

## Workshop W12

Wednesday, November 4, 1:30–3:00 p.m. and 3:30–5:00 p.m.

### UNDERSTANDING MARITIME RISKS AND EXPOSURES

Presented by



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Maritime risks are sometimes perceived as only applying to contractors working directly on maritime projects. In reality, many contractors stumble into maritime exposures unknowingly. In some cases, the exposure is so obscure the contractor is not aware that it exists, and the contract documents rarely stipulate that coverage for these risks is required. As infrastructure projects gear up, more contractors will need an understanding of the various maritime statutes to avoid not only a violation of the law but also a potentially significant uninsured claim.



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**Francis V. Liantonio Jr.**  
**Partner**  
**Adams and Reese LLP**

Mr. Liantonio is copresenting Workshop W12, "Understanding Maritime Risks and Exposures," on Wednesday afternoon. He is a litigator and business advisor with experience in many diverse areas of law. With more than 20 years of experience in the maritime field, including work as a marine surveyor, he has handled a wide range of energy and marine claims involving collisions, towage, limitation of liability, oil pollution, salvage, personal injury, wrongful death, property damage, pipeline casualties, drilling and completion, reservoir damage, charter parties, master service agreements, drilling contracts, maritime contracts, vessel construction, and other similar claims. Mr. Liantonio is also experienced in the areas of environmental, oil and gas, toxic tort, federal whistle-blower, transportation, and commercial litigation matters. He has defended insurers against bad faith claims and professional liability claims against, among others, surveyors and insurance professionals.

Mr. Liantonio has appeared in federal and state courts in Louisiana and Texas and before the National Transportation Safety Board, the Minerals Management Service, the U.S. Coast Guard, and other Administrative Law Judges. He also has experience with arbitration and mediation of matters. He has investigated numerous serious casualties and has experience in quickly assessing risks and managing the response with clients by working with investigating governmental authorities, the media, and outside consultants. In addition to litigating claims, Mr. Liantonio regularly advises clients on contractual and general business issues. He regularly drafts and negotiates maritime and oilfield contracts, including vessel construction and repair contracts, and has defended corporate criminal investigations. He recently completed a significant maritime financing transaction for the construction of U.S. flag tankships, which involved the negotiation and drafting of a variety of construction, fabrication, design, and procurement contracts.

When not practicing law, Mr. Liantonio is active in the community. He is a member of the Board of the Susan G. Komen for the Cure New Orleans Affiliate and has served as the Race for the Cure Co-Chair since 2007. He has coached youth soccer for more than a decade and has served on the board of a local soccer club. An avid supporter of the firm's HUGS program, he is a founder and coordinator for the "Donate a Phone" program that provides donated cell phones to special needs recipients.

**Mark J. Spansel**  
**Partner**  
**Adams and Reese LLP**

Mr. Spansel is copresenting Workshop W12, "Understanding Maritime Risks and Exposures," on Wednesday afternoon. In his trial practice, Mr. Spansel concentrates in the defense of litigation in the areas of Environmental and Toxic Tort Litigation, Energy and Maritime Litigation, Commercial Litigation, Complex Litigation, and Class Action Litigation. He is a member of the following Adams and Reese LLP practice teams: Environmental Litigation and Toxic Tort, Maritime/Offshore, and Oil and Gas Litigation. He frequently lectures on maritime law and offshore, oil field liabilities at professional and industry seminars including the Construction Risk Conference, the Dallas Bar Association—Energy Law Section, the Petroleum Insurance & Environmental Protection Conference, PSAM-II (an international conference devoted to the design and

operation of technological systems and processes), and the Loyola Longshore Conference. Twice a year he chairs the Forum on Litigation in the Gulf South (Fall—Dallas, Spring—San Antonio), a seminar hosted by Adams and Reese. He is the coauthor of several articles on maritime law in International Risk Management Institute's *The Risk Report*.

Mr. Spansel is listed in *The Best Lawyers® in America* (Maritime Law). The Best Lawyers lists, representing 57 specialties in all 50 states and Washington, D.C., are compiled through exhaustive peer-review surveys in which thousands of the top lawyers in the United States confidentially evaluate their professional peers. He is also listed in *Louisiana Super Lawyers* (Environmental) and *Chambers USA* (Environmental), and is AV® Peer Review Rated by Martindale-Hubbell. Mr. Spansel has always served in a leadership capacity within the firm. He is currently serving his fourth term as a member of the firm's Executive Committee, and served as its Chairman in 1999. He currently serves on the firm's Expansion Committee, the Strategic Planning Committee, and is Chairman of the Louisiana Offices' Strategic Planning Committee. In response to Hurricane Katrina, he also established the New Orleans/Baton Rouge Business Team and leads the team as Chairman. He is a former Practice Team Leader of the Marine and Energy Practice Team in the Litigation Practice Group. Mr. Spansel was honored with the "Words of Wisdom" Award for outstanding speaking accomplishment presented by International Risk Management Institute, Inc. (IRMI), at the Construction Risk Conference in October 2007.

He is active in several professional organizations such as the Louisiana State and American Bar Associations, the Louisiana Association of Defense Counsel, and the Defense Research Institute, and is a Proctor Member of the Maritime Law Association of the United States. In the community, Mr. Spansel serves on the Board of Directors of Greater New Orleans, Inc., is on the Board of Directors and Executive Committee of the Jefferson Parish Chamber of Commerce, and is a member of the Jefferson Business Council and serves as the Chamber's General Counsel. Additionally, he is a member of St. Thomas More Catholic Lawyers Association and the Co-Chair of Christian Brother's School's Capital Campaign. In 2010, he will serve as Chairman of the Archbishop's Community Appeal.

A New Orleans native, he is a graduate of Jesuit of High School in New Orleans. Prior to earning his Juris Doctorate from Tulane University Law School in 1978, Mr. Spansel attended Tulane University where he majored in Economics.

# Understanding Maritime Risks and Exposures

*29th IRMI Construction Risk Conference*

*November 1-5, 2009*

*National Harbor, MD*

**Francis V. Liantonio, Jr.**

**Mark J. Spansel**

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## APPLICABLE LAWS

- Jones Act
- Unseaworthiness
- Wages, maintenance, and cure
- Maritime tort
- Statutory compensation laws

# IDENTIFICATION OF AVAILABLE REMEDIES

## Status of the Plaintiff

- Seaman
- Longshoreman
- Other

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# IDENTIFICATION OF AVAILABLE REMEDIES

## Status of the Defendant

- Employer
- Non-Employer
- Vessel Owner
- Non-Vessel Owner

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## **IDENTIFICATION OF AVAILABLE REMEDIES**

### **Situs of Accident**

- Land
- Vessel
- Platform
- Within or beyond state territorial waters

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## **JONES ACT**

- Must be brought by injured seaman or survivors
- Against employer for negligence
- Employer can be direct, payroll, or borrowing
- Suit can be brought in state or federal court
- Seaman has right to elect a jury trial

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# JONES ACT

## Elements of Proof:

- Employer-employee relationship
- “Seaman”
- “Course and scope”
- Negligence must contribute in whole or in part (even the slightest) to the injury or death; not proximate cause
- Situs not controlling

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# SEAMAN STATUS

- More or less permanent assignment or perform substantial part of work duties
- Specific vessel or fleet of vessels
- Under common ownership or control
- Work in furtherance of overall function of the vessel

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# SEAMAN STATUS

- **Duties contribute to function of vessel or accomplishment of its mission**
- **Substantial connection (in duration and nature) to a vessel or an identifiable group**
- **Member of vessel's crew or land-based employee who happens to be working on a vessel?**

# SEAMAN STATUS

*"Rule of Thumb"*

**A worker who spends less than thirty percent (30%) of his time in the service of a vessel should not qualify as a Jones Act seaman**

## **PERMANENT ASSIGNMENT**

- **Determined in the context of worker's entire employment with his current employer**
- **Does not preclude consideration of shorter period if permanent job assignment occurs**

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## **SPECIFIC VESSEL OR FLEET**

- **Identifiable vessel or fleet of vessels**
- **Acting together or under common control**

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## **VESSEL STATUS**

**Vessel—Traditionally refers to structures designed or utilized for transportation of passengers, cargo, or equipment from place to place across navigable waters**

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## **STEWART v. DUTRA CONSTRUCTION**

**U.S. Supreme Court 2005**

**What is a vessel?**

**Every description of watercraft or other artificial contrivance used or capable of being used as a means of transportation on water.**

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## **VESSEL STATUS Factors**

- **Navigational aids**
- **Raked bow**
- **Lifeboats and other life-saving equipment**
- **Bilge pumps**
- **Crew quarters**
- **Registration as a vessel with the Coast Guard**
- **Intention of owner to move structure on regular basis**
- **Ability of submerged structure to be refloated**
- **Length of time structure has remained stationary**

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## **NAVIGABLE WATERS**

- **Capable of commercial travel**
- **Between states or other countries**
- **Directly or with connecting waters**

