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**Amphibious Maritime Workers-The Law of the Tide Pool**

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**I. INTRODUCTION**

An Able Seaman employed on a container ship operating between the U.S. and China will be viewed as “seaman” during the entire period of his employment. A longshoreman who works for various stevedore companies out of the union dispatch hall, loading and unloading container ships, is a longshore worker, irrespective of whether his/her injury occurs on ship or on shore. But for maritime workers whose job is not so clearly defined, or who spend part of their working time ashore and part aboard ship or off shore, the distinction is not so clear. With mutually exclusive remedies available under the Jones Act, the Longshore And Harbor Workers' Compensation Act (LHWCA) and state workers compensation programs, these amphibious maritime workers and their lawyers face the sometimes difficult, but always important task of sorting out what law applies to them in the tide pool.

**II. SOURCES OF SUBSTANTIVE/PROCEDURAL LAW**

A. Jones Act

While the Jones Act, 46 *U.S.C.* §30104 et. seq. is the common name of a federal statute authorizing negligence actions by seamen, the term “Jones Act” has become a shorthand reference for the triple threat<sup>1</sup> package of remedies available to injured crew members in personal injury claims against their employers and vessel owners under both the Jones Act and general maritime law.

B. Longshore & Harbor Workers' Compensation Act

The Longshore & Harbor Workers' Compensation Act (LHWCA), 33 *U.S.C.*, §901-950, contains the statutory framework for this federal workers compensation program. The Outer Continental Shelf Lands Act (OCSLA), 43 *U.S.C.*, § 1331-1356 extends LHWCA

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<sup>1</sup> The three causes of action typically available include negligence under the Jones Act, unseaworthiness and maintenance and cure under the general maritime law.

benefits to energy worker employed on the outer continental shelf<sup>2</sup>.

C. State Workers Compensation Acts

The workers compensation rights and remedies provided by the various states bordering navigable waters of the United States is beyond the scope of this paper.

**III. JURISDICTION/WHEN AND WHERE THEY APPLY**

A. Jones Act

The Jones Act and it's related general maritime law remedies apply to injury or illness befalling seamen on U.S. owned or operated vessels operating in "navigable waters"<sup>3</sup>.

B. Longshore & Harbor Workers' Compensation Act

The LHWCA coverage applies only if the disability or death results from an injury occurring upon the navigable waters of the United States including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel. 33 U.S.C. §903(a). Government officers and employees are excluded, as are persons employed at a facility engaged in building, repairing or dismantling exclusively "small vessels". 33 U.S.C. §920(b), (c), and (d). To be covered under the LHWCA an employee must meet both the situs and status requirements imposed by the Act. *Chesapeake & Ohio Ry. Company vs. Schwalb*, 493 U.S. 40 (1989). The Supreme Court in *Director OWCP vs. Perini North River Associates (Churchill)*, 459 U.S. 297 (1983), held Congress did not intend to apply the status requirement to maritime workers injured on the actual navigable waters and that in such circumstances a worker satisfies status requirement and is covered under Act, providing that he is an employee of statutory "employer". Thus, *Miller vs. Goldenstar Maritime Inc.*, 1997 AMC 1836 (E.D. LA, 1997) found that a boarding agent employed by a ship's local husbanding agency who was injured while aboard a vessel was covered by the Act. *Randall vs. Chevron U.S.A.*, 13 F.3d 888 (5<sup>th</sup> Circuit, 1994) held that workers injured while transiently or fortuitously on navigable waters are covered employees irrespective of their duties at the time of the injury. *Schwabenland vs. Sanger Boats Inc.*, 683 F.2d 309 (9<sup>th</sup> Circuit, 1982) held that the LHWCA applies where a sales manager for a boat manufacturer was injured while testing new vessels. Even aircraft pilots employed as fish spotters in fishing operations have been found to be covered under the LHWCA for death occurring during the course of their work. *Zapata-Haynie Corp. vs. Barnard*, 933 F.2d 256 (4<sup>th</sup>

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<sup>2</sup> Beyond the territorial waters of each state, generally 3 miles from shore, 43 U.S.C. 1331(a).

<sup>3</sup> Any body of water used, or capable of being used, for interstate or international commerce. *Three Bouys Houseboat Vacations, USA Ltd. V. Morts* 878 F2d 1096 (8<sup>th</sup> Cir. 1989).

Circuit, 1991).

1. Amphibious employees.

Persons who spend only part of their time working in actual loading or unloading of ships or other maritime employments covered under the Act are normally considered to be covered for all of their employment. *PC Pfeiffer Company vs. Ford*, 444 U.S. 69 (1979). However, involvement with covered employment on only an “episodic basis” incident to non-maritime activities, such as truck driving does not confer covered status to the entire employment. *Doris vs. Director, OWCP*, 808 F.2d 1362 (9<sup>th</sup> Circuit, 1987). Maritime employment status may be found either where the employee was engaged in maritime activity at the time of the injury, or where he was engaged in maritime employment as a whole, though his activity at the time of the injury was not maritime. *Universal Fabricators Inc. vs. Smith*, 878 F.2d 843 (5<sup>th</sup> Circuit, 1989).

2. Outer Continental Shelf Amphibians

Three circuit courts have considered whether a worker injured on land is eligible for compensation under the Act. Each circuit has adopted a different test for resolving that question. The Third Circuit has adopted a "status" test: a worker is eligible for benefits no matter where he is injured, so long as he is involved in operations conducted on the outer continental shelf. See *Curtis v. Schlumberger Offshore Serv., Inc.*, 849 F.2d 805 (3d Cir. 1988) (applying the Act to a rig worker killed in a car accident on a New Jersey freeway while traveling to a helicopter that would have taken him to a rig on the shelf). The Fifth Circuit requires a worker to meet both a "status" test and a "situs" test: a worker is eligible for benefits only if his work is related to development on the outer continental shelf and the injury occurs while working on the shelf. Thus, injuries on land are not compensable. See *Mills v. Director, Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 877 F.2d 356 (5th Cir. 1989) (refusing to apply the Act to a welder injured on land while constructing an offshore oil platform). The Ninth Circuit has adopted a separate and fact-specific test: a worker injured on land is eligible for benefits if there is "a substantial nexus between the injury and extractive operations on the shelf," meaning that "the work performed directly furthers outer continental shelf operations and is in the regular course of such operations." *Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3d 1126, 1139 (9th Cir. 2010). October 11<sup>th</sup> the U.S. Supreme Court will hear *Pacific Operators (sic) Offshore v. Valladolid* to resolve the conflict among the circuits.

C. State Workers Compensation Acts

The 1972 amendment to the LHWCA extended coverage landward “including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area....” In *Sun Ship, Inc. vs. Commonwealth of Pennsylvania*, 447 U.S. 715 (1980), the United States Supreme Court held that the various states shared jurisdiction with the federal government in the area landward of the oceans edge. Many states have gone much further, applying their

state acts to workers on vessels in territorial waters.

#### IV. THE TIDE POOL

Only seamen are entitled to Jones Act remedies. Because of the nature of the remedy and the elements of damages recoverable, much may turn on whether an injured party qualifies as a seaman. As a result, the issue is frequently litigated.

