement of the vessels in the water, hazards from waking on the decks or barges with their fittings, ratchets, and riggings in inclement weather, hazards of falling overboard in the river, dangers of crossing from barge to barge, and dangers of injury from handling lines, are the same as a longshoreman and “do not rise to the level of the special hazards and disadvantages faced by seamen”); *Roberts v. Ingram Barge Co.*, No. 5:06-cv-00210-R, 2009 WL 1034111, at *1 (W.D. Kent. Apr. 16, 2009) (deciding that barge welder and repairer on employer’s barges from employer’s facility in the Tennessee River did not have a connection that was substantial in nature even though he was injured on a welding flat being pushed by a tug against a barge when the flat began to drift away from the barge, another worker released the new wire for the barge in order to avoid falling in the river, and Roberts had to take the full weight of the wire to get it to the barge); *Frazier v. Core Indus., Inc.*, 39 So.3d 140, 156–57 (Ala. 2009) (concluding a worker engaged in barge repair and construction, including maneuvering and mooring barges “was a land-based employee whose work was not of a seagoing nature”); *Smith v. Marine Terminals of Ark., Inc.*, No. 3:09CV00027 JLH, 2010 WL 4789167, at *1 (E.D. Ark. Nov. 17, 2010) (finding a truck driver hauling loose iron or steel from river barges at floating dock to scrap yard who was injured while assisting in the movement of a river barge faced the perils of a dock worker and truck driver and was not a seaman); *Casser*, 2010 WL 5065424, at *3 (holding that port engineer who claimed he spent 80% of his time working on vessels, including time on vessels that were under weigh at sea, was not a seaman because over 90% of the time the vessels were at dock and “[p]erforming repairs and conducting inspections on vessels that are at dockside hardly exposes the plaintiff to ‘the perils of the sea’”); *LeBlanc v. AEP Elmwood, LLC*, No. 2:11-cv-01668, 2012 WL 669416, at *1, *5 (E.D. La. Feb. 29, 2012) (deciding that barge cleaner working on barges that were “afloat and transient” in Mississippi River and “never affixed to the river bed” who fell through an open hatch on a barge did not face the perils of the sea); *Duet v. Am. Commercial Lines LLC*, No. 12-3025, 2013 WL 1682988, at *1 (E.D. La. Apr. 17, 2013) (concluding that a worker for barge repair facility involved in repair and maintenance, who also served as a deckhand to reposition barges to facilitate repair and assured compliance with Coast Guard regulations by performing air quality inspection and painting draft numbers on the vessels, who performed a majority of his work on vessels moored to a floating dock but also worked on barges moored at remote locations where he was transported by fleet boat and once traveled on a sea-trial to confirm that a vessel was operable, did not have a connection to his employer’s fleet of barges that was substantial in nature as he was not exposed to the

Consequently, Dize “was not a seaman for the purposes of the Jones Act.”¹⁹⁶

Although the lower courts have reached widely inconsistent results, applying conflicting interpretations of the Supreme Court’s formulation of the requirement that a worker’s duties must take him to sea in order to satisfy the nature prong of the seaman status test, the Supreme Court has declined to intervene and has permitted the dissonant interpretations to continue and to expand. Even though the Court received petitions for certiorari in the same year, within six months of each other, raising the same issue in the conflicting decisions in *Dize* and *Naquin*, the Court declined to hear either case and also declined to grant rehearing in *Dize* after the filing of the petition in *Naquin*.¹⁹⁷

The confusion in the lower courts over the proper interpretation of nature element for seaman status reached a new level in *Guidry v. ABC Insurance Co.*¹⁹⁸ Ernest Lee Guidry was employed as a welder by Tanner Services, LLC from February 2, 2010 until his injury on May 8, 2012. For the first two years of his

perils of the sea on a regular basis); *Vasquez v. McAllister Towing & Transp. Co.*, No. 12 Civ. 5442 (NRB), 2013 WL 2181186, at *1 (S.D.N.Y. May 16, 2013) (finding that a yard worker who spent 99% of his time repairing vessels in the water that were tied to the dock failed the connection test because he was not regularly exposed to seagoing perils); *Hartley v. Williams S. Co.*, No. 01-11-00849-CV, 2013 WL 4477993, at *4 (Tex. App.—Houston [1st Dist.] Aug. 20, 2013, no pet.) (holding that floorman on workover rigs in Louisiana marsh who traveled daily to the rigs by crewboat performed work that was not “one of the traditional maritime trades and did not expose him to “the special hazards of those who go to sea” and did not have a connection to a vessel that was substantial in nature); *Riverport Ins. Co. v. C&M Indus., Inc.*, 87 Va. Cir. 281, 281 (Va. Cir. Ct. 2013) (deciding that tankerman assigned to fleet of five barges who was primarily responsible for loading and unloading of hazardous liquids while the barges were moored to a dock or vessel, who opened and closed valves on the barges and occasionally adjusted mooring lines, was not subjected to any special hazards other than those of a longshoreman or outdoor employment); *Turner v. Wayne B. Smith, Inc.*, No. 2:13-cv-100-SPM, 2014 WL 6775796, at *6 (E.D. Mo. Dec. 2, 2014) (concluding that a welder who spent 90% of his time working on his employer’s docked towboats and barges at his employer’s facility on the Mississippi River and only rarely did work on vessels moving up and down the river was “not regularly exposed to the special hazards and disadvantages faced by those who go out to sea”); *Mercado v. Paducah River Painting, Inc.*, No. 2012-CA-001903-MR, 2014 WL 7205782, at *1 (Kent. Ct. App. Dec. 19, 2014) (finding work of blaster/painter on barges on the water was not of a “seagoing nature” and was not subject to the perils and hazards of the sea).

¹⁹⁶ *Dize*, 77 A.3d at 1030.

¹⁹⁷ See *supra* note 22 (declining to grant rehearing for the denial of certiorari in *Dize* subsequent to the filing of the petition in *Naquin*).