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## **JONES ACT DAMAGES**

- **Loss of past and future wages**
- **Impairment of future earning capacity**
- **Medical expenses**
- **Past and future pain, suffering, disability, humiliation, and mental anguish**
- **No punitive damages**
- **Prejudgment interest may be awarded in non-jury cases, but**
- **Not in jury trials, where interest is awarded from date of judgment**

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## **JONES ACT DEFENSES**

- **Comparative negligence of the seaman**
- **No assumption of risk**
- **Three (3) year statute of limitation**

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## **UNSEAWORTHINESS**

**A strict liability remedy to compensate for injury or death of a seaman caused by a vessel or vessel equipment not reasonably fit for its intended use**

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## **UNSEAWORTHINESS**

- **Claim is against vessel, the owner, or bareboat charterer**
- **Time and voyage charterer do not owe the warranty unless they exercise a high degree of control over the operation of the vessel**
- **Suit may be brought in state or federal court**
- **No jury unless claim is coupled with Jones Act claim or there is diversity of citizenship in federal court**

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# UNSEAWORTHINESS

## Elements of the Claim:

- Seaman or one who performs traditional duties of a seaman and is not covered by the LHWCA
- Vessel
- Breach of the warranty of seaworthiness
  - duty is absolute, continuing, and non-delegable
  - warranty extends to the ship's hull, gear, stowage, appurtenances, appliances, passageways, cargo, and crew
- Causation—proximate cause

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# UNSEAWORTHINESS

## *DAMAGES*

- Same as under the Jones Act
- Prejudgment interest is discretionary, but generally awarded
- Punitive damages not recoverable against employer, but may be recoverable against non-employer vessel owner or bareboat charter

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# **UNSEAWORTHINESS**

## *DEFENSES*

- **Comparative negligence**
- **Operational negligence**
- **Vessel not in navigation?**
  - **withdrawn from navigation for substantial repairs**
  - **launched but incomplete vessel**
  - **undergoing sea trials**
- **Three (3) year statute of limitation**

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# **WAGES, MAINTENANCE, & CURE**

- **Right is implicit in the contractual relationship between the seaman and the employer**
- **Designed to ensure recovery for seaman injured or who falls ill while in the service of the vessel**
- **Seaman may bring claim against employer or vessel**
- **No jury unless coupled with Jones Act claim**

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## **WAGES, MAINTENANCE, & CURE**

### *WAGES*

- **Payable to the end of the voyage**
- **“Voyage” depends upon articles and custom**
- **Wage withheld without sufficient cause gives rise to liability under the double wage penalty law**

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## **WAGES, MAINTENANCE, & CURE**

### *MAINTENANCE*

- **Per diem living allowance payable until maximum cure—the point beyond which further medical treatment will not improve the seaman’s condition**
- **Value of room and board while aboard the vessel**
- **Rate can be an issue at trial**
- **Union contract rates are still enforceable in the 5<sup>th</sup> Circuit**

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## **WAGES, MAINTENANCE, & CURE**

### *CURE*

- **Cost of necessary medical expenses**
- **Medical, therapeutic, and hospital expenses are owed until the seaman reaches the point of maximum cure**
- **Obligation ends when condition is incurable or future treatment will merely relieve pain**

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## **WAGES, MAINTENANCE, & CURE**

### Elements of the claim:

- **Liability without fault**
- **“In the service of the vessel”**
- **“Answerable to the call of duty”**

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## **WAGES, MAINTENANCE, & CURE**

### **Defenses:**

- Laches
- Gross intoxication—sole cause or willful and wanton. "Ordinary" drunkenness is acceptable
- Willful misconduct and fighting
- Venereal disease
- Conscious concealment of a relevant, known prior disability
- No actual expenditures—seaman who lives with parents

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## **MARITIME TORT**

- Remedy for personal injuries occurring on navigable waters
- Brought by the injured party or his spouse, where recovery for loss of society is permitted
- May be brought against the vessel, person, or corporation committing the tort

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## **ELEMENTS OF THE CLAIM**

- **Situs of the Accident**
- **Situs of the Negligent Act—Location of the injury may be irrelevant; courts look instead to where the "substance and consummation of the occurrence giving rise to the injuries" occurred**
- **The circumstances surrounding the accident must be significantly related to traditional maritime activity**
- **Negligence—Standard of reasonable care under the circumstances**
- **Proximate cause**

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## **DAMAGES**

- **General and special damages—Loss of past and future wages, impairment of future earning capacity, medical expenses, pain, suffering, disability, humiliation, and mental anguish.**
- **Loss of consortium or society—Courts are divided. However, spouse of a Jones Act seaman may not assert such a claim.**
- **Prejudgment interest usually allowed, but within discretion of court.**

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## **PUNITIVE DAMAGES**

- **Courts are divided whether they can be recovered in an action under the General Maritime Law**
- **Courts generally require willful and wanton acts performed or ratified by a representative of the defendant with decision-making authority**
- **But a Jones Act seaman or his survivors may not recover punitive damages against the employer**

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## **DEFENSES**

- **Comparative Negligence**
- **Time Limitation**
  - **Suit must be filed within three years from the date that death or injury occurs**

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## **LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT**

- **Compensation remedy against employer for injury or death occurring in course and scope of employment**
- **Maritime employment (status)**
- **Navigable waters of the U.S. or adjoining areas (situs)**
- **Excludes Jones Act seamen**

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## **JONES ACT AND LONGSHORE ACT**

**Benefits are mutually exclusive**

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# LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

## Elements of claim

- Maritime work (status and situs)
- Injury
- Course and scope of employment

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# LONGSHOREMAN

## Status:

- Engaged in maritime employment

## Situs:

- Upon navigable waters of the United States and adjoining areas

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## **STATUS BY STATUTE**

- **Longshoremen/harbor workers**
- **Ship repairmen**
- **Shipbuilders**
- **Ship-breakers**

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## **STATUS FOUND**

- **Construction workers**
- **Chippers**
- **Maintenance workers**
- **General managers of shipyards**
- **Machinists**
- **Pipefitters**
- **Sandblasters**
- **Security guards—patrols on and off vessels**
- **Sheet metal workers**
- **Welders**

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## **NO STATUS BY STATUTE**

- Clerical secretarial
- Security
- Data processing
- Recreational workers—camp, club & restaurant
- Marina workers
- Personnel building, repairing, or dismantling recreational vessels under 65 feet in length or repairing small vessels under 18 tons
- Individuals employed by suppliers, transporters, or vendors who are temporarily performing their job on your premises
- Master or member of crew of any vessel (seaman)

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## **STATUS NOT FOUND**

- Maintenance workers
- Laborers
- Cooks
- Security guards
- Mechanics
- Machinists
- Truck drivers

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## **SITUS BY STATUTE**

- **Pier**
- **Wharf**
- **Drydock**
- **Terminal**
- **Building way**
- **Marine railway**
- **Other adjoining areas customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel**

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## **SITUS FOUND**

- **Fabrication shop**
- **Sheet metal shop**
- **Steel fabrication plant**
- **Scrapyard**
- **Maintenance and storage buildings**
- **Public highways adjoining employers facility**

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## **SITUS NOT FOUND**

- **Offices**
- **Steel fabrication plants**
- **Public streets**
- **Shipyard shops not used  
in shipbuilding**

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## **BENEFITS UNDER THE LHWCA**

- **Medical**
- **Compensation**
  - **Temporary**
  - **Permanent Partial**
  - **Permanent Total**
- **Death**

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## **DEFENSES**

- **Intoxication**
- **Suicide**
- **Intent to injure another**
- **Failure to give written notice within 30 days**
- **Failure to file claim within one year**
- **Election of state benefits**

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## **EMPLOYER MUST PROVIDE LONGSHORE COVERAGE**

**If an employer fails to obtain coverage an injured employee or his survivors may elect compensation benefits or may file an action at law or in admiralty for damages. Should such an action be filed, the employer does not have the following defenses:**

- **Negligence of a co-employee**
- **Assumption of the risk**
- **Contributory negligence**

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# SIGNIFICANT DIFFERENCES BETWEEN LONGSHORE AND STATE COMPENSATION ACT


- Coverage limited to areas on, around, or near water
- Higher benefits—longer time
- Administration by federal bureaucracy
- More paperwork
- More difficult to settle
- Civil and criminal penalties

## Understanding Maritime Risks and Exposures

*29th IRMI Construction Risk  
Conference*  
*November 1-5, 2009*  
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**Francis V. Liantonio, Jr.**  
**Mark J. Spansel**

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**26<sup>TH</sup> IRMI CONSTRUCTION RISK CONFERENCE**  
**LIANTONIO/SPANSEL SUPPLEMENTAL HANDOUT**  
**NOVEMBER 4, 2009**

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## I. RECENT SEAMAN CASES

### A. Olson v. E.H. Wachs, Inc., 2009 WL 152512 (E.D.La. 2009)

**Overview:** Plaintiff had been working for defendant’s land-based power plant for some time. Two weeks after the defendant reassigned the plaintiff to work aboard a vessel training and managing divers, plaintiff suffered a back injury. Although the plaintiff had spent the vast majority of his time with his employer working on land, the plaintiff argued that he met the requirement for duration of sea-based employment. In particular, the plaintiff cited an exception for workers who are “reassigned permanently to a classic seaman’s job.” He argued that the reassignment was permanent and that his job as a manager of divers was a classic seaman’s job. The court agreed with the plaintiff, finding that summary judgment was inappropriate because the particular facts could support the conclusion that the plaintiff met the exception.