##### A. The Seaman Status Test

The modern “test” for seaman status was formulated by the Supreme Court in *Chandris, Inc. v. Latsis* 515 U.S. 347 (1995):

We think that the essential requirements for seaman status are twofold. First, as we emphasized in *Wilander* (infra) “**an employee’s duties must ‘contribute to the function of the vessel or the accomplishment of its mission’**”. The Jones Act’s protections, like other admiralty protections for seamen, only extend to those maritime employees who do the ships work. But this threshold requirement is very broad: “all who work at sea in the service of a ship are *eligible* for seaman status.

Second,...**a seaman must have a connection to a vessel in navigation (or an identifiable group of such vessels) that is substantial in terms of both it’s duration and nature.** The fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefor whose employment does not regularly expose them to them to the perils of the sea.

##### 1. The seaman’s employment must contribute to the work of the vessel.

Modern cases have applied a broad definition to the term “work of the vessel” to include all those whose employment contributed to the function of the vessel. In *McDermott Intern., Inc. v Wilander* 498 U.S. 397 (1991) the court had before it the question of whether an employee whose work aboard the vessel did not contribute to the navigation function of the vessel could be a Jones Act seaman. In holding that such a worker could, the court jettisoned the “aid to navigation” terminology used by some courts and instead focused the inquiry on whether the employee’s work contributed to the mission of the vessel. Under this broad definition most workers on a ship will be eligible for seaman status. Persons who have been found to contribute to the function of the vessel include fishermen, *Domandich vs. Doratich*, 165 Wash. 315 (1951); hairdressers on passenger ships, *Mahramas vs. American Export Lines*, 475 F.2d 165 (2<sup>nd</sup> Circuit, 1973); bartenders on passenger ships, *The JS WARDEN*, 175 Fed 314 (S.D.N.Y., 1910); roustabouts on floating oil rigs, *Offshore Company vs. Robinson*, 266 F.2d 769; and, crewmembers on ocean racing yachts, *Griffen vs. LeCompte*, 471 So. 2d 1382 (LA. 1985).

2. Vessel in navigation.

In general, to be a “vessel” the purpose and function of a floating structure must be an instrument of commerce or it must be used to transport passengers, cargo or equipment from place to place on navigable waters. *Griffith vs. Wheeling Pittsburg Steel Corp.*, 521 F.2d 31 (3<sup>rd</sup> Circuit, 1975). The Supreme Court has recently defined a “vessel” as any watercraft practically capable of maritime transportation regardless of its primary purpose or state of transit at a particular moment. As the court explained ... “the court has sometimes spoken of the requirement that a vessel be ‘in navigation,’ but never to indicate that a structure’s locomotion at any given moment mattered. Rather, the point was that structures may lose their character as vessels if they have been withdrawn from the water for extended periods of time.” *Stewart v. Dutra*, 543 U.S. 481(2005)<sup>4</sup>. The following is a list of structures that have been found to be “vessels”is offered by way of example, not limitation:

- Schooner tied to wharf and used as a restaurant and dancing, but equipped for sailing and capable of being towed.
- Dredging barge without motive power but capable of being towed.
- Sunken and refloated barge.
- Pile driving barge.
- Racing yacht.
- Small aluminum dinghy.
- Houseboat without motive power.

3. Identifiable Group of vessels

The “fleet doctrine” allows seamen working on a group of vessels to claim seaman status. The key elements to establish the fleet doctrine are common ownership or control. There are substantial differences among and within the circuits as to how these elements are applied.

a. The 9<sup>th</sup> Circuit held in *Papai v. Harbor Tug* 67 F3d 203 (9<sup>th</sup> Cir. 1995) that workers hired out of a union hiring hall but working for several different companies qualified for seaman status by viewing a “group of employers who join together to obtain a common labor pool ...as a common employee for purposes of ... determining...seaman status.” The 9<sup>th</sup> Circuit decision was reversed by the Supreme Court<sup>5</sup> because on the day of his injury, Papai was hired for a one day job (see discussion in paragraph IV, A, 4, b below but the 9<sup>th</sup>

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<sup>4</sup> (A) vessel is in navigation...when it returns from a voyage and is taken to a drydock or shipyard to undergo repairs in preparation to making another trip, and likewise a vessel is in navigation, although moored to a dock, if it remains in readiness for another voyage. *Chandras Inc. v. Latsis* (supra)

<sup>5</sup> *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997)

Circuit's view of the fleet doctrine was not overruled.

b. The 5<sup>th</sup> Circuit rule appears to be that the "fleet doctrine" applies only to a fleet of vessels owned or operated by the same employer. *New Associated Painting Services, Inc.* 863 F2d 1205 (5<sup>th</sup> Cir. 1989); *Campo v. Electro-Coal Transfer Co.*, 970 F2d 51 (5<sup>th</sup> Cir. 1992).

c. The 3d Circuit requires continuous employment by same employer. In *Shade v. Great Lakes Dredge* 154 F3d 143 the Third Circuit reversed a trial court finding of seaman status based on plaintiffs employment history over a number of years that included periods of prior employment with Great Lakes. In doing so, the court explained "...after the termination of the employment relationship, the employee severs any duties that the employee had towards the employer...Upon being rehired, the employee does not recapture that prior relationship. Instead, the employee adopts a prospective set of duties and responsibilities...In effect, the employment in the new position could be considered to be for an entirely different employer, and as such, evidence of the prior employment would have no relevance...."

d. Transitory workers performing *only* vessel related work may be "seamen". In *Bertrand v. International Mooring & Marine*, 700 F.2d 240 (5<sup>th</sup> Circuit 1983) the 5<sup>th</sup> Circuit held that a member of an anchor handling crew assigned to various vessels was a seaman, despite the lack of common ownership or operation of the vessel. One hundred percent of Bertrand's full time work was on vessels and in furtherance of the mission. In *Brown v. Trinity Catering, Inc.*, 2007 U.S. Dist. Lexis 90868 (ED La. 2007) a post *Chandris* district court case did not follow *Bertrand* and denied seaman status to a catering company employee who performed all of his work for the company, serving one or two week hitches aboard various vessels not under common ownership or control.

4. Employment connection that is substantial in duration and nature.

As noted above, to qualify as a Jones Act seaman, the potential seaman must have an employment connection to a vessel that is substantial both in terms of duration and it's nature. In *Chandras, Inc. vs. Latsis*, 515 U.S. 347 (1995), the Supreme Court reviewed the policy reasons for extending seaman status and stated a two part test: "the essential requirements for seaman status are twofold. First .... an employee's duties must contribute to the function of the vessel or to the accomplishment of her mission . . . second . . . a seaman must have a connection to a vessel in navigation, or to an identifiable group of such vessels, that is substantial in both it's duration and it's nature."

a. Duration of employment

As to what constitutes a substantial duration, the court in *Chandris* stated: "generally, the Fifth Circuit seems to have identified an appropriate rule of thumb for the ordinary case: a worker who spends less than about 30% 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 no more than a guideline established by years of experience and departure from it will certainly be justified in appropriate cases. As we have said, "the inquiry into seaman status is of necessity

facts specific; it will depend on the nature of the vessel and the employee's precise relation to it." *Wilander*, 498 U.S. at 356. Nevertheless, we believe that courts, employers and maritime workers can all benefit from reference to those general principles."

i. Change of job classification.

In *Chandris* the court stated that "...(i)f a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of substantiality of his vessel related work made on the basis of" activities in his new position".

ii. New hires.