¹⁹⁸ 206 So.3d 378, 378 (La. App. 3 Cir. 2016), *aff’d in part, vacated in part*, 209 So.3d 90 (La. 2017).

employment he worked at his employer's shop in Eunice, Louisiana.¹⁹⁹ After Tanner was awarded a contract to construct a bulkhead for a dock in Grand Isle, Louisiana, Guidry was reassigned from Tanner's "land division to work for the marine division for the project," which "was estimated to last for about three to four months."²⁰⁰ The construction of the bulkhead used three barges and two tugboats "to move the equipment, supplies, and to store materials, as well as to act as 'floating docks' or 'work stations' for a crane and preparatory welding."²⁰¹ During the construction of the bulkhead, the crane operator on a barge would move a king pile into place for the bulkhead where a vibrating hammer would drive the pile into the ground. The crane then brought a sheet pile that the welders would weld in place to the king piles while they stood on a floating mat.²⁰²

Guidry spent the majority of his time on the floating mat, "a large piece of wood which was described as a 'raft' and 'scaffold in the water.'"²⁰³ The rest of his work was spent on the barges or driving back and forth to the jobsite in his pickup truck.²⁰⁴ Guidry was injured when the vibrating hammer fell on him while he was on the floating mat to weld the sheet piles.²⁰⁵

The district court held that Guidry satisfied the test for seaman status,²⁰⁶ and Tanner Services argued to the court of appeal that Guidry could not satisfy the nature element, as defined and applied in *Papai*, because he was not on the vessels when they moved, he did not assist in their movement, and when he was working on the mat he was never farther from shore than the welding leads attached to the welding machine on his pickup

¹⁹⁹ See *id.* at 379 (describing Guidry's working conditions as a welder for Tanner Services prior to his injury).

²⁰⁰ *Id.* at 380.

²⁰¹ *Id.*

²⁰² See *Guidry*, 206 So.3d at 380 (recounting Guidry's day-to-day work duties, including work with cranes that would place sheet piles in place for welders working on a floating mat).

²⁰³ *Id.*

²⁰⁴ See *id.* (outlining Guidry's other activities such as welding on a barge and driving to and from his job).

²⁰⁵ See *id.* (detailing the injury sustained by Guidry as he performed his work on a floating mat and welded).

²⁰⁶ See *id.* at 381, 382 (agreeing with district court that Guidry met the test for seaman status based on his contribution to the function or mission of a vessel).

truck on the land.²⁰⁷

The court of appeal rejected the argument that Guidry's duties did not take him to sea, calling the argument "misguided."²⁰⁸ The reason given by the court for declining to apply the nature test as set forth and applied in *Papai* was that the requirement that a worker's duties take him to sea conflicts with the Supreme Court's rejection in *Chandris* of a "voyage" test in formulating the duration requirement for seaman status.²⁰⁹ Thus, the court of appeal did not even purport to consider whether Guidry's duties took him to sea and held that the nature requirement was met simply because Guidry satisfied the separate element that his duties must contribute to the function or mission of the vessel.²¹⁰ "Plaintiff's duties contributed to the

²⁰⁷ See Reply Br. of Tanner Servs., LLC, at 12–13, *Guidry v. ABC Ins. Co.*, 206 So.3d 378 (La. App. 3 Cir. 2016), 2016 La. App. Ct. Briefs LEXIS 91.

²⁰⁸ *Guidry*, 206 So.3d at 383.

²⁰⁹ See *id.* Of course, the Supreme Court did not consider that its requirement that a worker's duties take him to sea conflicted with the Court's rejection of a voyage test.

²¹⁰ In order to conclude that Guidry's duties contributed to the function or mission of the vessels, the district court and court of appeal had to invoke a flawed syllogism, improperly conflating the functions of Guidry and the vessels. The district court recognized that the overall "mission of Tanner was the building of the bulkhead," and "that the vessels were a necessary and essential part of that mission." *Guidry v. Tanner Servs., L.L.C.*, No. 13-C-2180-A, 2015 La. Dist. LEXIS 9677, at *6 (27th Jud. Dist. Ct., St. Landry Parish, La. Oct. 7, 2015), *aff'd Guidry.*, 206 So.3d at 378 (La. App. 3d Cir. 2016), *aff'd in part, vacated in part*, 209 So.3d 90, 90 (La. 2017). The court identified the role of the vessels in accomplishing Tanner's project to construct the bulkhead: "The function of the vessels was to provide a work platform, a storage area for equipment and supplies and to maneuver equipment and supplies . . ." *Id.* The court also described the role of Tanner's welders and "land crew," "to put the construction pieces together." *Id.* The court then joined the distinct missions of Guidry and the vessels: "It is the Court's opinion these functions joined together were parts that made up the whole of the mission and that was the construction of the bulkhead." *Id.* Adding the separate parts together, the court came to its ruling that because Guidry and the vessels both contributed to Tanner's mission to build the bulkhead, Guidry thereby contributed to the mission of the vessels: "The Court finding that the mission of Tanner was the building of the bulkhead and further that the vessels were a necessary and essential part of that mission and further that the services of the plaintiff were also a part of or contributed to the mission, the Court finds that the plaintiff has met his burden of proving that he contributed to the mission of the vessels." *Id.* In other words, A's mission contributes to C; B's mission contributes to C; therefore, A's mission contributes to B's mission. That logic might work if the test for seaman status were that the worker and vessel each must contribute to the same work project. But that has never been the test because everyone working on the project would be a seaman. The court of appeal then used the same flawed syllogism as the district court and affirmed the district court's conclusion: "Defendant states that the mission of the vessels was to build the bulkhead. Plaintiff's primary job duty was to build the bulkhead via welding. As such,

barge's mission and function, the building of the bulkhead, thus making them inherently vessel-related and fulfilling of the substantial nature requirement of the *Chandris* test.”²¹¹

When the lower courts become so confused that they do not apply one of the tests for seaman status based on a misunderstanding of the decisions of the Supreme Court, and when the Supreme Court is presented with conflicting interpretations of a federal statute within the same year, it is time for the admiralty judges of the Supreme Court to restore

Plaintiff ‘contribute[d] to [the] function of the vessel or to the accomplishment of its mission.’” *Guidry*, 206 So.3d at 383 (quoting *Chandris*, 515 U.S. at 357, 368, 376).