### B. Denson v. Ingram Barge Co., 2009 WL 1033817 (W.D.Ky. 2009)

**Overview:** Plaintiff, a barge employee, had his hand crushed between the barge and a spud well while working. The employee’s regular duties on the barge included cleaning the barge and operating the front-end loader. The defendant conceded that the plaintiff’s work contributed to the function or mission of the vessel, and conceded that the plaintiff’s duties had a connection to the vessel that was substantial in duration. At issue was whether the plaintiff’s duties had a connection to the vessel that was substantial in nature. The defendant argued that the plaintiff did not meet this requirement because he was not regularly exposed to the perils of the sea. The court agreed with the defendant, reasoning that the Jones Act remedy is reserved especially for those “special hazards and disadvantages” that maritime employees typically face. The court noted that

the plaintiff's duties, conversely, were more typical of longshoremen. Consequently, the court dismissed the plaintiff's Jones Act claim.

**C. Washington v. Blanchard Contrs., Inc., 2009 U.S. Dist. LEXIS 34749 (S.D. Tex. 2009)**

**Overview:** Plaintiff's claims for unseaworthiness and maintenance and cure were foreclosed because he did not spend thirty percent of his time employed on a vessel and did not qualify for the exception articulated in Chandris. The plaintiff worked on a vessel for less than thirty percent of the time he worked for the defendant—six out of thirty-seven days. Therefore, the worker did not have a cognizable Jones Act claim unless the worker could show that he had been reassigned permanently to a ship in a classic seaman's job. The worker did not contest an affidavit stating that his reassignment was temporary, so he did not qualify for this exception. The district court therefore rendered summary judgment for the defendant, holding that the worker was not a Jones Act Seaman as a matter of law.

**D. Belcher v. Sundad, Inc., 2008 U.S. Dist. LEXIS 56607 (D. Or. 2008)**

**Overview:** Fisheries observer was aboard trawler for the purpose of observing certain aquatic species. The observer's presence was legally required for the vessel to operate. The observer injured herself in the course of her duties as observer while lifting a bycatch basket. However, in her claim under the Jones Act, the court found that the plaintiff-observer was not a seaman because she did not contribute to the function or mission of the vessel.

**E. Willis v. Fugro Chance, Inc., 2008 A.M.C. 1461 (5th Cir. 2008)**

**Overview:** Defendant provided a range of services for the energy industry including positioning offshore drilling rigs, production platforms, and pipeline lay barges. Plaintiff was a

survey party chief employed by the defendant, who assisted in moving vessels and other devices. In the course of his employment the plaintiff was exposed to toxic substances that damaged his brain and central nervous system. When the plaintiff alleged Jones Act seaman status, the defendant argued that plaintiff did not have seaman status because he did not work on vessels owned or controlled by the defendant. The district court agreed with the defendant and dismissed the plaintiff's claim. On appeal, the Fifth Circuit affirmed, distinguishing *Bertrand*, a case in which a plaintiff was deemed to have seaman status although he did not work on vessels owned or controlled by his defendant/employer.

**F. Parker v. Jackup Boat Serv., LLC, 542 F. Supp. 2d 481 (E.D. La. 2008)**

**Overview:** Court found that employee was a Jones Act seaman even though he regularly moved among various vessels and land projects. Employee spent 219 of his 433 days working for his employer on various vessels owned by a single company. At the time of the accident, employee was assigned to a vessel owned by a different company. Nevertheless, because the employee spent most of his time working for vessels owned by a single company, the court found that he worked for an identifiable fleet of vessels. Therefore, he was a Jones Act seaman.

**G. Hebert v. Weeks Marine, Inc., 251 Fed. Appx. 305 (5th Cir. 2007)**

**Overview:** Welder who was assigned to work on defendant's vessel was working on a land project when he injured his shoulder. The vessel to which the welder was assigned was not deployed at the time of the accident. The court held on summary judgment that the welder had seaman status under the Jones Act because, during his full employment with defendant, he worked on a vessel approximately seventy-five percent of the time. In so finding, the court relied

on Supreme Court jurisprudence stating that a worker does not lose seaman status simply because his duties take him ashore.

**H. Bentley v. L & M Lignos Enterprise, 2007 WL 2780897 (N.D. Ohio 2007)**

**Overview:** District court granted summary judgment denying seaman status of a carpenter foreman, even though he spent part of his work days on a barge. Foreman worked on a bridge repair project. He traveled at least daily by motor boat to a barge and then used the barge as a transfer point to the scaffolding on the bridge pier. His main duties included chipping concrete from the bridge, making concrete forms, and pouring concrete into the forms. The court held that he was not a Jones Act seaman as a matter of law because his main duties did not have a substantial connection to the barge or the motor boat.

**I. LaCount v. Southport Enters., 2007 U.S. Dist. LEXIS 47049 (D.N.J. 2007)**

**Overview:** Defendant conducted maritime construction work involving building and repairing bulkheads, land pilings, piers and docks, and installing mooring pilings in the water. Plaintiff worked for defendant as an ironworker for three days. On the first two days, the plaintiff worked intermittently on land and the barge. On the third day he worked exclusively on the barge. On the third day he gave notice that it was his last day, and was injured in the afternoon. The plaintiff's claim survived summary judgment because it was disputable whether the plaintiff had a connection to the vessel that was substantial in duration and nature.

**J. Scheuring v. Traylor Bros., Inc., 476 F.3d 781 (9th Cir. 2007)**

**Overview:** The plaintiff, a crane operator, performed various duties such as handling lines, weighing and dropping anchors, standing lookout, monitoring the marine band radio and splicing wire and rope. The crane was situated on the defendant's barge. In his personal injury

action, plaintiff contended that he had status as a Jones Act seaman. The defendant conceded that the plaintiff's work contributed to the function or mission of the vessel, and conceded that the plaintiff's duties had a connection to the vessel that was substantial in duration. The question was whether the duties had a connection to the vessel that was substantial in nature. The court found that it could not resolve this question on summary judgment. Genuine issues of material fact existed as to whether the plaintiff's duties as a crane operator had a connection to the vessel that was substantial in nature.

**K. Mudrick v. Cross Servs., 200 Fed. Appx. 338 (5th Cir. 2006)**

**Overview:** An oil spill engineer was killed while operating the stern anchor winch on a barge. In order to assert products liability action against manufacturer, plaintiffs sought to prove that employee was not a Jones Act seaman. The district court rendered summary judgment for defendant, holding that the employee had seaman status and therefore the employee's claim against the manufacturer was barred. On appeal, the Fifth Circuit reversed. The appellate court held that the manufacturers bore the burden of proving that the employee was a Jones Act seaman, because the manufacturer was the party moving for summary judgment. Certain facts regarding the employee's timesheets were in dispute, and should have been construed in favor of nonmoving party. The Fifth Circuit vacated the summary judgment and remanded for further consideration.

**L. Arnold v. Luedtke Eng'g Co., 196 Fed. Appx. 331 (6th Cir. 2006)**

**Overview:** The Sixth Circuit found that a tug boat worker who was attaching wedge plates to a seawall had seaman status. The Sixth Circuit reversed the district court's ruling. The district court had determined that attaching wedge plates to a seawall was a land-based job that

did not involve any service to a vessel. In reversing the lower court's decision, the Sixth Circuit held that the lower court should have considered the totality of the worker's employment on the project. Because the worker was also a tugboat captain and performed many other tasks to support the project, there was a genuine issue of fact as to whether he was a Jones Act seaman. Summary judgment was therefore improper.

**M. Poole v. Kirby Inland Marine L.P., 2006 U.S. Dist. LEXIS 50019 (D. Tex. 2006)**

**Overview:** Plaintiff tankerman alleged injury from a slip and fall on a catwalk of a docked barge. Defendant moved to dismiss for lack of seaman status. The nature of plaintiff's connection with defendants' barges was as a shore-side maritime worker, not a seaman. He worked as a shore-based tankerman on various docked barges owned by Defendants. As a tankerman, he transferred liquid materials and cargo to and from the various barges. He was never a crew member of a boat, and he never worked on a barge while it was underway or at sea. He worked shift work, was paid hourly, and received overtime. Plaintiff performed traditional longshoreman's duties, and not those of a seaman. Court found plaintiff found to be a longshoreman.

**N. Napier v. F/V Deesie, Inc., 454 F.3d 61 (1st Cir. 2006)**

**Overview:** During a fishing accident, a hook impaled the seaman's abdomen. Physicians later discovered that the seaman had suffered an ulcer. A medical expert testified that although the fishing hook did not directly cause the ulcer, there was a causal relationship between the hook injury and the development of the ulcer. The district court concluded that there was insufficient evidence of this. On appeal, the court held that the district court erred in granting summary

judgment because the employer admitted that the seaman took two types of NSAIDs, which can cause ulcers, following the fishing accident and the seaman's affidavit stated that he took the NSAIDs. Whether the ulcer was foreseeable and whether the taking of NSAIDs was an intervening cause were issues for the jury to decide. The court reversed the district court's grant of summary judgment on the Jones Act and unseaworthiness claims and remanded the case for further proceedings.