Like workers on a new assignment, new hires are entitled to have their seaman status based on their prospective job duties on the new job. *Foult v. Donjon Marine Co.*, 144 F.3d 252 (3d Cir. 1998).

iii. Short term/temporary employment

Even though the workers meets the seaman status in all other respects, where the employment was short term and temporary, seaman status can be denied (retired tug captain injured in the course of anticipated 2.5 hour job). *Borque v. D. Hutson Charter Services, Inc.*, 535 F.Supp.2d 843 (S.D. Tx 2007).

iv. Transitory workers employed by "contractors"

See discussion under paragraph IV, A, 3, d above.

While the cases have generally denied seaman status to such workers, that holding does not appear to be consistent with spirit of *Chandris* or any of the other modern Supreme Court decisions on seaman status.

b. Nature of employment.

Providing further definition in *Harbor Tug & Barge Company vs. Papai*, 520 U.S. 548 (1997), the court denied seaman status to a tug boat deckhand who was a casual employee, that is he was dispatched from his Union hall to various tug companies for day work. Though plaintiff estimated 70% of this employment was as a deckhand on tugs underway, he was injured on a day when he was hired to paint a tug, moored at the dock and his employment that day did not anticipate the tug would be underway. The court stated "for the substantial connection requirement to serve it's 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.

i. Going to Sea

The 9<sup>th</sup> and 5<sup>th</sup> Circuits have followed very different courses interpreting the going to sea language of the court in *Harbor Tug*. In *Cabral v. Healey Tibitts, Inc.* 118 F.3d 1363 (9<sup>th</sup> Cir. 1997) the 9<sup>th</sup> Circuit denied seaman status to a crane operator who spent 90% of his employment time on a crane barge. Noting that Cabral did not accompany the

barge when it was being moved the court said “Cabral was hired to work on Barge 538 as a crane operator and not as a crew member....All of the evidence points to one conclusion: that Cabral was a land-based crane operator who just happened to be assigned to a project which required him to work aboard Barge 538.” In *Endevour Marine, Inc. Limitation Process* 234 F.3d 287(5<sup>th</sup> Cir. 2001) the 5<sup>th</sup> Circuit held that a crane operator on a crane barge was a seaman even though he only accompanied the barge once when it changed location. In doing so the court held that the facts that he spent almost all of his employment time on the vessel and during his employment he was exposed to the perils of the sea led to the conclusion that he was a seaman. In *Carter v. Bisso Marine Co., Inc.* 238 F.Supp.2d 778 (E.D.La.,2002) the District Court held that maintenance work plaintiff performed on a trailerable vessel while it was on land may well be relevant to the issue of seaman status provided the vessel remained in navigation during those times, which is itself a factual determination (citing *Chandris*, 515 U.S. at 373-75).

ii. Shore based workers

Shore based maritime workers who’s work is in support of the mission of the vessel and who meet the “duration” requirement of *Chandris* must nonetheless demonstrate some exposure to the “perils of the sea” to establish seamen status. In *Saienniv. Capital Marine Supply, Inc.* 2005 U.S. Dist. Lexis 2005 6928 (E.D. La. 2005) the District court granted summary judgment denying seaman status to a shore side vessel mechanic noting the following:

Regardless of whether plaintiff may be able to prove that his temporal connection to the Ingram defendants' vessels passes the 30 percent threshold, the Court finds plaintiff has failed to come forward with any specific facts demonstrating that the nature of his work was anything other than land-based repair of the Ingram defendants' vessels. The undisputed facts in this case are (1) at the time of the alleged accidents, plaintiff was employed by the Ingram defendants as a shoreside mechanic operating out of a land-based fleeting facility and mechanic shop; (2) while performing his job duties, plaintiff's time was split between working at the fleeting facility in Reserve and traveling by car to service vessels at other locations; (3) of the 40 percent of plaintiff's total work time which was spent [\*36] at the fleeting facility, half of that time (20 percent overall) was spent in the mechanic's shop; (4) when plaintiff's work duties were performed aboard vessels, the vessels were generally moored at a dock, shipyard or other stationary location; (5) while performing his work at off-site locations, when an overnight stay was required, plaintiff would spend his nights at motels and plaintiff could only recall one occasion when he slept on one of the vessels; (6) while aboard the vessels, plaintiff did not serve as a deckhand, pilot or captain because the vessels had their own crews; (7) in plaintiff's capacity as a shoreside mechanic, plaintiff reported directly to a shore-based port engineer; and (8) plaintiff performed repairs aboard a vessel while it was underway only four times a year.

The Court finds that the totality of the circumstances would not permit a reasonable fact finder to conclude that plaintiff was a seaman. Although plaintiff may have performed work on the Ingram defendants' vessels, plaintiff's work was not of a seagoing nature. Plaintiff has submitted no evidence undercutting the Ingram defendants'

contention that plaintiff's infrequent repair episodes aboard vessels while they were underway was anything other than a transitory or sporadic exposure to the perils of the sea. Plaintiff did not regularly eat or sleep aboard defendants' vessels and plaintiff's duties, although including on-board repairs of vessels, included managing the coordination of repairs for a group of vessels. Although none of the foregoing facts taken alone would automatically preclude seaman status, the Court finds that the aggregation of the circumstances of plaintiff's employment supports only the conclusion that plaintiff was a land-based maintenance and repair coordinator and worker who happened to be on a vessel when he was allegedly injured.

iii. The question of what duties should be included is itself, a factual determination.

In *Am. Marine Corp. v. Dir.*, *OWCP*, 407 Fed.

Appx. 94, the 9<sup>th</sup> Circuit had before it the question of whether a diver met the 30 % threshold for seaman status. The court upheld the BRB's decision that he did not, and stated "...applying the *Chandris* test, the ALJ determined that Bowes spent less than 30 percent of his time in the service of a vessel (or an identifiable group of vessels) in navigation. "[I]f reasonable persons, applying the proper legal standard, could differ as to whether the employee was a "member of a crew," it is a question for the [finder of fact]." *Id.* at 369 (quoting *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 356, 111 S. Ct. 807, 112 L. Ed. 2d 866 (1991)). Consequently, the determination of what duties should be counted as "in the service of a vessel in navigation" for purposes of applying the 30 percent rule of thumb is a factual question for the ALJ. Here, the ALJ's findings are supported by substantial evidence."

C. Longshore Act as default if Seaman Status not established

A worker who lacks the requisite connection to a vessel in navigation to qualify for seaman status is limited to the remedies provided by the LHWCA. See *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 89, 112 S. Ct. 486, 492, 116 L. Ed.2d 405 (1991).

D. Election of Remedies issues in the "Tide Pool"

The fact that a claimant may have received benefits under a workers' compensation program, does not in itself preclude assertion of rights under the Jones Act. Likewise the prosecution of a Jones Act suit does not preclude the filing of a workers compensation claim. *Calbeck vs. Travelers Insurance Company*, (supra). The "claiming" of benefits by some affirmative act (such as filing suit under the Jones Act or a claim for compensation raises the possibility of a defense based on an Election of Remedies. A full discussion of this issue is beyond the scope of this paper. There is a good discussion in Larson's *Workers' Compensation Law*, Matthew Bender & Company, Inc. Part15, Chapter 146 Conflicts Involving Seamen's Remedies. Additionally, attached to this paper as Appendix 1 is an excerpt from the Brief For Respondent in Opposition To Petition For Certiorari in the matter of *Setton, Inc. v. Gross*, authored by Joshua T. Gillelan II, Esq. which discusses the issues in masterly detail.