²¹¹ *Guidry*, 206 So.3d at 384. Compare *Guidry*, where the court of appeal held that the worker was a seaman even though he was tethered to his pickup truck with *Clark*, where the court of appeals held that the worker, who was tethered to a land base, did not perform work of a seafaring nature and was not a seaman. 494 Fed. Appx. 32. The conflict in the interpretation of the nature element is further exemplified by comparison of *Guidry* with *In re Buchanan Marine L.P.*, 874 F.3d 356, 356 (2d Cir. 2017). Wayne Volk was employed by Buchanan Marine at its quarried rock processing facility on the Hudson River as a barge maintainer to inspect and maintain barges that transported rock down the river. *Id.* at 360. When an empty barge arrived to be loaded, he inspected the barge for damage and excess water and repaired any damage so that the barge was in an acceptable condition to be loaded with rock. After the barge was loaded with rock, he conducted a final inspection. These functions occurred while the barge was in the water and either tied directly to the dock or tied to barges that were tied to the dock. If the work was performed on a barge that was tied to other barges, Volk had to climb over the other barges to get to the one he needed to inspect or repair. *Id.* at 361. His inspection work required that he walk on the narrow margin decks along the perimeter of the barges without guard or hand rails and often wet and littered with excess gravel from the loading process. *Id.* at 361–62. While performing repairs, Volk sometimes stood on a pontoon work boat alongside the water side of the barge. *Id.* at 362. He was injured when he slipped on wet stone while walking on the margin deck of a barge. Focusing on the requirement that the worker's duties must take him to sea, the Second Circuit held that Volk did not qualify as a seaman as a matter of law, stating: “As a reasonable factfinder could only conclude, his work on the barges did not regularly expose him to the special hazards and disadvantages of the sea.” *Id.* at 366. As in *Papai*, Volk was not engaged in sea-based activities as he “never operated a barge and only worked aboard the barges when they were secured to the dock.” *Id.* Volk did not spend the night on the barges, he worked an hourly shift, and he went home at night after his shift was over, in contrast to a “traditional Jones Act seaman” who “normally serves for voyages or tours of duty.” *Id.* at 367. Volk reported to the dock foreman, not an officer on a vessel, and it was the dock foreman who took Volk to the clinic after he was injured. *See id.* Even though Volk contributed to the mission of the barges and was subject to marine perils, performing repairs from pontoon work boats in the Hudson River and walking on the decks of barges without rails when the decks were covered with wet stone from the loading process, the Second Circuit concluded: “In sum, none of Volk's work was of a seagoing nature. Volk's duties were limited to inspecting and repairing barges that were secured to the dock at the Clinton Point facility.” *Id.* at 368. Therefore, “Volk did not go to sea and was not exposed to the ‘perils of the sea’ in the manner associated with seaman status.” *Id.*

uniformity to the interpretation of the Jones Act and the general maritime law rather than allowing the labyrinth to grow for 33 years. The courts have created many categories of seamen, including the blue-water seaman,²¹² the brown-water seaman,²¹³ and the “*Sieracki* seaman.”²¹⁴ The Supreme Court should correct the wayward case law before there is a new category of seamen for land-based workers like Ernest Guidry, the pickup truck seaman.²¹⁵

B. Duration Element of the Connection Test

In determining whether a worker’s connection is substantial in duration, the Supreme Court stated that “the total circumstances of an individual’s employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon.”²¹⁶ The connection only includes employment with the defendant employer and does not consider “prior employments with independent employers.”²¹⁷ The Court rejected a “snapshot” or “voyage” test for the requisite²¹⁸ temporal connection and instead held that “[l]and-based maritime workers do not become seamen because they happen to be working on board a vessel when they are injured.”²¹⁹

²¹² See *Brown v. ITT Rayonier, Inc.*, 497 F.2d 234, 236 (5th Cir. 1976) (noting the different classes of maritime workers ranging from blue-water seamen to land-based longshore workers).

²¹³ See *Price v. Connolly-Pac. Co.*, 162 Cal. App. 4th 1210, 1214 (Cal. App. 2d Dist. 2008) (contrasting the brown-water seamen who commute to and from their place of employment with the blue-water seamen who live aboard the vessel on which they work).

²¹⁴ See *Aparicio v. Swan Lake*, 643 F.2d 1109, 1110 (5th Cir. 1981) (citing *Sieracki*, 328 U.S. 85, 85 (1946) (defining the *Sieracki* seaman category of “landlubbers who do sailor’s work aboard ships,” whose status was eliminated by the 1972 Amendments to the LHWCA except for a few remaining pockets of *Sieracki* seamen).

²¹⁵ When the conflicting cases are not only from the courts in different circuits or different states, but are within the courts of a single state and even from the same court, it is time for the Supreme Court to restore uniformity to the law. Compare *Richard*, 799 So.2d at 467 (denying seaman status to a worker whose work on vessels “was never more than a gangplank’s distance from shore”), and *Reeves*, 967 So.2d at 1183 (noting duties of pile driver/operator who was injured on the deck of a pile driving barge located dockside did not take him to sea and he was not a seaman), with *Guidry*, 206 So.3d at 383 (finding seaman status for a welder injured in the construction of a bulkhead for a dock while on a floating mat and connected to the welding machine on his pickup truck on the land).

²¹⁶ *Chandris*, 515 U.S. at 369 (quoting *Wallace*, 727 F.2d at 432).

²¹⁷ *Papai*, 520 U.S. at 558.

²¹⁸ *Chandris*, 515 U.S. at 363.

²¹⁹ *Id.* at 361.