**O. Ausama v. Tetra Applied Techs., LP, 2006 U.S. Dist. LEXIS 49971 (E.D.La. 2006)**

**Overview:** The plaintiff worked on offshore platforms and could only identify a few occasions in which he worked on a vessel. Plaintiff was transported to the platforms, ate, and slept aboard a vessel, but defendant did not own any vessel on which plaintiff worked. Furthermore, during plaintiff's employment with defendant, the vast majority of plaintiff's time was spent on a specific ship. However, that assignment was not permanent; defendant could and did place plaintiff in other assignments as needed. The court consequently found that the plaintiff lacked sufficient connection to a vessel or identifiable fleet of vessels to support a finding of seaman status.

**P. Churchwell v. Bluegrass Marine, Inc., 444 F.3d 898 (6th Cir. 2006)**

**Overview:** A cook sustained back injuries from a fall while cleaning up the kitchen after serving breakfast to the crew. The court held that the cook presented sufficient evidence such that she could prevail at trial on both unseaworthiness and Jones Act claims. Moreover, the court found that, contrary to the owners' assertions, the cook's own negligence did not provide an adequate basis on which to grant summary judgment.

**Q. Gulasky v. Ingram Barge Co., 2006 U.S. Dist. LEXIS 1188 (D. Ky. 2006)**

**Overview:** Plaintiff fell from a ladder while climbing out of a barge floating on a river. Defendant operated several vessels that were used in cleaning, repair, and fleeting work. Defendant argued that plaintiff was not a "seaman" at the time of the accident because he lacked a connection to a vessel or identifiable fleet and his duties did not expose him to the perils of sea. The court held that the question as to whether plaintiff qualified as a seaman under the Jones Act was a jury issue. Defendant owned approximately 70 percent of the vessels on which plaintiff worked, and he spent approximately 80 percent of his time working on vessels owned by defendant. These facts could have led the finder of fact to hold that plaintiff had a connection to defendant's vessels. An employee was not required to go out to sea in order to have been exposed to the perils of sea. Rather, one of the factors to consider when determining whether or not an employee was exposed to the perils of sea is the seagoing nature of his duties. Therefore, the court denied a motion for summary judgment against the plaintiff.

**R. Watson v. Oceaneering Int'l, Inc., 387 F. Supp. 2d 385 (D. Del. 2005)**

**Overview:** Seaman brought a negligence claim against his employer under the Jones Act, 46 U.S.C.S. App. § 688, alleging that the employer failed to promptly and properly respond to a medical emergency suffered by the seaman at sea. The employer was denied summary judgment because the issue of negligence was a question for the jury.

**S. Bunch v. Canton Marine Towing Co., 419 F.3d 868 (8th Cir. 2005)**

**Overview:** Court reversed a summary judgment denying seaman status and held that, under Stewart, a cleaning barge where plaintiff worked that was moored to the bed of the Missouri River by spud poles was a Jones Act 'vessel in navigation' as a matter of law. The barge

was capable of being used as a means of transportation on water. Because the employer had conceded the other elements of seaman status, this finding meant that a worker assigned to that barge was a Jones Act seaman as a matter of law.

**T. Stanfield v. Quality Marine Serv., 2005 U.S. Dist. LEXIS 8050 (D. La. 2005)**

**Overview:** Jones Act seaman's allegations against deckhand's employer were sufficient to withstand employer's motion to dismiss under Fed. R. Civ. P. 12(b)(6). Seaman, who was injured when he fell into a manhole that should have been sealed, alleged that employer was negligent in failing to provide competent crew and failing to train and supervise deckhands.

**U. Saienni v. Capital Marine Supply, Inc., 2005 U.S. Dist. LEXIS 6928 (D. La. 2005)**

**Overview:** The court found that the plaintiff failed the substantial-in-nature requirement. The plaintiff was a "shoreside mechanic" or "port captain" assigned to his employer's fleet of vessels. All of his work was centered on the repair and maintenance of these vessels. Thus, the court concluded that his work "was not of a seagoing nature. Plaintiff had submitted no evidence undercutting the [...] 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."

**V. Stevens v. Omega Protein, Inc., 2005 U.S. Dist. LEXIS 537 (D. La. 2005)**

**Overview:** An injured seaman's employer was liable for a fishing boat crew's negligence; the crew's incompetence rendered the boat unseaworthy. The plaintiff-seaman was entitled to maintenance and cure benefits and damages for lost wages and pain arising from his back injury.

**W. Almotaz Alshazli v. Am. Seafoods Co., L.L.C., 2005 U.S. Dist. LEXIS 38860 (D. Wash. 2005)**

**Overview:** The seaman sought to recover from defendants lost wages, loss of earning capacity, future medical expenses, and pain and suffering from an injury he suffered while working aboard the vessel. Defendants argued that the seaman's injury resulted from his own negligence. Seaman was injured when he slipped and fell in the vessel's freezer hold because of the accumulation of trash. Further, defendants were made aware of, and had an opportunity to correct the hazard. Thus, defendants were liable under the Jones Act. Because the vessel was unseaworthy, the seaman was entitled to recover past lost earnings, future medical costs, and damages for pain and suffering.

**X. Patterson v. Allseas USA, Inc., 137 Fed. Appx. 633 (5th Cir. 2005)**

**Overview:** Employee, who was the highest ranking employee on the ship other than the captain, slipped due to wet boots from having inspected a pool of standing water. The court pointed out that, under the Jones Act, a ship-owner need not warn seamen of dangers that were "open and obvious." The court held that the employee, who was the co-employee's supervisor and the main safety official on the ship, should have known of the dangers associated with descending a stairway in wet boots, and thus, the co-employee had no duty to warn. Therefore, court granted summary judgment for employer.

**Y. Frost v. Teco Barge Lines, 2005 WL 1389118 (S.D. Ill. June 1, 2005)**

**Overview:** The court predicted that the Seventh Circuit will follow the Fifth and Ninth Circuits in holding that punitive damages can no longer be awarded against employers who willfully and

callously disregard their maintenance-and-cure obligations. Under this view, the only sanction is attorneys' fees.

**Z. Marcic v. Reinauer Transportation Cos., 397 F.3d 120 (2d Cir. 2005).**

**Overview:** Held that a CBA can limit cure and maintenance remedies for seaman.

**II. RECENT TREATMENT OF STEWART V. DUTRA CONST. CO.**

**A. Stewart v. Dutra Const. Co., 543 U.S. 481 (2005)**

**Facts:** The plaintiff was a marine engineer hired by Dutra Construction Company to maintain mechanical systems on what was then the world's largest dredge, the Super Scoop. The dredge was owned by Dutra and was being used to dredge Boston Harbor. The dredge itself was a floating platform with limited means of self-propulsion. It moved short distances by manipulating its cables and anchors. It traveled greater distances by use of a tug. The dredge used a massive clamshell bucket to remove silt from the ocean floor and deposit it upon one of two scows that floated alongside the dredge. The scows were then used to transport the dredge out to sea.

When the scow's engine malfunctioned, the plaintiff was asked to assist in the repair process. Although the dredge was idle at this time, it had not been taken out of service or permanently anchored. While the plaintiff was on board the scow feeding wires through an open hatch, the dredge used its bucket to move the scow. This caused the scow to collide with the dredge. The jolt created by the two ships colliding threw the plaintiff headlong through the hatch to the deck floor below, seriously injuring him in the process.

**Procedure:** Petitioner, the maritime engineer, sued the owner of the dredge seeking relief under 46 U.S.C. § 688(a) of the Jones Act on the ground that he was a seaman injured by the company's negligence. The petitioner filed an alternative claim under 33 USCS § 905(b) of the LHWCA, which authorized covered employees to sue a "vessel" owner as a third party for an injury caused by the owner's negligence. The district court granted summary judgment to the company on the Jones Act claim and the 1st Circuit affirmed, concluding that the engineer was not a seaman for purposes of the Jones Act. The court reasoned that the dredge was not a "vessel in navigation" within the Jones Act's contemplation since the dredge did not have the primary purpose of navigation and was not in transit when the collision occurred. On remand, the District Court granted summary judgment to the company on the LHWCA claim. The Court of Appeals, in affirming, noted that the company had conceded that the dredge was a "vessel" for purposes of § 905(b), but found that the company's alleged negligence had been committed in its capacity as an employer and not as the vessel's owner.

**Decision:** The U.S. Supreme Court unanimously reversed the judgment of the 1st Circuit that the dredge was not a vessel under the Jones Act or the LHWCA. The Court remanded the case, holding that under the definition set out in 1 U.S.C. § 3 which applied to both the LHWCA and the Jones Act claims, the dredge was a vessel since it was a watercraft practically capable of maritime transportation.