It is important to note that there is, a split in the Circuits between on the effect of receiving and award of compensation under the LHWCA. The 5<sup>th</sup> Circuit in *Sharp v. Johnson Bros.*, 973 F.2d 423 (1992) held that receipt of a compensation award in an case where crew member status was not litigated bared subsequent prosecution of a Jones Act claim. The 9<sup>th</sup> Circuit has taken a different tack. In *Figueroa v. Campbell Industries*, 45 F.3d 311 (1995) the 9<sup>th</sup> Circuit held that if the jurisdictional issue was not contested, and no finding was made at the administrative level, a plaintiff is not estopped from bringing a Jones Act claim.

## **V. THE REMEDIES-OR WHY DO WE CARE WHAT LAW APPLIES?**

### **A. Seaman's Remedies-the triple threat**

The compensation due to seamen depends upon whether liability of the shipowner/employer can be predicated on a finding of negligence or unseaworthiness. If there is no such finding, the seaman is limited to compensation available under the no fault doctrine of maintenance and cure.

#### **1. Maintenance and Cure.**

Maintenance is a daily stipend intended to compensate the seaman for the value of quarters and meals furnished aboard the vessel. Cure is medical care. The duty to provide maintenance and cure to a seaman who becomes ill or injured while in the service of the vessel arises from the employment relationship and not from any negligence or fault on the part of the vessel. *Calmar SS Corp. vs. Taylor*, 303 U.S. 525 (1938). Digested annotations of cases construing the obligation to provide maintenance and cure are found at 46 *U.S.C.*, §11102. The seaman has the burden of proving that his disability occurred, was aggravated or became manifest while he was in the service of the vessel. *Miller vs. Lykes Bros.-Ripley SS Company*, 98 F.2d 185 (5<sup>th</sup> Circuit, 1938). The employer has an affirmative duty to promptly investigate a claim for maintenance and cure and, resolving doubts as to entitlement in favor of the seaman, promptly pay amounts due. *Vaughan vs. Atkinson*, 369 U.S. 527 (1962). A seaman is entitled to his actual reasonable expenses of room and board ashore, equivalent to the quality received aboard the vessel. *McWilliams vs. Texaco Inc.*, 781 F.2d 514 (5<sup>th</sup> Circuit, 1986). The amount of maintenance to be paid is a question of fact to be determined at trial, *United States vs. Robinson*, 170 F.2d 578 (5<sup>th</sup> Circuit, 1948), but is frequently established by collective bargaining agreements. Rates being paid to seaman in Southern California are typically in the range of \$16 to \$30 per day. In the 9<sup>th</sup> Circuit, the daily rate provided for in a collective bargaining agreement is binding on the trial court. *Berg vs. Fourth Shipmor Associates*, 82 F.3d 307 (9<sup>th</sup> Circuit, 1996). The daily rate negotiated by the various maritime unions fluctuates greatly, from as low as \$12 per day to as high as \$45 per day.

Cure is defined as the reasonable medical expenses for treatment of an injury or illness until the seaman is fit for duty, or until maximum cure is reached. A shipowner has no obligation to prepay for medical care. *Dominguez vs. Marine Transport Management Company*, 1992 AMC 2863 (E.D., La. 1992) The employer, however, does have a duty to guarantee payment for reasonable medical expenses. *Sullivan vs. Tropical Tuna Inc.*, 963 F.Supp 42 (1997). Where plaintiff has not reached maximum cure at the time of trial, the court has discretion to award “such amounts as may be needed in the immediate future for the maintenance and cure of a kind and for a period which can be definitely ascertained”. *Calmar SS Corp. vs. Taylor*, 305 U.S. 525 (1938).

An employer who fails to provide maintenance and cure does so at it’s peril. The failure to provide reasonably necessary medical care exposes the employer and vessel owner to liability under the general maritime law for full tort damages for any prolongation of the period of recovery and/or aggravation of the underlying injury. *Cortes v. Baltimore Insular Line, Inc.* 287 U.S. 367, 53 S. Ct. 173 (1932). If the failure to provide medical care was negligent, a cause of action lies under the Jones Act<sup>6</sup>. *Picou v. American Offshore Fleet*, 576 F. 2d 585 (5<sup>th</sup> Cir. 1978). Moreover, if the employer/ship owners failure to provide maintenance and/or cure is willful, the seaman is entitled to recover his attorneys fees, and to seek punitive and exemplary damages. *Atlantic Sounding Co., Inc. v. Townsend* , 557 U.S. \_\_\_,129 S.Ct. 2561(2009).

Thus, except in the unusual situation where the employer fails to provide maintenance and/or cure, the maintenance and cure remedy is very limited. It basically provides for a daily stipend while a seaman is non-fit for duty and medical care until the seaman is found fit or permanent not fit for duty. At that point the obligation ends and the seaman receives nothing further.

## 2. Remedies Based on Finding of Fault (Negligence or Unseaworthiness)

Maritime law follows shore side law generally so far as defining duty and negligent conduct is concerned. *Gavagon vs. United States*, 955 F.2d 1016 (5<sup>th</sup> Circuit, 1992). There is, however, a major difference in linking negligence and the injury. Under the Jones Act, negligence is a legal cause of an injury if it plays “any part, even the slightest in producing the

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<sup>6</sup> Although the same damages are recoverable under the general maritime law cause of action and the Jones Act cause of action, the Jones Act cause of action comes with a right to jury trial (46 U.S.C. §30104) and to select the forum in which the action is brought pursuant to the Savings to Suitors Clause (28 U.S. C.§1333).

injury or death for which damages are sought.”<sup>7</sup> *Rogers vs. Missouri Pacific RR Co.*, 352 U.S. 500 (1957). *Perkins vs. American Electric Power Fuel Supply, Inc.*, 246 F.3d 593 (6<sup>th</sup> Circuit, 2001). In addition to negligence, a shipowner can be found liable for unseaworthiness of its vessel. To be considered seaworthy, the vessel, its crew, appurtenances and operation must be reasonably fit for the vessel’s intended purpose. *Usner vs. Luckenbach Overseas Corp.*, 400 U.S. 494 (1971). The standard is not absolute perfection, but reasonable fitness for her intended service. *Mahnich vs. Southern SS Co.*, 321 U.S. 96 (1944). Foreseeability and notice are not factors in determining reasonable fitness. *Rackenberg vs. Canal Barge Company*, 571 F.2d 912 (5<sup>th</sup> Circuit, 1978). While it is sometimes easier to establish an unseaworthy claim, then a negligence claim, the standard of causation in unseaworthy cases is higher than in Jones Act cases. For an unseaworthiness claim, plaintiff must prove that the unseaworthy condition played a substantial part in bringing about or causing the injury (substantial factor test), *Johnson vs. Offshore Express, Inc.*, 845 F.2d 1347 (5<sup>th</sup> Circuit, 1988); *Joyce vs. Atlantic Richfield Company*, 651 F.2d 676 (10<sup>th</sup> Circuit, 1981).