The Court accepted the Fifth Circuit's measurement for the employment connection: "Under *Barrett v. Chevron, U.S.A., Inc.* . . . , if an employee's regular duties require him to divide his time between vessel and land, his status as a crewmember is determined 'in the context of his entire employment with his current employer.'²²⁰ The Court supported that standard with the reasoning of the Fifth Circuit in *Longmire v. Sea Drilling Corp.*, "explaining that a worker's seaman status 'should be addressed with reference to the nature and location of his occupation as a whole.'²²¹

When the Supreme Court in *Chandris* approved the Fifth Circuit's thirty percent rule of thumb as a guide for determining whether a worker's employment-related connection to a vessel or fleet is substantial in duration, the Court stated:

We agree with the Court of Appeals that seaman status is not *merely* a temporal concept, but we also believe that it necessarily includes a temporal element. A maritime worker who spends only a small fraction of his working time on board a vessel is fundamentally land based and therefore not a member of the vessel's crew, regardless of what his duties are. Naturally, substantiality in this context is determined by reference to the period covered by the Jones Act plaintiff's maritime employment, rather than by some absolute measure. 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.²²²

The cases construing the thirty percent rule have addressed injuries occurring from a relatively short time spent on the

²²⁰ *Id.* at 366 (quoting *Barrett*, 781 F.2d at 1075).

²²¹ *Id.* at 366–67 (quoting *Longmire*, 610 F.2d at 1347).

²²² *Id.* at 371 (emphasis supplied by the Court).

vessel²²³ to more substantial amounts.²²⁴ As the Court in *Chandris* noted, the figure of thirty percent is a guideline²²⁵ so that the courts can depart from it whether the amount is less

²²³ Compare *Voight v. R.L. Eldridge Constr. Inc.*, 422 F. Supp. 2d 742, 742 (E.D. Tex. 2006) (granting summary judgment to marine construction company on claim of crane rigger who performed no more than one percent of his work on the barge), and *Tu Le v. Tetra Techs., Inc.*, No. 06-1044, 2008 WL 1167328 (W.D. La. Apr. 9, 2008) (finding summary judgment on claim of welder on the D/B Arapaho who worked as much as eighty to ninety percent of the time on a platform), and *Jones v. Stayner*, 2006 WL 1831527, at *1 (W.D. La. June 28, 2006) (finding city inspector had inadequate connection to riverboat), and *Prestenbach v. Global Int'l Marine, Inc.*, No. 05-5454 Sec. "F," 2006 WL 2331159, at *1 (E.D. La. Aug. 9, 2006) (finding worker who was hired for a salvage job that was expected to take three days could not establish seaman status), with *Fouk v. Donjon Marine Co.*, 144 F.3d 252, 259 (3d Cir. 1998) (finding diver injured on the first day of a ten-day job presented fact question of seaman status: "We conclude that the durational element cannot be answered by an absolute measure. It is the temporal element and the nature of the activities performed that, taken together, determine seaman status"), and *Grothe v. Central Boat Rentals, Inc.*, No. G-08-0090, 2008 WL 2783457 (S.D. Tex. July 15, 2008) (finding deckhand who was hired on September 21, 2007, assigned to the M/V Mr. Sid, and broke his ankle the next day on the vessel presented a fact question of seaman status), and *Stewart v. J.E. Borries, Inc.*, No. 1:06-cv-187, 2007 WL 2915033 (S.D. Miss. Oct. 4, 2007) (finding worker hired to assist in constructing a residential pier and boathouse in the Back Bay of Biloxi, who was injured on the first day of his assignment, presented a fact question of seaman status, but he was ultimately found not to be a seaman, 2008 U.S. DIST. LEXIS 30553 (Apr. 8, 2008), *aff'd*, 309 Fed. Appx. 887 (5th Cir. 2009)), and *Grab*, 506 Fed. Appx. 271 at 277 (finding worker injured on his first day of employment as an ironworker who performed part of his work in reconstructing a bridge from a derrick barge presented sufficient evidence for the Fifth Circuit to affirm the district court's finding of seaman status, with the court stating that "the appropriate scope of the duration inquiry is not limited to the day of his injury, but should instead consider the full breadth of the intended scope and duties of his employment"), and *Holt v. F/V Sir Martin E., Inc.*, No. 5:13-cv-100-RS-CJK, 2014 WL 4825223 (N.D. Fla. Sept. 26, 2014) (finding worker who began new trade as a commercial fisherman and had worked on two fishing trips of 7 and 2 or 3 days in approximately three months presented sufficient evidence that he spent more than 30% of his time in service of a vessel).

²²⁴ See, e.g., *Mudrick v. Cross Equip. Ltd.*, 250 Fed. Appx. 54, 54 (5th Cir. 2007) (considering the time the worker spent on the vessel as an oil spill technician—thirty-two percent of his work—together with his duties and the skills he was expected to perform, the worker was held to be a seaman as a matter of law).

²²⁵ See *Baldwin v. Cleanblast, LLC*, No. 14-1026, 2015 WL 445912, at *7-9 (La. App. 3 Cir. Feb. 4, 2015) (holding that a sandblaster/painter who performed his sandblasting/painting functions on the platform but slept, ate, attended meetings, took breaks, tended to equipment, and performed housekeeping functions on a vessel alongside the platform was held to present a fact question of seaman status even though he spent less than 30% of his time in the service of the vessel, as the temporal connection to the vessel was not "clearly inadequate").

than²²⁶ or greater than thirty percent.²²⁷ Thus, there are circumstances where a worker may spend all of his time on a vessel but cannot attain seaman status.²²⁸ Even though the amount of work on a vessel may increase in the period prior to the accident, absent a change of assignment, the Jones Act does not cover “probable or expectant seamen²²⁹ but seamen in being.”²³⁰

²²⁶ See, e.g., *LaCount v. Southport Enters.*, No. 05-5761 (JBS), 2007 WL 1892097, at *1 (D. N.J. June 29, 2007) (finding plaintiff spent less than 30% of his time on the barge in his three days of employment before he quit, but the court would not rule as a matter of law that the plaintiff was not a seaman).

²²⁷ Even though a worker spends more than 30% of his time on a vessel, the work may not be substantial in nature. E.g., *O'Hara*, 294 F.3d at 64.