**Analysis:** Writing for a nearly-unanimous Court, Justice Thomas concluded that 1 U.S.C. §3 not only provided the proper standard to determine whether a craft was a vessel under the LHWCA, but also for the "vessel in navigation" requirement of the two-prong Jones Act seaman status test. According to 1 U.S.C. §3, a vessel is "every description of watercraft or other

artificial contrivance used, or capable of being used as a means of transportation on water.” Thus the Court concluded that the dredge was a vessel, since it was a watercraft “practically capable of maritime transportation.” The definition does not require that the dredge be used primarily for navigation, even though the dredge was in fact used to transport equipment and workers over water. Furthermore the definition did not require the dredge to be in motion at the time of the collision to qualify as a vessel. Regarding the “in navigation” requirement for the Jones Act vessel status, the Court held that the requirement could no longer be treated as a separate element from the general inquiry of whether a particular watercraft constituted a vessel. The Court reasoned that the “in navigation” requirement had no relationship to actual locomotion. Rather, it related to a vessel’s status in terms of whether the craft “was used or capable of being used” as a means of maritime transportation. Justice Thomas explained that the main question is whether such use was “a practical possibility or merely a theoretical one.” Therefore the definition of vessel found in 1 U.S.C. §3 is applicable to both LHWCA and Jones Act claims.

## **B. Cases Following Stewart**

### **1. Nottingham v. Murphy Oil USA, Inc., 2009 WL 50160 (E.D.La. 2009)**

**Overview:** Plaintiff was an electrical instrumentation specialist working on a tension rig. The plaintiff was participating in a safety exercise on an attached lifeboat when the lifeboat fell to the water, causing several injuries. In a claim against his employer, plaintiff alleged that the tension rig was a vessel in navigation. The defendant argued that the tension rig was not a vessel in navigation because it was permanently attached to the seabed. The plaintiff insisted that the tension rig was capable of navigation. A crew member testified that the rig navigated around a well pattern and the Coast Guard had classified the rig as an “industrial vessel.” Therefore, the

court denied the defendant's motion for summary judgment, holding that there were factual disputes about whether the rig was capable of navigation.

2. **Ford v. Argosy Casino Lawrenceburg, 2008 U.S. Dist. LEXIS 23558, 2008 WL 817113 (S.D. Ind. 2008)**

**Overview:** The district court extended a line of decisions finding that riverboat casinos are ordinarily not vessels in navigation. Plaintiff, an employee at a riverboat casino, sought relief against its employer under the Jones Act. The riverboat had a full marine crew and was certified as "seaworthy" after regular Coast Guard inspections. The owners had contemplated that the riverboat would navigate to a new location in the near future. The riverboat was capable of commencing navigation within minutes. The court, nevertheless, found that it was not a vessel in navigation under Stewart because the possibility that the riverboat would sail again was merely theoretical. The employee's Jones Act claims were dismissed.

3. **Cain v. Transocean Offshore USA, Inc., 518 F.3d 295 (5th Cir. La. 2008)**

**Overview:** An accident occurred on an oil rig under construction. When an injured employee brought an action under the Jones Act, the employer argued for dismissal because the rig was under construction and therefore not a vessel in navigation under the Jones Act. Although the Fifth Circuit had previously found vessels under construction to not have vessel status under the Jones Act, the question was whether the Supreme Court's ruling in Stewart overturned that precedent. The Fifth Circuit concluded that Stewart did not overturn its precedent regarding vessels under construction. The court reasoned that the vessel lacked vital equipment to make it

fully operational. In a dissenting opinion, Judge Owen wrote that the rig was capable of being used as a means of transportation, and therefore ought to be considered a vessel under Stewart.

**4. In re Two-J Ranch, Inc., 534 F.Supp.2d 671 (W.D. La. 2008)**

**Overview:** A welder who primarily worked on a drydock and spud barge was reassigned to work as a deck hand on a tow boat. The worker slipped and fell overboard and drowned in the Mississippi River. First, the district court found that the drydock and spud barge was a vessel despite its relative immobility. In so finding, the court noted that the dry dock typically moved up to several hundred feet up or down the river about once a year, and moved closer or farther from the river bank more frequently. Second, the court found that the worker’s tasks as a welder and as a deck hand had a substantial connection to the vessels in duration and nature. Consequently, the district court granted summary judgment for the plaintiff, finding that the worker was a seaman as a matter of law.

**5. Lee v. Great Lakes Dredge & Dock Co., 2007 WL 3406924 (S.D.N.Y. 2007)**

**Overview:** As part of its beach nourishment and restoration project, Great Lakes Dredge & Dock Co. utilized a coastal research amphibious buggy (CRAB) a vehicle on three tall legs. Attached to the bottom of each leg is an inflatable rubber tire. The defendant argued that the CRAB was not a vessel because it could only maneuver in shallow waters and maintained constant contact with the seabed. The court rejected this argument, noting that courts have construed “vessel” broadly to include new types of watercraft.

6. **Jordan v. Shell Oil Co., 2007 U.S. Dis. LEXIS 56337 (S.D. Tex. 2007)**

**Overview:** Plaintiff was injured while working on a tension leg platform and sought relief under the Jones Act. The defendant moved for summary judgment on the issue of whether the tension leg platform was a vessel in navigation. The defendant produced evidence showing that the platform was towed to its current location and remained attached to the seabed with tendons and pilings reaching 396 feet into the subsoil. The defendant did not intend to move the platform, and any movement would require significant re-engineering. The court agreed with the defendant and granted summary judgment, finding that the platform was not a vessel.

7. **Holmes v. Atlantic Sounding Co., 437 F.3d 441 (5th Cir. 2006).**

**Overview:** The employee sued defendants seeking damages for injuries that she allegedly sustained on her first day of work as a cook aboard the BT-213. The BT-213 was a floating dormitory, a barge with a two-story, fifty-bed sleeping quarters attached. The BT-213 was incapable of self-propulsion and was towed by tugs from place to place to house and feed employees during dredging projects. It was not intended to transport personnel, equipment, passengers, or cargo. It did have a raked bow on each end and two end tanks where the rakes were for flotation. The district court held that the BT-213 was not a vessel for purposes of the Jones Act, 46 U.S.C.S. app. § 688. But in reversing the district court's decisions, the 5th Circuit held that Stewart v. Dutra Const. Co. had broadened the definition of a vessel. The BT-213 was a vessel for Jones Act purposes because it was “practically capable of maritime transportation.”

8. **Gross v. Tonomo Marine, Inc., 2005 U.S. Dist. LEXIS 24323 (D. Pa. 2005)**

**Overview:** Plaintiff was assisting the operator's employees in unloading a barge at the time that he was injured. At issue in plaintiff's motion was whether the crane barge was, as

claimed by plaintiff, a "vessel" under 1 U.S.C.S. § 3, or whether it was a work platform. Following Stewart, the United States Supreme Court distinguishes between watercraft that are temporarily stationed in a particular location and those that are permanently affixed to the shore or ocean bottom. The former were capable of transport, even if not self-propelled, and thus, were vessels. The magistrate concluded that the crane barge was a "vessel" because it could be used for transportation, even if transportation was incidental to its purpose as a work platform.

**9. Bunch v. Canton Marine Towing Co., 419 F.3d 868 (8th Cir. 2005)**

**Overview:** Plaintiff-employee sued defendant-employer and tugboat under the Jones Act, § 33 of the Merchant Marine Act of 1920, 46 U.S.C.S. app. § 688, over injuries he sustained while a passenger on the tugboat. The United States District Court for the Eastern District of Missouri granted summary judgment to the defendants, concluding the employer was not a "seaman" covered by the Jones Act. The employer appealed. The employee worked as a barge cleaner on a cleaning barge moored to the bed of the Missouri River. He was ferried to and from the barge on the tugboat. The trial court held that he was not a seaman under the Jones Act because he did not have a substantial connection to a vessel in navigation. The appellate court disagreed. Under the Jones Act, a vessel was not defined by its capability for self-propulsion. A "vessel" is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment. The barge was originally built for navigation, but was later moored to the riverbed by spud poles. While it did not have propellers and did not move by itself, it had been moved from its mooring to travel across the river during the time the employee worked for the employer. Therefore, the cleaning barge was a vessel in navigation under the

Jones Act. As it was undisputed that the employee had a substantial connection to the barge, he was a "seaman" eligible for benefits under the Jones Act.