Where there is negligence or unseaworthiness as the basis of liability for damages for personal injuries, the injured party is entitled to traditional tort damages including; compensation for loss of earnings; for any impairment of his earning capacity; for medical expenses incurred and to be incurred; and for any other economic loss he may have sustained, or is likely to sustain. He is also entitled to redress for his physical injury, including the effects thereof, such as pain, suffering, mental anguish, discomfort, and inconvenience. *Pfeiffer vs. Jones and Laughlin Steel Corp.*, 678 F.2d 453 (3<sup>rd</sup> Circuit, 1982).

a. Punitive Damages

Since the Supreme Court’s decision of *Atlantic Sounding Co., Inc. v. Townsend* (supra) in 2009, a number of courts have taken up the question of whether punitive damages are available under the general maritime law for unseaworthiness where the vessel owner was guilty of conduct which manifested reckless or callous disregard for the rights of others or gross negligence or actual malice criminal indifference. See for example *Wagner v. Kona Blue Water Farms* 2010 WL1837839 (D. Hawaii), 2010 A.M.C. 1217 denying defendants motion to dismiss cause of action for punitive damages on unseaworthiness claim.

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<sup>7</sup> The “relaxed” causation standard for negligence under FELA was recently upheld by the Supreme Court in *CSX Transportation, Inc. v. McBride*, \_\_U.S.\_\_, 131 S. Ct. 2630 (2011).

### 3. Wrongful Death

Death claims for seamen takes us into a complex maze of state law, general maritime law, the Jones Act (*supra*) and the Death On The High Seas Act (DOHSA) 46 *U.S.C.*, §761-768 that is beyond the scope of this paper.

#### B. Benefits/Compensation under the LHWCA

##### 1. Compensation Rate.

Compensation is payable for Temporary Disability and for Permanent Disability at a compensation rate equal to 2/3 of the workers pre-injury average weekly wage on the date of the injury, subject to maximum and minimum rates<sup>8</sup>. In the event of death, or permanent and total disability, the claimant is entitled to receive the annual increases in the compensation rate, 33 *U.S.C.* 910 (f).

##### 2. Permanent Partial Disability

###### a. Scheduled Disability

Permanent partial disability under the LHWCA is divided into two categories, scheduled and unscheduled. A table of scheduled disabilities is included in the LHWCA at 33 *U.S.C.*, §908(c)(1) - (20). The schedule provides a list of covered body parts and the number of weeks of disability payments for a 100% loss of use of the body part. For example, 100% loss of use of a lower extremity equates to 288 weeks of disability, paid at the compensation rate determined as described above. Percentages of disability are ordinarily determined under the Guides to the Evaluation of Permanent Impairment of the American Medical Association. Scheduled injuries under the Act include injuries to the arms, hands, fingers, legs, feet, toes, eyes and ears. Scheduled injuries are paid irrespective of actual loss of wages. Loss of wage earning capacity is conclusively presumed when the physical impairment establishing a scheduled disability is proved. *Travelers Insurance Company vs. Cardillo*, 225 F.2d 137 (2nd Circuit, 1955), cert. denied 350 U.S. 913 (1955).

There is no apportionment under the LHWCA. An injury may include aggravation or lighting up of a preexisting illness, injury or condition. *Oregon Ship vs. Johnson*, 908 F.2d 1434 (9th Circuit, 1990). Under the holding in *Oregon Ship* the aggravation rule applies to allow compensation for a workers' entire condition although the injuries were partially caused by preexisting conditions.

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<sup>8</sup> The rates are adjusted annually effective October 1<sup>st</sup>. The maximum and minimum rates effective through September 30, 2011 were \$1,256.84 and \$314.21 respectively.

b.       Unscheduled Disability

Injuries other than those enumerated in the schedule referred to above, are “non-scheduled”. Non-scheduled disability is an economic and not a physical concept. *American Mutual Insurance Company of Boston vs. Jones*, 426 F.2d 1263 (D.C. Circuit, 1970). Consideration must be given to claimant’s age, education, work history and the availability of employment within his work limitations. *McDuffie vs. Eller & Company*, 10 BRBS 685 (1979). A claimant with a minor injury might be found permanently totally disabled if it prevents him from performing the only type of work for which he is qualified. *American Mutual Insurance Company of Boston vs. Jones*, 426 F.2d 1263 (D.C. Circuit, 1970). In cases of non-scheduled permanent partial disability the compensation “shall be 66 2/3% of the difference between the average weekly wages of the employee and the employee’s wage earning capacity thereafter . . . payable during the continuance of such partial disability”. 33 U.S.C., Section 908 (c)(21). In plain language, compensation is two-thirds of the wage loss, paid on a weekly basis and limited to the maximum compensation rate on the date of the injury.

3.       Permanent and Total Disability

Once the claimant has shown that he can no longer perform the duties of his usual employment the burden shifts to the employer to show the availability of alternate employment. Failing that, claimant will be found permanently and totally disabled. *Pilkington vs. Sun Ship Building and Drydock Company*, 9 BRBS 473 (1978); *Sam vs. Loffland Brothers Company*, 19 BRBS 228 (1987). The compensation rate for permanent and total disability is two-thirds of the claimant’s pre-injury average weekly wage, limited to the maximum rate, but adjusted up each October 1<sup>st</sup> giving the claimant the annual increase to the maximum compensation rate. *Pucetti vs. Ceres Gulf*, 24 BRBS 25 (1990). Compensation is payable for the duration of the disability (i.e., for life, unless modified by subsequent order). 33 U.S.C. §908(a).

4.       Compensation for Death

The spouse and minor children<sup>9</sup> of an employee who dies as a result of injury or illness incurred in the course of his employment, or if there is no spouse or child, then siblings, if dependent, may receive compensation for the employee’s death. The LHWCA death benefits are a complicated scheme, but generally provide for the payment to the spouse of 50% of the average weekly wage so long as the spouse remains single, plus compensation for children of 16 2/3 % of the average weekly wage. Thus the maximum death benefit is 66 2/3% of the average weekly wage.

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<sup>9</sup> The definition of “child” in §902(14) is important in limiting compensation to children under age 18, or who are defined students or disabled dependents.

### C. State Benefits

A description of the compensation and death benefits provided by the various states bordering navigable waters of the United States is beyond the scope of this paper.

## VII. THE SILVER LINING

It is a common belief that when a claim could be viewed as either a Longshore Act claim or a Jones Act case, a Jones Act claim will be more valuable because of the availability of tort remedies, but that is not always so. The determination of seaman status is a fact intensive process. There is room for dispute in many cases. When there is, you need to consider which way it comes out best for you client. Sometimes the answer is surprising.

### A. When the comp claim value is high.

There are several factors that increase the value of an LHWCA compensation claim in relation to a potential Jones Act Claim. Such factors include:

1. **Non-scheduled injury resulting in substantial loss of earning capacity claim on older workers (i.e. with a short statistical work life expectancy).** For example, a 68 year old tankerman earning \$75K per year with combined knee, shoulder and back injuries that preclude him/her from returning to work. Viewed as an LHWCA claim, the permanent disability has a potential value of \$961 per week for life or a present value of between \$400,000.00 and \$750,000.00 depending on whether the disability is partial or total<sup>10</sup>. It would be unlikely that an award under the Jones Act for such disability would be that substantial because of the effect a short work life expectancy would have on the loss or earning capacity calculations. If there was also an apportionment to pre-existing disability the potential value of the Jones Act claim would be further diminished.