²²⁸ For example, in *Bourque v. D. Huston Charter Servs., Inc.*, 525 F. Supp. 2d 843, 843 (S.D. Tex. 2007), *Bourque*, who was retired, had been a land-based worker before his acquaintance, Donald Wilson, who was captain on a towboat, asked *Bourque* to fill in for the deckhand of the vessel for a fuel delivery. Wilson assigned *Bourque* to lookout duties on the two-and-a-half hour voyage. *Bourque* was injured when the towboat allided with a jetty during the voyage. Despite the fact that *Bourque* spent 100% of his work for his employer in furtherance of the mission of the towboat, his work on the vessel was not performed “with at least some degree of regularity and continuity” as required in *Chandris*. *Id.* at 847 (quoting *Chandris*, 515 U.S. at 368–69) (emphasis supplied by the district court). The court concluded: “This single trip, to take place over the course of a few hours, is not one that exposed him to the perils of the sea with any degree of regularity and continuity.” *Bourque*, 525 F. Supp. 2d at 847.

²²⁹ The decisions in *Campbell v. Royal Caribbean Cruises Ltd.*, 349 Fed. Appx. 872, 872 (5th Cir. 2009) and *Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 835 (9th Cir. 2012), produced different results for the expectant-seaman analysis depending on when the seaman’s connection to the vessel attached. *Campbell* was a ballet dancer who was hired to work on Royal Caribbean’s cruise ship, *Radiance of the Seas*. He was injured during the on-shore rehearsals, before beginning the voyage. The Fifth Circuit held: “Until *Campbell* actually embarked on the cruise to perform his ballet, he was a land-based worker.” *Campbell*, 349 Fed. Appx. at 873. *Tracy*’s injury was from cumulative trauma throughout his employment, including his assignment as barge foreman on the *Iroquois*, a pipe-laying derrick barge. During the first three weeks of his assignment to the *Iroquois*, *Tracy* performed repairs, maintenance, and modifications on the vessel in a Louisiana shipyard to prepare the vessel for its mission. He also performed work while the vessel was in port thereafter, helping with the checking and loading of equipment, repairs, and maintenance. The Ninth Circuit did not consider *Tracy* to have been an “expectant seaman” during the period prior to commencement of the voyage, stating, “*Tracy* was an experienced seaman whose connection to the *Iroquois* as barge foreman was established from the beginning of his employment.” *Tracy*, 696 F.3d at 842, 843.

²³⁰ *Jarrett v. Dir., OWCP*, 234 Fed. Appx. 714, 715 (9th Cir. 2007) (quoting *Heise v. Fishing Co. of Alaska, Inc.*, 79 F.3d 903, 907 (9th Cir. 1996) (quoting *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 191 (1952))).

Employees of catering companies who work on vessels present particular connection issues. In *Brown v. Trinity Catering, Inc.*, No. 06-5756, 2007 WL 4365384, at *1 (E.D. La. Dec. 11, 2007), *Brown* was employed as a cook by *Trinity* and assigned to work on the *M/V Wotan*, owned and operated by *Manson Construction Co.* During his second hitch he was injured when he slipped while descending the short ladder to his upper bunk bed. Although *Brown* spent one hundred percent of his time while employed by *Trinity* on

the M/V Wotan, Trinity argued that Brown should not be a seaman because Trinity supplied its personnel to a large variety of customers on various installations and facilities. “It asserts that had he remained in Trinity’s employ, Brown would not have worked a substantial period of his employment on the M/V WOTAN or any specific vessel or identifiable fleet of vessels.” *Id.* at *3. According to Trinity, “Brown would have been assigned to work on various vessels and platforms as demonstrated by the work histories of other Trinity employees who had been assigned to work on the M/V WOTAN.” *Id.* Brown countered that these employment histories did “not mean that he automatically would have forfeited his seaman status had he worked for Trinity for a longer time period.” *Id.* The court concluded:

In order to adhere to the *Chandris* Court’s admonition that the employment on a vessel must also be substantial [in] duration, the court must look beyond Brown’s brief actual employment history at Trinity to Trinity’s established employment patterns and practices. Trinity has demonstrated that, given its documented practice of randomly assigning its employees to hundreds of vessels owned by more [than] two hundred different owners, it is highly unlikely that Brown would have spent 30 percent of his time on a vessel or group of vessels owned by Manson. Given his brief and limited employment tenure by Trinity and aboard the M/V WOTAN, the Court finds that Brown has not shown the necessary connection of substantial duration to a vessel or an identifiable fleet of vessels sufficient to establish Jones Act seaman status, as it is defined by the Supreme Court and applied in the Fifth Circuit, to present a disputed issue to a jury.

Id. at *6.

The Court in *Drake v. Danos & Curole Marine Contractors, L.L.C.* reached a result similar to *Brown*. Nos. 04-3522, 05-6657, 2007 WL 781972 (E.D. La. March 13, 2007). Drake was employed by Trinity Catering as the night cook on the M/V Dixie Patriot, owned by Power Marine Investments and operated by Danos and Curole Marine Contractors, when it allided with a fixed platform. Trinity presented evidence that it provided galleyhands “for typically short-term jobs on land, fixed platforms, and vessels,” that “the duration of each job is determined by the client’s needs,” and that “it is rare for a Trinity employee to be permanently assigned to work on a particular vessel for a particular company.” *Id.* at *5. Instead, “job orders are assigned to available employees based on how long it has been since an employee’s last assignment and his travel to the job.” *Id.* In opposition, plaintiff stated that the day cook was leaving the M/V Dixie Patriot and that it was Drake’s “understanding that [he] was going to be permanently assigned to the M/V DIXIE PATRIOT as the day cook.” *Id.* Finding plaintiff’s opposition to be insufficient to establish a fact question regarding plaintiff’s substantial connection to a vessel or identifiable fleet, the court denied seaman status to Drake. *Id.* at *6; *see also* Fontenette v. Blue Marlin Servs. LLC, No. 11-0584, 2012 WL 1957555, at *1 (W.D. La. May 30, 2012) (denying seaman status to galleyhand who “was randomly assigned to various locations and companies based on the needs of Blue Marlin’s customers,” working for five customers on five assignments); *George v. Cal-Dive Int’l, Inc.*, No. 09-5472, 2010 WL 2696876, at *1 (E.D. La. July 1, 2010) (denying seaman status to galleyhand whose assignments to land-