**10. Uzdavines v. Weeks Marine, Inc., 418 F.3d 138 (2d Cir. 2005)**

**Overview:** Petitioner widow sought review of a decision of the Benefits Review Board affirming an administrative law judge's (ALJ) disallowance of her survivor claim against respondent-employer for recovery of death benefits under 33 U.S.C.S. § 909 of the LHWCA in connection with her deceased husband's cancer from alleged exposure to asbestos while working aboard a "bucket" dredge. The Board concluded that the decedent was excluded from coverage under the LHWCA because he was a "member of a crew of a vessel" within the meaning of 33 U.S.C.S. § 902(3)(G) at the time of the alleged injury. The court concluded that the dredge was a "vessel" after applying the U.S. Supreme Court's holding in Stewart, which revised the court's previous test for "vessel" status. Further, the decedent contributed to the function of the dredge, and his connection to the dredge was substantial in both its duration of four weeks and its nature as an oiler maintaining the vessel's engines. The court rejected the widow's assertion that the doctrines of collateral and judicial estoppel precluded the employer from "relitigating" the issue of the decedent's coverage under LHWCA. Although the parties stipulated that coverage existed in the decedent's initial disability claim, the stipulation assumed that coverage existed for the narrow purposes of allowing the ALJ to resolve the employer's motion to dismiss under 33 U.S.C.S. § 933(g) and there was a mutual understanding that the stipulation would not be binding on future claims against the employer. The court denied the petition for review

III. TREATMENT OF GRUBART V. GREAT LAKES DREDGE & DOCK CO.

A. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527 (U.S. 1995)

**Facts:** In August and September 1991, Great Lakes Dredge & Dock Company replaced clusters of wooden pilings around the piers of several bridges spanning the Chicago River. Great Lakes used a crane mounted on a stationary barge to remove the old pilings and drive new ones into the river bed. The pilings were stored on a second barge, and both of the barges were moved by tug boat. In April 1992, a network of tunnels under the Chicago River began to leak near the site of some of the replaced pilings. Subsequently, the walls and ceiling of a freight tunnel completely collapsed, flooding low-lying buildings in the downtown Chicago Loop. Many downtown businesses were damaged, and vessel traffic on the river was brought to a halt.

**Procedure:** Jerome B. Grubart, Inc., one of the flooded businesses, sued Great Lakes and the City of Chicago in state court, alleging that the flooding resulted from Great Lakes' negligent pile-driving operations and from Chicago's negligent maintenance of the tunnel where the leak began. Great Lakes, invoking federal admiralty jurisdiction then filed its own action in federal court against the city, Grubart, and others, seeking limitation of liability and a declaration as to whether the dredging company committed a tort. The district court granted the city's 12(b)(1) motion to dismiss Great Lakes' action for lack of admiralty jurisdiction. The Court of Appeals for the Seventh Circuit reversed, holding that the district court had admiralty jurisdiction over Great Lakes' Limitation Act suit. The United States Supreme Court granted certiorari to review that decision.

**Held:** The damage caused to a freight tunnel running under the Chicago fell within federal admiralty jurisdiction for the purposes of determining tort liability.

**Analysis:** The Court utilized a two-part test in finding that admiralty jurisdiction applied. In order to successfully invoke federal admiralty jurisdiction, a party must first satisfy a "location test [to] determine whether the tort occurred on navigable water or whether the injury suffered on land was caused by a vessel on navigable water." Next, the party must answer a two-prong nexus/connection test: first, whether, after "assessing the general features of the type of incident involved," the incident has "a potentially disruptive impact on maritime commerce;" and, second, whether "the general character of the activity giving rise to the incident' shows a "substantial relationship to traditional maritime activity."

The court determined that the location part of the test was easily satisfied because the tort that allegedly occurred took place on navigable waters. The Court then turned to the second part: the two prong maritime nexus/connection test. In evaluating the first prong, the Court defined the incident before it as, "damage by a vessel in navigable water to an underwater structure." So defined, the Court noted that this type of incident disrupted maritime commerce. Addressing the second prong of the nexus/connection test, the Court characterized the activity giving rise to the incident as "repair or maintenance work on a navigable waterway performed from a vessel." So characterized, this type of activity is easily "substantially related to traditional maritime activity." The Court emphasized that, "as long as one of the putative tortfeasors was engaged in traditional maritime activity, the allegedly wrongful activity will 'involve' such traditional maritime activity and will meet the second nexus prong." Since the Court found that both the location test and the two prong maritime connection/nexus test had been met, admiralty jurisdiction existed.

## B. Cases Following Grubart

### 1. In re Katrina Canal Breaches Litigation, 2009 WL 1162552 (5th Cir. 2009)

**Overview:** Plaintiffs brought suit against various private engineering and construction entities claiming that the plaintiffs' hurricane damages resulted from negligent canal and drainage maintenance by the defendants. The case turned on the second prong of the Grubart nexus test: whether the defendants' activities bear a substantial relationship to traditional maritime activity. While acknowledging some similarities to Grubart, the court found a key factual distinction. In Grubart, the repair and maintenance was done to improve a navigable river. In this case, however, the project was "essentially a drainage ditch." It primarily involved land interests. Consequently, the second prong of the nexus test was not met and the claims were dismissed for lack of admiralty jurisdiction.

### 2. Tucker v. Petroleum Helicopters, Inc., 2008-CA-1019 (La. App. 4 Cir. 03/23/09)

**Overview:** Helicopter service company brought action against helicopter manufacturer to recover damages that resulted when one of the manufacturer's helicopters crashed in the Gulf of Mexico. A significant amount of the damages was recoverable under state products liability law but not recoverable under general maritime law. The plaintiff argued that admiralty jurisdiction was lacking because helicopter operations do not "bear a substantial relationship to traditional maritime activity." The court determined that helicopter transport—which gave rise to the accident—was a traditional maritime activity. In so finding, the court noted Supreme Court jurisprudence stating that helicopter transport of passengers from island to shore or vice versa is a

traditional maritime activity. Nevertheless, the court found that the helicopter accident was an appropriate circumstance to supplement federal maritime policy with Louisiana state law. Accordingly, the court heard the plaintiff's claim under its admiralty jurisdiction but applied state products liability law.

3. **Vasquez v. FCE Industries, Ltd., 2008 WL 4224396 (E.D.N.Y. 2008)**

**Overview:** The location requirement for admiralty jurisdiction—navigable waters—was met when the accident occurred on a dry-docked ship. In this case, a maritime worker was ascending a ladder in one of four interior tanks on a tank barge. The dry-dock was a “graving dock,” which is “a basin dug into the land at the water's edge that was temporarily sealed off and drained.” Nevertheless, the court found that the ship was on navigable waters for the purpose of admiralty jurisdiction.

4. **Guillotte v. Energy Ptnrs. Ltd., 2008 U.S. Dist. LEXIS 24858 (S.D. Tex. 2008)**

**Overview:** Plaintiff was injured while attempting to transfer from defendant's boat to a movable offshore production unit (MOPU). The plaintiff was attempting to complete an overhaul of the MOPU's engine while the MOPU was jacked up above navigable waters. The court found that the incident was disruptive to maritime commerce because the plaintiff's injury could have delayed completion of the overhaul. Consequently, performing such repairs on a vessel constitutes a traditional maritime activity.

5. **Carefree Cartage, Inc v. Husky Terminal & Stevedoring, Inc., 2007 WL 4358316 (W.D.Wash. 2007)**

**Overview:** “K” Line, an ocean transport company, delivered containers of chemicals in Tacoma, Washington to Husky, a stevedoring company. Husky, in turn, transported the

containers from the ship to the railroad. While Husky was transporting the containers, an accident led to a leak in the containers. The recipient of the containers sued Husky, alleging that Husky was responsible for the chemical leaks. Husky asserted that “K” Line was responsible for the damages on theories of breach of contract and negligence. The district court determined that it had admiralty jurisdiction over the breach of contract claim, because it was primarily a maritime contract. However, the court determined that it did not have admiralty jurisdiction over the tort claims under the Grubart test, because the claim did not satisfy the locus requirement. The incident leading to the chemical leaks took place on land. Consequently, the court heard the plaintiff’s tort claims under its diversity jurisdiction and applied state law.

**6. Abt v. Dickson Equip. Co., 251 Fed. Appx. 293 (5th Cir. 2007)**

**Overview:** While a crane operator was working off a dock, a section of the crane sheared off. As a result, the crane operator fell from his cab and into the water. The Fifth Circuit found that the locality test was met, even though the crane was attached to the dock, because the crane was extended over the water and plaintiff’s injuries were suffered by hitting the water. Regarding the nexus test, however, the court found that this case did not satisfy the second prong of the Grubart test. The court found that when the crane broke, it was not providing services to a vessel in navigable waters, as the plaintiff was simply moving the crane from one end of the dock to the other. There was no admiralty jurisdiction because no vessel or seaman was involved.

**7. Gruver v. Lesman Fisheries, Inc., 489 F.3d 978 (9th Cir. 2007)**

**Overview:** Plaintiff appealed the decision of the District Court for the Western District of Washington, which found that injuries resulting from a fight between a seaman and his maritime employer did not come under the court’s admiralty jurisdiction. The Ninth Circuit reversed the

lower court's decision, finding that the claim was cognizable under its admiralty jurisdiction. The parties did not dispute that the tort took place on navigable waters, and did not dispute that the fight had a potentially disruptive effect on maritime commerce. At issue was whether the activity giving rise to the claim was connected to traditional maritime activity. The court found that the wage dispute which gave rise to the fight satisfied this connection test. The court reasoned that the obligation of maritime employers to pay seamen is part of the "fundamental interest giving rise to maritime jurisdiction." Consequently, the court allowed the seaman's admiralty claim for negligence and unpaid wages.