2. **A substantial scheduled disability caused by prior injuries or pre-existing conditions that was/were aggravated or accelerated by an injury at work.** Because there is no apportionment of disability under the LHWCA, such an injury is fully compensable under that Act, even though the contribution from the work related injury may have been small. Under the LHWCA, such a worker who required knee replacement surgery with a fair result may

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<sup>10</sup> A partial disability with a \$10 per hour residual earning capacity results in an annual wage loss of \$54,200.00 (75,000 - 20,800) and a PPD compensation rate of \$694 per week or \$36,088 per year and a present value of approximately \$401,284. A total disability results in compensation rate of \$961 per week ( $75,000 \div 52 = 1442.31 \times 2/3 = 961$ ) or \$49,972 per year ( $961 \times 52$ ).  $49,972 \times 15 \text{ years} = \$749,580$ . No present value reduction is required as the value of annual increases and the interest rates are approximately equal.

be entitled to a scheduled permanent partial disability award based on a 50% disability to the leg. For a worker earning \$1,500 per week such a disability would have a value of \$144,000.00. Under the Jones Act, the value of an award for future disability for such an injury would highly speculative, and in any event would be limited to that portion of the disability that was caused by the injury.

B. When liability is difficult and/or comparative negligence is high.

In amphibious worker cases, seaman status will often be in dispute. When liability is also difficult a double layer of uncertainty as to whether plaintiff will succeed at all is introduced. The case becomes more problematic when there is the potential for a finding of a significant percentage of comparative negligence on the plaintiff because comparative negligence reduces the verdict proportionately. When you add to the equation the typically higher attorney fees and costs, the value of a Jones Act case with liability problems can be severely reduced. Liability factors have no effect on the value of a LHWCA compensation claim and when successful the attorneys fees and cost are generally paid by the employer/carrier.

A careful early analysis of the liability factors and a comparison of potential value of the Jones Act vs. the LHWCA claim is well worthwhile in amphibious worker cases.

C. When seaman status is in dispute.

Almost nothing is more disappointing than a verdict upholding seaman status but finding no liability under the Jones Act or general maritime law (i.e. for unseaworthiness). As discussed in the section on Election of Remedies above, the finding of seaman status will likely preclude any later effort to prosecute a LHWCA claim, leaving the claimant with no recovery at all. The risk of this disaster scenario must be carefully weighed against the likelihood of success and potential value of a LHWCA claim.

D. Casual “seamen” and continuous trauma under the LHWCA

Wear and tear or continuous trauma injuries that arise from years of work in difficult circumstances are difficult to handle successfully under the Jones Act. Even when causation is clear, there are some awful statute of limitations decisions which will time bar many of these claims, and for those that are not time barred proving liability is no easy thing. As a result traditional seamen with degenerative and/or arthritic knees, shoulders, hips, backs and necks or with noise related hearing loss often simply work until their condition forces them into lower paying shore side work or early retirement and are never compensated for the disability.

Decisions on crew member status such as *Harbor Tug v. Papai (supra)* holding that casual seaman’s work does not qualify for crew member status create an opportunity for traditional seamen to seek compensation for these cumulative trauma injuries through a

compensation claim under the LHWCA. Many seamen's unions offer casual work<sup>11</sup> to their members when they are not at sea. It is the view of this author that in most circumstances, traditional seamen doing casual work will not qualify as seamen and are therefore entitled to compensation under the LHWCA. Given the very liberal standards for causation under the LHWCA, a relatively short period of casual work is likely to be viewed as having aggravated or accelerated the progression of a traditional seaman's longstanding continuous trauma injuries. Viewed in that light, the cumulative trauma injuries of traditional seamen that were so problematic under the Jones Act become valuable compensation claims under the LHWCA.

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<sup>11</sup> Often referred to as standby or shore gang work, these are typically one, two or three day jobs doing maintenance work while a vessel is in port.

**No. 03-1699**

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IN THE  
SUPREME COURT OF THE UNITED STATES

—  
FRED SETTOON, INC., ET AL.  
*Petitioners,*

v.

MICHAEL GROS,  
*Respondent.*

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**On Petition for Writ of Certiorari  
to the Louisiana Court of Appeal, Third Circuit**

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**BRIEF FOR RESPONDENT IN OPPOSITION  
TO PETITION FOR CERTIORARI**

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**COUNTER-STATEMENT OF QUESTIONS  
PRESENTED**

1. Whether a compensation order awarding benefits for a worker's injury under the Longshore and Harbor Workers' Compensation Act, without addressing whether the worker was a "member of the crew of [a] vessel" excluded from the Act's "coverage," forecloses the worker from asserting in a proceeding under the Jones Act and general maritime law that he *was* a "crew member."

2. Whether the ALJ who decided Gros's Longshore Act claim made a potentially preclusive finding that Gros's work aboard vessels during some relevant period amounted to no more than ten percent of his work time.

sent case went a step further, denying that the injured worker's employment was "maritime" at all, and paying workers'-compensation benefits only under state law. The end result was the same: an award under the Longshore Act, without the employer ever having asserted in the Longshore Act proceedings that the worker was excluded from the Act as a "crew member," or the worker ever having asserted that he was *not*, and without any tribunal having considered the question.

### B. The Conflict

Petitioners blatantly overstate their case in contending that the decision below conflicts with this court's decision in *Southwest Marine, Inc. v. Gizoni* (Pet. 4-8); but it is beyond cavil that there is a conflict in the lower courts on a question *Gizoni* left open: the effect of an injured worker's pursuit of, and acceptance of benefits under, an *award* in a Longshore Act "compensation order." The decision below extended that conflict from one between federal circuits (explicitly between the Fifth and Ninth Circuits) to one between a federal circuit and a state appellate court *within* that circuit.

In *Gizoni*, a ship-repair worker who spent much of his time, and was injured, aboard a barge used in his employer's shipyard operations "submitted a claim for, and received, medical and compensation benefits from [the employer] pur-

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Longshore Act, over the injured worker's objection that in view of the Fifth Circuit's rule that a Longshore Act award forecloses seamen's remedies (*Sharp, infra*) he wanted to preserve his crew-member contention for presentation to a jury in his Jones Act action. The ALJ granted the worker's motion to stay the hearing on his Longshore claim pending the outcome of the Jones Act suit; on the employer's appeal from the stay, the Board affirmed (while expressing its disagreement with *Sharp*). The court of appeals has not yet ruled on its jurisdiction to review the Board's decision, which is arguably not a "final order" subject to review, Longshore Act § 21(c), 33 U.S.C. 921(c).

suant to the Longshore Act,” without a compensation order ever having been entered, and thereafter brought an action under the Jones Act asserting that he was a member of the barge’s crew. 502 U.S. at 84. Although the Fifth Circuit had held that, as a matter of law, one working in an occupation enumerated as “maritime employment” in Longshore Act § 2(3) (such as Gizoni, a “ship repairman” within § 2(3) on any apparent reading) could not be a crew member, the Ninth Circuit disagreed, holding that such a worker is entitled to try to prove the requisite connection to a vessel (or fleet) for crew-membership status. *See id.* at 85 n.1. Besides agreeing with the Ninth Circuit on that issue (*id.* at 86-89), this Court unanimously turned aside two procedural arguments against allowing the worker to get to the jury with his Jones Act claim. First, it rejected the employer’s argument that the Longshore Act tribunals should have “primary,” or exclusive original, jurisdiction to decide questions of coverage under that Act, including the applicability of the crew-member exclusion (among other reasons, because the Act obviously does not contemplate such a rule, in that it includes an explicit provision that time limitations on assertion of a claim under the Act begin anew upon the denial of a tort remedy on grounds of Longshore Act exclusivity<sup>9</sup>). *Id.* at 89-91. And second, in the passage whose meaning and implications have divided the lower courts, the Court rejected the employer’s

. . . suggest[ion] that an employee’s receipt of benefits under the Longshore Act should preclude subsequent litigation under the Jones Act. To the contrary, however, we have ruled that where the evidence is sufficient to send the threshold question of seaman status to the jury, it is reversible error to permit an employer to prove that the worker accepted Longshore Act benefits while awaiting trial. *Tipton v. Socony Mobil Oil Co.*, 375 U.S. 34, 37

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<sup>9</sup> Longshore Act § 13(d), 33 U.S.C. § 913(d).