When the Fifth Circuit reconstructed seaman status in *Barrett*, so that a worker's "status as a crew member is determined 'in the context of his entire employment' with his current employer,"²³¹ the court recognized that an exception could be made for a change in the worker's assignment if "the change involves a regular and continuous, rather than intermittent, commitment of the worker's labor to the 'function of the vessel, its mission, its operation, or its welfare.'"²³² The court stated: "If the plaintiff receives a new work assignment before his accident in which either his essential duties or his work location is permanently changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new job."²³³ The Supreme Court in *Chandris* agreed that "[w]hen a maritime worker's basic assignment changes, his seaman status may change as well," stating:

For example, we can imagine situations in which someone who had worked for years in an employer's shoreside headquarters is then reassigned to a ship in a classic seaman's job that involves a regular and continuous, rather than intermittent, commitment of the worker's labor to the function of a vessel. Such a person should not be denied seaman status if injured shortly after the reassignment, just as someone actually transferred to a desk job in the company's office and injured in the hallway should not be entitled to claim seaman status on the basis of prior service at sea. If a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the

based and offshore facilities, including jack-up rigs, were "temporary and were determined based on the needs of Defendant's clients").

When employees of catering companies have a more substantial connection over a longer period of time to a smaller number of vessels, some courts have found that the worker may present a claim of seaman status. *E.g.*, *Parker v. Jackup Boat Service, LLC*, 542 F. Supp. 2d 481, 481 (E.D. La. 2008); *Joseph v. Marine Mgmt. Contractors, Inc.*, No. 06-0405, 2007 WL 1964527 (S.D. Tex. July 3, 2007).

²³¹ *Barrett*, 781 F.2d at 1075 (quoting *Longmire*, 610 F.2d at 1347).

²³² *Id.* at 1075 (quoting *Longmire*, 610 F.2d at 1347 (quoting *Beard v. Shell Oil Co.*, 606 F.2d 515, 517 (5th Cir. 1979))).

²³³ *Id.* at 1075-76.

basis of his activities in his new position.²³⁴

The Fifth Circuit explained the reassignment exception²³⁵ in *Becker v. Tidewater, Inc.*²³⁶ After finishing the fourth year of a five-year program where he studied mechanical and petroleum engineering at Montana State University, Seth Becker accepted an internship position for the summer with Baker Hughes, Inc. His assignment began with land-based work to gain knowledge in a variety of areas, but “a superior at Baker expressed hopefully that Baker would ‘try to get [Becker] out on a boat’ at some point

²³⁴ *Chandris*, 515 U.S. at 372.

²³⁵ Workers who are loaned to an employer present reassignment arguments with conflicting results. In *Wilcox v. Wild Well Control, Inc.*, 794 F.3d 531, 531 (5th Cir. 2015), Wilcox worked as a welder for Max Welders and spent less than thirty percent of his time on any vessel or fleet. Max Welders was hired by Wild Well Control to supply welders to assist in decommissioning a well in the Gulf of Mexico. Wilcox was sent to work on the project, expected to last for approximately two months, where he was injured in a gas explosion. Wilcox and Wild Well agreed that Wilcox was a borrowed servant of Wild Well on this job, and Wilcox conceded that his work on the decommissioning job for Wild Well did not constitute a reassignment pursuant to the reassignment exception from *Chandris* and *Barrett* as there was no fundamental change in his duties as a welder. *Id.* at 537. However, Wilcox argued that, as he was making his claim against Wild Well Control, his duties should be considered at the time he began work as an employee of Wild Well Control. *Id.* at 537-38. However, the Fifth Circuit found “good reason to distinguish Wilcox from Wild Well’s permanent employees” and, evaluating his work in the context of his 191 jobs for Max Welders, held that Wilcox was not a seaman as a matter of law. *Id.* at 538-39. In contrast, in *Bell v. Dunn*, 924 So.2d 224, 224 (La. App. 4 Cir. 2005), Bell was employed by Tradesman International, a supplier of temporary construction workers to contractors. Tradesman assigned Bell to work for Dunn on a project to construct a railroad bridge. Most of the work performed by Bell for Dunn was from a spud barge; however, Bell was a land-based worker before the assignment for Dunn, and it was Tradesman’s intent to return him to land-based work after Bell completed the assignment for Dunn. Only two of the seventeen days Bell worked for Dunn were land-based. Equating the situation in *Dunn* to the case in which a worker who has been land-based for many years is “reassigned to a ship in a classic seaman’s job that involves a regular and continuous, rather than intermittent, commitment of the worker’s labor to the function of a vessel,” the court ruled:

Thus, the Jones Act issue in the instant case boils down to this: Is there enough of an issue to warrant letting the jury decide whether an employee meets the duration test when his employment is of short duration, but he spends substantially all of that time in the furtherance of the function of the vessel and the accomplishment of its mission, as the plaintiff is conceded to have done in the instant case? We find that the plaintiff is entitled to have a jury view his activities in the context of his work with his current employer which, in the instant case, was Dunn.

Id. at 231.

²³⁶ 335 F.3d 376, 376 (5th Cir. 2003).

during the summer.”²³⁷ After observing a gravel-packing operation on an offshore platform, Baker “determined that its technology vessel, the M/V REPUBLIC TIDE . . . needed two workers to replace two members of the requisite six-person crew who had served at sea for an extended period of time and were in need of time off.”²³⁸ Although Baker assigned Becker to the vessel, “instructing him to ‘learn as much as you can,’” Becker actually “filled one of the required six positions on the REPUBLIC TIDE, engaged in real work while onboard, and was treated no differently than the other workers on the vessel.”²³⁹

On the first day of the mission, during a gravel-pack operation, Becker was pinned by a hose and suffered catastrophic injuries to his legs. After the jury found that Becker was a seaman, the Fifth Circuit was presented with the question whether Becker’s connection to the vessel was substantial. The court began by reviewing the reasoning of the Supreme Court in *Chandris* and *Papai* that “it is not the employee’s particular job that is determinative [of seaman status], but the employee’s connection to a vessel,”²⁴⁰ and that the coverage of the Jones Act “is confined to ‘those workers who face *regular* exposure to the perils of the sea.’”²⁴¹ Thus, the Supreme Court invoked a “status-based standard” and rejected a “‘voyage test’ in which ‘anyone working on board a vessel for the duration of a ‘voyage’ in furtherance of the vessel’s mission has the necessary employment-related connection to qualify as a seaman.’”²⁴² As Becker’s employment-related connection did not satisfy the thirty percent rule of thumb, he sought to qualify for the reassignment exception, “claiming that his assignment to the REPUBLIC TIDE constituted the requisite fundamental change in his status.”²⁴³

The Fifth Circuit noted that the Supreme Court had preemptively answered arguments that employees who work intermittently on vessels have a reassignment each time they have a sea-based assignment “by specifically rejecting a ‘voyage

²³⁷ *Id.* at 382.