**8. Murillo v. Caddell Dry Dock & Repair Co., 2005 U.S. Dist. LEXIS 15161 (D.N.Y. 2005)**

**Overview:** Plaintiff worker alleged that he was injured when he fell from a scaffold due to unsafe working conditions. He described the corporation's facility as a dry dock and shipping yard. Plaintiff argued that an injury occurring on a vessel in dry dock was not within the court's admiralty jurisdiction. The court held that repairs to a tugboat while in ordinary dry dock were not made on land. Because all serious repairs upon the hulls of vessels were made in dry dock, the proposition that such repairs were made on land would practically deprive the admiralty courts of their largest and most important jurisdiction in connection with repairs. The court distinguished a case cited by the worker on the ground that the vessel in that case had been hauled upon the land and was 50 feet from the water when the accident occurred.

**9. Goldsmith v. Swan Reefer A.S., 173 Fed. Appx. 983 (3d Cir. 2006)**

**Overview:** Longshoreman was injured when a ship's crane that was unloading cargo caused a container to hit the longshoreman and knock him overboard. Court found admiralty jurisdiction existed for a claim of negligence against the operator.

10. **In re Ingram Barge Co., 2006 U.S. Dist. LEXIS 44838 (D. La. 2006)**

**Overview:** Admiralty jurisdiction does not exist for defective design of levees since there is no substantial relationship to traditional maritime activity. Levees are more akin to structures like bridges, whose fixed land-based nature and non-maritime purpose had been found not to need the protection of a uniform body of law accorded vessels which roamed the sea for business purposes.

11. **Torres Vazquez v. Commercial Union Ins. Co., 367 F.Supp.2d 231 (D.P.R. 2005)**

**Overview:** Plaintiff-longshoreman was injured when a land-based crane picked up and dropped the truck he was driving on a pier. Defendant-insurer moved to dismiss the complaint for lack of maritime jurisdiction. The defendant asserted that admiralty jurisdiction was lacking because the injury was caused by neither the vessel nor one of its appurtenances, nor was the longshoreman performing a traditional maritime activity. The injuries also did not impact maritime commerce, and the tort did not occur on navigable waters, but on a pier. The district judge found that maritime jurisdiction under 46 U.S.C.S. app. § 740 was lacking, and the longshoreman was limited to state law remedies. A claim for unseaworthiness similarly failed and was ordered stricken.

#### IV. PUNITIVE DAMAGES

A. **Exxon Shipping Co. v. Baker, 128 S.Ct. 2605 (2008)**

**Facts:** Defendants employed a relapsed alcoholic to captain its oil tanker through a narrow Alaskan strait. The oil tanker ran aground, causing a major oil spill. The district court found

defendants liable for \$513.1 million in harm, and a jury assessed \$5 billion in punitive damages. After two appeals of the punitive damage award, the district court instituted punitive damages of \$4.5 billion. On the third appeal, the court vacated that award and ordered a remittitur of \$2 billion, reducing the punitive damages award to \$2.5 billion. The district court had erred in inadvertently including a \$9 million overpayment in its calculations, and the total harm component was thus \$504.1 million. The court noted that defendants' conduct was not intentionally malicious, though it was knowing and reckless, and that defendants had promptly attempted to clean up the oil spill and mitigate the damage. Thus, a punitive damages award that corresponded with the highest degree of reprehensibility did not comport with due process, inasmuch as defendants' conduct fell squarely in the middle of the fault continuum.

**Procedure:** Defendants, an oil company and its related shipping company, sought review from a decision of the United States District Court for the District of Alaska, which imposed \$4.5 billion in punitive damages after defendants' negligence caused an oil tanker to run aground and a large oil spill to occur in Alaskan waters. The court had remanded the district court's decision as to punitive damages on two previous occasions.

**Decision:** The court vacated the district court's decision and ordered a remittitur of \$2 billion, resulting in punitive damages of \$2.5 billion.

**Analysis:** With Exxon, the Court determined that punitive damages may not exceed compensatory damages in cases in which the defendant's conduct, while sufficiently blameworthy to deserve civil punishment, was not actuated by avarice or the purpose of inflicting injury. The Court indicated that this limit might not apply when compensatory damages were small or the defendant's conduct was calculated to escape detection. The Court's new rule meant that the \$2.5

billion punitive damages award against Exxon arising from the 1989 EXXON VALDEZ oil spill was reduced to \$507.5 million.

Exxon also presented another important maritime issue, one that the Court was unable to resolve: whether a corporate employer can be held vicariously liable for punitive damages based on the conduct of a "managerial agent" (here, the captain of the ship). Because the Court divided 4-4 on this issue, the United States Court of Appeals for the Ninth Circuit's affirmative answer to the question was left undisturbed, with the caveat that the Court's decision "is not precedential on the derivative liability question." Exxon v. Baker is a dramatic decision for several reasons. Among its more important features is the Court's strong affirmation of the federal admiralty courts' authority to decide substantive issues of maritime law "in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result." No member of the Court expressed any disagreement with this proposition.

The U.S. Supreme Court emphasized that the most important indicium of a punitive damages award's reasonableness is the relative reprehensibility of the defendant's conduct. The Court significantly refined the reprehensibility analysis by instructing courts to weigh five specific considerations: (1) whether the harm caused was physical as opposed to economic; (2) whether the conduct causing the plaintiff's harm showed indifference to or a reckless disregard of the health or safety of others; (3) whether the target of the conduct was financially vulnerable; (4) whether the defendant's conduct involved repeated actions as opposed to an isolated incident; and (5) whether the harm caused was the result of intentional malice, trickery, or deceit, or mere accident. The Court has not ranked these factors. It has explained, however, that only one factor

weighing in a plaintiff's favor may not be sufficient to support a punitive damages award, and the absence of all factors makes any such award suspect.

The Court considers three approaches, one verbal and two quantitative, to arrive at a standard for assessing maritime punitive damages. The Court was skeptical that verbal formulations are the best insurance against unpredictable outlier punitive awards, in light of its experience with attempts to produce consistency in the analogous business of criminal sentencing. Thus, the Court looked to quantified limits. The option of setting a hard-dollar punitive cap, however, was rejected because there is no “standard” tort or contract injury, making it difficult to settle upon a particular dollar figure as appropriate across the board; and because a judicially selected dollar cap would carry the serious drawback that the issue might not return to the docket before there was a need to revisit the figure selected. The more promising alternative was to peg punitive awards to compensatory damages using a ratio or maximum multiple. This is the model in many States and in analogous federal statutes allowing multiple damages. Accordingly, the Court found that a 1:1 ratio is a fair upper limit in such maritime cases. Applying this standard to the present case, the Court takes for granted the District Court's calculation of the total relevant compensatory damages at \$507.5 million. A punitive-to-compensatory ratio of 1:1 thus yields maximum punitive damages in that amount.

**B. After Exxon v. Baker: Atlantic Sounding Co., Inc. v. Townsend, ---S.Ct. ----, 2009 WL 1789469 (U.S. 2009).**

**Overview:** Employer of injured seaman was owner of vessel on which seaman was working at time of injury. Employer refused to pay maintenance and cure and sought declaratory

judgment as to its obligations. Seaman counterclaimed under Jones Act and general maritime law, alleging arbitrary and willful failure to pay maintenance and cure, and seeking punitive damages on that claim. The Supreme Court held that the seaman was entitled, as a matter of general maritime law, to seek punitive damages for his employer's alleged willful and wanton disregard for its maintenance and cure obligation because punitive damages are an accepted remedy under general maritime law. No case law or statute had eliminated the availability of that remedy. Petitioners did not argue that the size of punitive damages awards in maintenance and cure cases necessitates a recovery cap, which the Court has elsewhere imposed. Because punitive damages have long been an accepted remedy under general maritime law, and because nothing in the Jones Act altered this understanding, such damages for the willful and wanton disregard of the maintenance and cure obligation should remain available in the appropriate case as a matter of general maritime law.

## V. RECENT L.H.W.C.A. SITUS AND STATUS CASE LAW

### A. Coastal Production Services Inc. v. Hudson, 555 F.3d 426 (5th Cir. 2009)

**Overview:** Plaintiff worked as a junior contract platform operator, and was injured when the saltwater disposal pump on which he was working exploded. The court held that the fixed platform in question was inseparable from the adjacent sunken oil storage barge and that together they constitute a loading facility for the transshipment of cargo by vessel. As such, the platform qualifies as a maritime situs, being an element that is essential to the maritime activity of loading cargo for transport. The court also held that Hudson regularly engaged in sufficient maritime

activities to meet the status requirement of the Act. It follows that, as Hudson was injured on a maritime location and qualifies as a maritime employee, he is eligible for benefits under the L.H.W.C.A.

**B. Villaverde v. J. D'Annunzio and Sons, 2009 U.S. App. LEXIS 11853 (2nd Cir. 2009)**

**Overview:** Plaintiff appealed from a decision of the Benefits Review Board affirming the Administrative Law Judge's grant of summary judgment finding no coverage under the L.H.W.C.A for failure to meet the situs requirement. In order to qualify for coverage under the L.H.W.C.A., the maritime worker must meet both "status" and situs" requirements. Plaintiff met the status requirement because he was engaged in "maritime employment" which involved overseeing the repairs of the vessel but also contended that he satisfied the "situs" requirement because his injury occurred on a bulkhead, which he argues qualifies as a "wharf" under the statute. However, the court found that plaintiff was not injured on the bulkhead, rather, he was injured eighty-five to ninety feet landward of the bulkhead, close to a highway and no maritime activity occurred at the site where he was injured. Therefore plaintiff's argument lacked merit.