(1963). It is by now 'universally accepted' that an employee who receives voluntary payments under the Longshore Act without a formal award is not barred from subsequently seeking relief under the Jones Act. G. Gilmore & C. Black, *Law of Admiralty* 435 (2d ed. 1975); see 4 A. Larson, *Workmen's Compensation Law* § 90.51, p. 16-507 (1989) (collecting cases); *Simms v. Valley Line Co.*, 709 F.2d 409, 412 & nn. 3 and 5 (5th Cir. 1983). This is so, quite obviously, because the question of coverage has never actually been litigated. Moreover, the Longshore Act clearly does not comprehend such a preclusive effect, as it specifically provides that any amounts paid to an employee for the same injury, disability, or death pursuant to the Jones Act shall be credited against any liability imposed by the Longshore Act.<sup>5</sup> 33 U. S. C. § 903(e). See Gilmore & Black, *supra*, at 435.

<sup>5</sup> For this same reason, equitable estoppel arguments suggested by *amicus* Shipbuilders Council of America must fail. Where full compensation credit removes the threat of double recovery, the critical element of detrimental reliance does not appear. See *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 59 (1984); *Lyng v. Payne*, 476 U.S. 926, 935 (1986). Argument by *amicus* would force injured maritime workers to an election of remedies we do not believe Congress to have intended.

502 U.S. at 91-92 & n.5.

Shortly thereafter, the Fifth Circuit considered *Sharp v. Johnson Bros.*, 973 F.2d 423 (1992), *cert. denied*, 508 U.S. 907 (1993), in which a worker was injured aboard a crane barge. The employer initiated Longshore Act benefits without any claim having been filed, but cut them off shortly after

the worker filed an action under the Jones Act; he thereupon filed a compensation claim, but the employer (despite answering in court that he was *not* a crew member) took the unusual step of denying Longshore Act liability on the ground that he *was* a crew member. 973 F.2d at 424. When the district court directed a verdict against him in the tort action on grounds that the crane barge was not a “vessel” and he was not a crew member, the worker pursued reversal of that judgment, which the Fifth Circuit granted (*Sharp v. Johnson Bros.*, 917 F.2d 885 (1991)). Meanwhile, however, back at the Department of Labor, along with the employer and its Longshore Act insurer, he entered into a settlement of his claim for Longshore Act benefits and any other claims against the employer other than those insured by its tort insurers, and an ALJ gave the settlement the required approval in a compensation order.<sup>10</sup> *Id.*

The district court, on remand, again dismissed the Jones Act action, this time based on the settlement-approval order, and the worker again appealed. *Id.* at 424-25. Describing the district court’s reasoning in a manner presaging its own, the court of appeals first indicated that it had found that the approved settlement “constituted an election of remedies,” but went on to say:

The district court reasoned that the entry of an order by the ALJ constituted a finding that the injuries were compensable under the Longshore Act and that by seeking, and acquiescing to, the finding, Sharp is collaterally estopped from contesting Longshore Act coverage.

*Id.* at 425.

The Fifth Circuit affirmed. It distinguished *Gizoni* on the ground that Sharp had not merely accepted benefits and filed

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<sup>10</sup> See Longshore Act §§ 8(i), 16, 33 U.S.C. §§ 908(i), 916; 20 C.F.R. § 702.243.

a claim under the Longshore Act, but had secured an *order* making an award in the Longshore Act proceedings. It did not in any way address *Gizoni's* explanations (quoted in full at pp. 11-12 *supra*) that the lack of preclusive effect in that case “is so, quite obviously, because the question of [crew membership] has never actually been litigated;” that the one-remedy theory was contraindicated by Longshore Act § 3(e)’s “credit” provision; and that an *equitable*-estoppel bar “would force injured maritime workers to an election of remedies we do not believe Congress to have intended.” Instead, after acknowledging that “[i]t is true that Longshore Act coverage was never litigated in an adversarial proceeding,” *Sharp* reasoned, “[t]here is a difference . . . between saying a plaintiff may pursue only one remedy and declaring that he may receive only one award.” *Id.* at 426, 427. It did not examine or rely on any body of law relevant to the “election of remedies” doctrine, collateral estoppel, or equitable estoppel, and the opinion leaves it unclear whether it relied upon any such principle. Instead, it relied on the fact that the worker had “availed himself of the statutory machinery to bargain for an award, and he had the full opportunity to argue for (or against) coverage,” and on its view that it was the “purpose” of the Longshore Act to “giv[e employers] limited and predictable liability in exchange for their giving up their ability to defend tort actions [*sic*; to avoid *any* liability by asserting tort defenses].” *Id.* at 426.<sup>11</sup> As the court explained it,

Permitting a Jones Act proceeding after a formal compensation award here would defeat the purpose of the Longshore Act, as well as work unfairness, because, as here, employers often have different in-

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<sup>11</sup> The *Sharp* court made no reference to the major qualification that limits the insured employer’s tort immunity granted by LHWCA § 5(a): that if the employer is also the *owner or operator of the vessel* on which the injury occurs, it remains liable for negligence in that capacity (§ 5(b)).

surance carriers for workers' compensation claims and tort claims, so the compensation insurer, by guaranteeing a minimum award, necessarily would reduce the ability of the tort insurer to effect a settlement.

*Id.* at 427.

*Sharp* cited no precedent at any level for its result, based on either a settlement or any other form of Longshore Act compensation order. No other reported decision appears ever to have so ruled.<sup>12</sup>

The Ninth Circuit in particular has gone the other way. In *Figueroa v. Campbell Industries*, 45 F.3d 311 (1995), the injured worker had settled claims under both the Longshore Act and state compensation law for an injury sustained aboard his employer's shipyard tugboat. He then filed an admiralty action seeking crew members' remedies (but acknowledging the appropriateness of an "offset" for his compensation recoveries). *Id.* at 313. A jury found that he was indeed a crew member, and the employer appealed from the resulting award of damages. *Id.* Without mention of *Sharp*,<sup>13</sup>

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<sup>12</sup> The only other authority on point cited by Petitioners is *Anders v. Ormet*, 874 F.Supp. 738 (M.D. La. 1994), Pet. 15. But *Anders* was decided under the controlling precedent of *Sharp*. Further, unlike that in the present case, the ALJ's award in *Anders* explicitly found non-crew-membership, and the court described the issue as having been litigated between the parties before the ALJ.

In *Roth v. U.S.S. Great Lakes Fleet, Inc.*, 1993 WL 668784 (D. Minn. Jun 18, 1993) (No. Civ. 3-91-646), *aff'd*, 25 F.3d 707 (8th Cir. 1994), the district court dismissed at the summary judgment stage on grounds that the plaintiff was not a crew member as a matter of law, and added that based on *Sharp* the issue was also foreclosed by a settlement under the Longshore Act; but the court of appeals "affirm[ed] on the former issue, and d[id] not address the latter," 25 F.3d at 708.