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Becker*, 335 F.3d at 388 (quoting *Chandris*, 515 U.S. at 364).

²⁴¹ *Id.* (quoting *Papai*, 520 U.S. at 560) (emphasis supplied by the Fifth Circuit).

²⁴² *Id.* (quoting *Chandris*, 515 U.S. at 358).

²⁴³ *Id.* at 389.

test' of seaman status under which a worker could 'walk into and out of coverage in the course of his regular duties.'"²⁴⁴ The court stated that "for plaintiff to qualify for the Jones Act's protections, he must have undergone a substantial change in status, not simply serve on a boat sporadically."²⁴⁵ Therefore, "[t]o give teeth to the *Chandris* opinion's rejection of a voyage test," the Fifth Circuit reasoned that "it must be held that merely serving an assignment on a vessel in navigation does not alter a worker's status."²⁴⁶ In order to support a reassignment exception, Becker would have to establish:

When plaintiff was assigned to the REPUBLIC TIDE, he was removed from his former position of land-based intern and assigned to a new, sea-based position, (ii) this reassignment permanently changed his status, and (iii) by serving in this new position, plaintiff would spend at least 30% of his time aboard a vessel.²⁴⁷

Becker was unable to carry his burden of proof. The assignment on the vessel "was not a fundamental change in status,²⁴⁸ but rather an opportunity presented to him in the course of his internship."²⁴⁹ In essence, "plaintiff's placement onboard the REPUBLIC TIDE was one of many activities to take place during the course of the summer."²⁵⁰ Facts such as the training in offshore work and safety and Becker's performance of work that "was as much a part of the crew as any other person" were not relevant to the connection test, as these facts apply equally to temporary workers.²⁵¹ Consequently, as a land-based worker who had merely been assigned to a mission on a vessel at sea, Becker was not a seaman as a matter of law.²⁵²

²⁴⁴ *Id.* (quoting *Chandris*, 515 U.S. at 363 (citing *Barrett*, 781 F.2d at 1075)).

²⁴⁵ *Id.*

²⁴⁶ *Becker*, 335 F.3d at 389–90.

²⁴⁷ *Id.* at 390.

²⁴⁸ *See James v. Wards Cove Packing Co.*, 209 Fed. Appx. 648, 650 (9th Cir. 2006) (finding the workers duties, and not changes in job title and pay rate, are determinative).

²⁴⁹ *Becker*, 335 F.3d at 390.

²⁵⁰ *See id.* (noting that Becker did not establish that "he was reassigned from his job as a summer engineering intern to a regular and continuous sea-based employment position aboard the REPUBLIC TIDE").

²⁵¹ *Id.* at 391.

²⁵² *Id.* at 393.

Many workers harbor the hope of vessel work and seek to translate that hope into status as a seaman. Thus, an engineer who claimed to have been a seaman and was then assigned to a mobile offshore drilling unit during its construction but was injured before it became a vessel, was not a seaman while the structure was under construction.²⁵³ Similarly claims of other workers who are relegated to land-based work have been denied seaman status: “[T]he fact that the plaintiff may have been a seaman in the past and might have the prospect of becoming one again in the future does not mean that his assignment to Platform Rig-3 was temporary instead of permanent as those terms are understood in the jurisprudence.”²⁵⁴ Just because a worker begins performing more work on vessels does not constitute a change in assignment so that his connection is no longer determined from his employment as a whole.²⁵⁵ While the location of a worker’s duties may change to a maritime setting, without a change in his essential duties, there is not a reassignment that would cause the connection to be evaluated outside of his entire employment:

Plaintiff’s argument shows a basic misunderstanding of the reassignment exception. Plaintiff acknowledges that at all times during his employment with defendant, he was a member of a pile driving crew. What he argues is that, beginning in 2001, Plaintiff began spending significantly more time on the water than in previous years. However the record established that at all times during his employment with Defendant, Plaintiff’s essential duties never changed. His co-worker Timothy Hall stated that he and Plaintiff were always “considered pile drivers.” Plaintiff was considered a pile driver when he worked

²⁵³ *Hyman v. Transocean Offshore U.S.A., Inc.*, 207 Fed. Appx. 485, 485 (5th Cir. 2006).

²⁵⁴ *McInnis v. Parker Drilling Co.*, 905 So.2d 1153, 1158 (La. App. 4 Cir. 2005), *writ denied*, 920 So.2d 241 (La. 2006) (adding that “the fact that he was once a seaman and that either he or his employer intend some day for him again to become one does not suffice to tint with blue water status all the events that happen in between, however remote in time and place from a vessel past or a vessel future”).