**C. In re Donjon Marine Co., Inc., 2008 WL 3153721 (S.D.N.Y. 2008)**

**Overview:** Employer owned a tugboat and hired company to perform maintenance and repair work on the tugboat at its facility. Employee of company was standing on a twelve-foot ladder sandblasting the hull of the tugboat, when he fell and sustained injuries. At the time of the incident, the tugboat was docked and the ladder was neither on board nor leaning against it. Employee's injury occurred on a floating dry dock, which has long been considered navigable waters. Therefore, he met the situs requirement. Employee's claim also met the status

requirement, when “the acts or omissions sufficiently relate to traditional maritime activity.” Ship repair falls within the scope of “traditional maritime activity.” Therefore, the L.H.W.C.A. expressly preempted employees state claims against vessel owner.

**D. Lapp v. Maersk Lines Limited, 2008 U.S. Dist. LEXIS 90935, 2008 AMC 2836 (S.D. SC 2008)**

**Overview:** During a transatlantic crossing from Bremerhaven, Germany, to Charleston, South Carolina, the Sealand Pride encountered heavy weather and several chemical containers were damaged and broke open. Defendants hired a spill management team, which employed the plaintiff, to oversee the safe cleanup and remediation of the spilled chemical. Plaintiff assisted in the surveying of the damage and the cleanup/remediation of the chemical. He was not provided with or advised to wear Personal Protective Equipment ("PPE"), such as a respirator, goggles, or a Tyvex suit. Plaintiff asserted that he spent twelve hours a day, seven days a week aboard the vessel monitoring the progress of repairs and was negligently exposed to the chemical. Plaintiff qualified as a covered employee under the L.H.W.C.A and it was his exclusion means of recovery.

**E. Daniel McElheney v. Workers Compensation Appeal Board, 596 Pa. 48 (Pa. 2008).**

**Overview:** On appeal, the issue was whether a graven dry dock was within the navigable waters of the United States and, thus, within the exclusive purview of the LHWCA, 33 U.S.C.S. § 901 et seq. The state supreme court concluded that, under the circumstances, recovery was available under both the LHWCA and the state workers’ compensation act. As a pipe-fitter welder working aboard a dry-docked vessel, the employee was clearly performing a traditional

maritime function. A graven dry dock was a land-based site within the scope of the 1972 land-based amendments to the LHWCA. Though "dry dock" was included in the original language of the LHWCA, it was undoubtedly within the scope of the statute as amended, i.e., as an area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel pursuant to 33 U.S.C.S. § 903(a). A graven dry dock, by definition, was cut and dug out of the land. Therefore, the LHWCA and the state statute shared concurrent jurisdiction over graven dry docks.

**F. McLaurin v. Noble Drilling Inc., 529 F.3d 285, (5th Cir. 2008)**

**Overview:** Plaintiff was injured while working in a shipyard as a scaffold carpenter supporting construction on a vessel owned by the defendant, when the shell of a pontoon extension fell from a crane and crushed his hand and arm. Plaintiff received medical benefits and disability compensation from his employer under the LHWCA and then sued the vessel owner, alleging negligence claims under Mississippi law, general maritime law, and §905(b) of the LHWCA. The Court of Appeals noted that §905(b) permits only the assertion of a claim for a maritime tort, and because “[i]njury on navigable waters is the sine qua non of the maritime tort,” and plaintiff’s injury took place ashore, the injury “did not occur on navigable waters” and “[failed] to meet the test for a maritime tort.” Therefore, Plaintiff’s tort claim did not satisfy the situs requirement and did not fall under the court’s admiralty jurisdiction. As such, section 905(b) did not apply, and plaintiff could proceed with his state claim.

**G. Peru v. Sharpshooter Spectrum Venture LLC, 493 F.3d 1058 (9th Cir. 2007)**

**Overview:** Plaintiff hit her head while ascending a ladder inside the USS Missouri, sustaining head and neck injuries. Plaintiff worked for defendant, the “exclusive provider of

photographic and imaging concession services for visitors” to the famous World War II battleship, moored at Pearl Harbor and open to the public. The court found the plaintiff eligible for coverage under the LHWCA, satisfying both status and situs requirements, “absent the applicability of any exclusions.” Ultimately, plaintiff fell under one of the LHWCA’s express exclusions and was excluded from coverage as an individual “employed by a retail outlet.” 33 U.S.C. § 902(3)(B).

**H. Anaya v. Traylor Brothers, Inc., 478 F.3d 251 (5th Cir. 2007)**

**Overview:** Estate of construction worker—who suffered fatal injuries on barge while constructing bridge—brought action against worker’s employer seeking exemplary damages. At the time of his accident, decedent was undoubtedly located on navigable waters, which satisfies the situs test, and the status test determines whether the LHWCA applies to the estate’s request for benefits. Neither the Fifth Circuit nor the Supreme Court provide a definitive explanation of what constitutes a transient and fortuitous presence on navigable water. Decedent spent the majority of his time working on navigable waters, performed his construction duties on a barge located on navigable waters, and a boat carried him between the shore and his work site. Further, the district court found that decedent regularly worked on the barge and the work assignment at issue was not an aberration from his normal work tasks. Therefore, the LHWCA covered the claim for benefits.

**I. Lockheed Martin Corp. v. Morganti, 412 F.3d 407 (2d Cir. 2005)**

**Overview:** Petitioners argued that the respondent could not meet the situs test of 33 U.S.C.S. § 903(a) because the waters of a lake where the deceased drowned were not navigable waters. The court of appeals held that the lake was a covered navigable waterway because the appropriate test for navigability depended on physical rather than economic characteristics of the

waterway in question. What's more, the court held that the deceased was not "transiently and fortuitously" on the navigable waters because he was on the navigable waters at least twice a week working in a floating lab. Finally, on status, the court noted that the deceased was covered by the LHWCA because there was no evidence in the record to support a conclusion that the deceased was "exclusively" employed to perform data processing as his work on the floating lab indicated that he performed analytical tasks inconsistent with the work of a data processor.

**J. Healy Tibbitts Builders, Inc. v. Dir., Office of Workers' Comp. Prog., 444 F.3d 1095 (9th Cir. 2006)**

**Overview:** Decedent was killed when a collapse occurred as he was digging a trench that was to house electrical and communication cables running to a berthing wharf for submarines. The trench was being excavated 40 to 75 feet from the shoreline. The controversy in this case centered on the terms "maritime employment" and "harbor worker," both of which the Act left undefined. The court held that the Board reasonably concluded that the decedent was a "harbor worker" even though his specific job was not uniquely maritime in nature. The decedent was directly involved in the renovation of berths designed for ships-- in this case, submarines. Any other interpretation of the Act would have excluded coverage for most of the many trade workers who contribute to the building of a harbor or dock.

**K. James v. Wards Cove Packing Co., 409 F. Supp. 2d 1252 (D. Wash. 2005), affirmed in part, reversed in part, and remanded, 209 Fed. Appx. 648 (9th Cir. 2006).**

**Overview:** District court erred when it concluded that defendant's vessels were not vessels in navigation as a matter of law because they were moored for the winter. Also, a genuine issue of material fact existed as to whether plaintiff met status test. Plaintiff presented evidence

that he spent at least two-thirds of his time working aboard defendant's ship and he performed deckhand work on both the Alaska and Seattle ships. The employee fell and was injured while disembarking from the vessel where he lived while it was moored for the winter. The employee's duties included working on shore in the welding shop and performing repairs on vessels moored at the yard. However, employee had not performed any tasks while working aboard the ship where he lived for nearly two months. However, the court held that the status requirement was met because an injury sustained while leaving quarters provided by the employer was substantially identical to an injury sustained while using recreational facilities sponsored and made available by the employer for the use of its employees. Thus, under United States Supreme Court precedent, the LHWCA applied to the present case, and to the employee's injury aboard the vessel.

L. **Northrop Grumman Ship Sys. v. Peralta, 2006 U.S. App. LEXIS 7000 (5th Cir. 2006)**

**Overview:** The defendant sustained an injury when his supervisor threw a metal chair at him, striking him in the left knee. The court denied a petition for review of the decision by the Benefits Review Board, affirming the Administrative Law Judge's decision to award benefits to the plaintiff, pursuant to the LHWCA, 33 U.S.C. § 901 et seq.

## VI. L.H.W.C.A. AMENDMENTS

Since 2006, there has been one amendment to the L.H.W.C.A. found in 33 USCS § 902: 2009. In 33 USCS § 902(3)(F) of the February 17, 2009, act, Congress deleted "**repair or dismantle**" following "build," and inserted "**or individuals employed to repair any**

**recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel." [Emphasis added].** 33 USCS § 902(3)(F) now reads as follows:

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include--

(F) individuals employed to build any recreational vessel under sixty-five feet in length, **or individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel.** [Emphasis added].