<sup>13</sup> Apparently the employer did not cite *Sharp* to the court. *See id.* at 316 ("Appellant cites no cases holding otherwise.").

the court held that its own and this Court's opinions in *Gizoni* controlled against the employer's collateral-estoppel argument. Part of the court's opinion proceeds on the questionable premise that this Court's resolution of *Gizoni* meant that workers who are crew members but also performing jobs expressly enumerated in the main clause of Longshore Act § 2(3) (longshoring and shipyard workers) are *entitled to* both Longshore Act and Jones Act status, with the right to recover both remedies serially (subject to credit against a later remedy for amounts recovered pursuant to the other). *Id.* at 315.<sup>14</sup> But the court also relied on an analysis of the limitations on the applicability of issue preclusion under the "collateral estoppel" doctrine, finding that

Courts that have addressed the precise issue of whether the jurisdictional issue must be actually litigated for estoppel to apply in this situation have found that if the jurisdictional issue was not contested and no finding was made at the administrative level, a plaintiff is not estopped from bringing a Jones Act claim.

*Id.* at 316, citing *Guidry v. Ocean Drilling & Exploration Co.*, 244 F.Supp. 691 (W.D. La. 1965), and *Biggs v. Norfolk Dredging Co.*, 360 F.2d 360 (4th Cir. 1966). Since no finding on crew-member status had been made in the Longshore

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<sup>14</sup> Respondent Gros does not rely on any such theory, which appears to be contrary to the thrust of *Gizoni* – that even a worker engaged in longshoring or shipyard work may have the requisite connection to a particular vessel or fleet, whose "mission" is such work, to be a crew member, and thus excluded from the coverage of the Longshore Act, and is entitled to an opportunity to show such relationship so as to have access to crew members' remedies in tort. That question, however, has no bearing on this case; neither marine oil and gas work in general nor pipelaying in particular is among the activities expressly enumerated as parts of "maritime employment" within Longshore Act § 2(3), so even under the *Figuerroa* reading Gros, if a crew member, was outside of the Longshore Act.

Act proceedings, there was nothing to estop litigation of that issue in the Jones Act proceedings. *Id.* at 315-16.<sup>15</sup>

Again in *Papai v. Harbor Tug & Barge Co.*, 67 F.3d 203 (9th Cir. 1995), *rev'd on other gr.*, 520 U.S. 548 (1997),<sup>16</sup> the court denied preclusive effect to an award under the Longshore Act. As this Court will remember, the injured worker there was a “deckhand” hired by the day out of a union hiring hall to perform a variety of daily assignments aboard harbor tugs owned by several different operators. Some of these daily assignments were sea-going; others, such as that in the course of which the injury occurred, were confined to maintenance work while the tug was at berth. The district court granted summary judgment dismissing his Jones Act and unseaworthiness counts, ruling that he lacked crew-member status as a matter of law when injured, and he was required to await resolution of his alternative tort count, for negligence of the vessel under Longshore Act § 5(b), before obtaining appellate review of that judgment. He then sought an award under the Longshore Act. The employer had never asserted as a defense against Longshore Act liability the proposition that, contrary to its position in the tort action (and the success that position had already enjoyed before the district court), the worker was excluded from the Act as a crew member; indeed, it had been paying some benefits under the Act from the time of the injury forward. 67 F.3d at 205. Nevertheless, at the hearing convened before the ALJ on other issues (concerning the amount payable under the Act), it asserted that he

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<sup>15</sup> The same rule – no preclusion by a prior compensation award unless it included a litigated decision on the issue – prevails in the context of the border between state workers’-compensation laws and the Federal Employers’ Liability Act, 45 U.S.C. § 51 (the very statute the Jones Act extends to “seamen”), i.e., the “interstate commerce” inquiry. *See generally* 32B Am.Jur.2d *Federal Employers’ Liability and Compensation Acts* § 53.

<sup>16</sup> The decision of this Court is addressed at p. 18 *infra*.

“*may* have been a Jones Act seaman”; and despite the fact that neither party had even *asserted a* position on the merits of that question (much less actually litigated it), the ALJ addressed it. See Pet. App. 34a-35a, *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997) (No. 95-1621). He found that the issue was not precluded by the district court’s summary judgment because the ruling was interlocutory and had not become final, but agreed with the district court that the claimant-plaintiff was not working as a crew member when injured. *Id.* at 35a n.2, 37a. After resolving the issues that *were* litigated, the ALJ entered an award of continuing Longshore Act benefits.

The district court found that there was no § 5(b) negligence, and on appeal the worker challenged the district court’s non-crew-member ruling. The defendant employer asserted in support of the challenged ruling that the ALJ’s decision foreclosed relitigation of crew membership, but the court of appeals rejected that argument. It did not rely on *Figueroa*, noting that it had “reached the same result for different reasons.” 67 F.3d at 208 n.6. Instead, it focused on this Court’s reasoning in *Gizoni*, the policies that reasoning implicated, and the support of the Longshore Act § 3(e) credit provision and scholarly authority cited in *Gizoni*. These led it to the conclusion that the litigation of the Longshore Act claim to a formal award should not bar litigation of the crew-member question before the tort tribunal. *Id.* at 207-08. It relied particularly on two observations: first, that the parties’ interests on the issue were reversed in the two proceedings, so as to deprive them of a motive for vigorous litigation of their purported positions on it in the compensation tribunal; and second, that – contrary to the purpose of the Longshore Act to deliver benefits without the delay incident to litigation except where the worker’s rights under the Act are genuinely controverted – “imposing such a bar would result in subjecting to suit an employer who immediately and voluntarily begins compensation payments while immunizing

from suit an employer who forces his employee to seek compensation through litigation.” *Id.*

Finally, although neither the court below nor Petitioners have mentioned it, this Court granted *certiorari* in *Papai* to resolve not only an intercircuit conflict with respect to the merits of the crew-member test applied by the Ninth Circuit (which combined the worker’s various assignments for all three employers who hired him out of his union hiring hall to work on their harbor tugs, and treated all those tugs as a “fleet,” in determining whether he bore the necessary relationship to a fleet of vessels), but also the conflict between *Sharp* and *Figueroa* and *Papai* on the preclusive effect of an award under the Longshore Act. *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 550 (1997). But the majority resolved the substantive issue against the Ninth Circuit’s multi-employer “fleet” approach, and hence found the worker to have been employed as a non-crew-member as a matter of law on the day of the injury; “as [that ruling] is dispositive of the case,” the Court explicitly declined to reach the preclusion issue. *Id.* The dissenting opinion expressed agreement with the Ninth Circuit’s view on the preclusion issue, however, on that court’s *Gizoni*-based reasoning. *Id.* at 563 n.2.

The court below recognized the federal intercircuit conflict on the issue, and followed the Ninth Circuit’s *Papai* reasoning. Pet. App. 5-11.

### C. Prematurity of Resolution of the Issue Now

Respondent recognizes that the *correctness* of the decision below, and the error of *Sharp* to the contrary, are beside the point at the present stage, as those circumstances do not affect the need for this Court’s intervention to resolve an existing conflict on a frequently recurring issue of federal law, both between federal circuits and between federal and state appellate courts within the Fifth Circuit. Neither the present