²⁵⁵ *See Reeves*, 967 So.2d at 1184.

at the job site at the Port of Lake Charles where he was injured.²⁵⁶

When the Supreme Court in *Chandris* agreed with the Fifth Circuit that there should be an exception for workers who have a change in “essential duties,”²⁵⁷ the Court stated that “we see no reason to limit the seaman status inquiry, as petitioners contend, exclusively to an examination of the overall course of a worker’s service with a particular employer.”²⁵⁸ That statement was taken out of context by the Ninth Circuit in *Papai*,²⁵⁹ to suggest that a worker’s duties with other employers might be considered, causing the Supreme Court to correct the misinterpretation by stating that the exception was limited to the situation where “the employee was injured on a new assignment with the same employer, an assignment with different ‘essential duties’ from the previous ones.”²⁶⁰ The Court in *Papai* reiterated that “the Fifth Circuit consistently has analyzed the problem [of determining seaman status] in terms of the percentage of work performed on vessels for the employer in question.”²⁶¹

Despite the Supreme Court’s attempt to clarify the misinterpretation of the requirement that a worker’s duties must be evaluated for the duration test in the context of his entire

²⁵⁶ *Id.* at 1184–85; see also *Little v. Amoco Prod. Co.*, 734 So.2d 933, 940 (La. App. 1 Cir.), writ denied, 748 So.2d 446 (La. 1999), in which the court stated:

Appellant argues that either his second crew assignment or his work with the tongs aboard the Suard 50 constitute new assignments and, consequently, he holds seaman status regardless of his time spent aboard the Suard 50. However, appellant’s essential duties did not change in either instance. Both crews to which appellant was assigned performed casing work. While appellant’s particular duties may have varied with each assignment, they were still within the normal duties performed by a member of the casing crew

For examples of cases in which a reassignment was found, see *Chambers v. Wilco Indus. Servs., LLC*, No. 09-7061, 2010 WL 3070392 (E.D. La. Aug. 3, 2010) (denying seaman status to a worker who was permanently reassigned to a job involving a vessel on a unnavigable bayou); *Encarnacion*, 2013 WL 968138 (denying seaman status to worker who was permanently reassigned to land-based work).

²⁵⁷ *Chandris*, 515 U.S. at 372.

²⁵⁸ *Id.* at 371–72.

²⁵⁹ *Papai*, 67 F.3d at 206.

²⁶⁰ *Papai*, 520 U.S. at 556 (quoting *Chandris*, 515 U.S. at 372).

²⁶¹ *Id.* at 557 (quoting *Chandris*, 515 U.S. at 367).

employment with his employer unless there has been a permanent change in his essential duties, the court of appeal in *Guidry v. ABC Insurance Co.* also misinterpreted the Supreme Court's language in *Chandris*.²⁶² However, the court of appeal did more than take the language out of context. The court also reasoned that it was not bound to apply the requirement that the worker's duties must be considered in the context of his entire employment:

Defendant argues in brief that this court should consider Plaintiff's entire span of employment including the two and a half years prior to Plaintiff's injury. Under *Chandris*, this argument was specifically addressed when the court stated, "[W]e see no reason to limit the seaman status inquiry . . . exclusively to an examination of the overall course of a worker's service with a particular employer.[?]"²⁶³

Having misunderstood *Chandris*, the court of appeal in *Guidry* made no attempt to apply the rule that the worker's duties must be evaluated in the content of his entire employment or the exception when there has been a permanent change in the worker's essential duties, allowing *Guidry* to satisfy the thirty percent rule of thumb from his short period of work welding on the Grand Isle project after working for two years welding in his employer's shop in Eunice, Louisiana.²⁶⁴

By declining to apply the duration test as enunciated by the Supreme Court and uniformly interpreted by the Fifth Circuit in federal cases in Louisiana, the court of appeal allowed *Guidry*'s status to oscillate back and forth between assignments and converted a land-based welder into a seaman because he worked on one job involving vessels.²⁶⁵ Besides misinterpreting and misapplying the Supreme Court's test, the decision in *Guidry*

²⁶² *Guidry*, 206 So.3d at 383.

²⁶³ *Id.* at 384 (quoting *Chandris*, 515 U.S. at 371-72).

²⁶⁴ *See id.* at 383-84.

²⁶⁵ As in *Guidry*, the worker in *Wilcox*, was a welder whose work did not satisfy the duration test based on his entire employment. 794 F.3d at 531. *Wilcox* was assigned to a project in the Gulf of Mexico scheduled to last for two months, but he remained a welder on that project and had no fundamental change in status. Although the Louisiana courts held that *Guidry* was a seaman, the Fifth Circuit held that *Wilcox* had not "demonstrated a genuine issue of material fact from which a reasonable jury could conclude that he qualifies for seaman status under the Jones Act." *Id.* at 539.

adds to the lack of uniformity because if Guidry had brought his action in federal court, rather than state court, it would have resulted in precisely the opposite conclusion.

V. ESCAPE FROM THE LABYRINTH

The status of a worker under a federal statute, particularly in an admiralty case where application of uniform principles of law is required by the Constitution, should not depend on the state in which the suit was brought or whether the case was brought in state court or federal court. “Local interests must yield to the common welfare. The Constitution is supreme.”²⁶⁶

It is the primary duty of admiralty judges from Article III of the Constitution to declare and apply uniform principles of admiralty law.²⁶⁷ However, the lower courts have instead constructed a new labyrinth of conflicting principles for determining who is covered under the Jones Act. It is time for the admiralty judges of the Supreme Court to end the confusion and restore the Congressional sea-based/land-based distinction that was used by the Court as the basis for the test for seaman status in *Wilander*, *Chandris*, and *Papai*. As the Court held in *Papai*, sea-based duties²⁶⁸ do not include work on a docked vessel.²⁶⁹ Instead, sea-based duties require an allegiance to the vessel that is peripatetic and migratory, continuing with the vessel as it travels to complete its missions.²⁷⁰ And, absent proof of a permanent change in essential duties, the duration of that service to the vessel must be determined in the context of the worker’s entire employment for an employer in order to establish true sea-based allegiance. The Supreme Court should not wait 33 years to restore uniformity to the interpretation of the Jones Act and general maritime law.

²⁶⁶ *Washington*, 264 U.S. at 228.

²⁶⁷ *S. Pac. Co. v. Jensen*, 244 U.S. 205, 214–16 (1917).

²⁶⁸ *Papai*, 520 U.S. at 555 (stating “[T]he inquiry into the nature of the employee’s connection to the vessel must concentrate on whether the employee’s duties take him to sea”).

²⁶⁹ *Id.* at 559.

²⁷⁰ See *Buchanan Marine*, 874 F.3d at 367 (stating that “a traditional Jones Act seaman normally serves for voyages or tours of duty”).