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UNDERSTANDING MARITIME EXPOSURES AND INSURANCE

Presented by

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Maritime risks can vary from operation to operation and can impact various business entities and contractors. It is quite possible to stumble into maritime exposures unknowingly. This session will explore the most significant federal laws that may apply to injured workers and insurance solutions to address the risks. You will leave with a better understanding of what triggers the application to each law, current trends in maritime law, and how insurance can be used to address these unique risks.
Notes

This file is set up for duplexed printing. Therefore, there are pages that are intentionally left blank. If you print this file, we suggest that you set your printer to duplex.
Kyle L. Potts  
Partner  
Adams and Reese LLP

Mr. Potts joined Adams and Reese in 2001 and is a partner in the Litigation Group. He focuses his practice on a variety of matters including maritime law, insurance defense, pharmaceutical matters, products liability, and premises liability claims.

In addition to practicing law, Mr. Potts is also active in the recruiting efforts of the firm. He serves on the Recruiting Committee and has served as the summer associate program coordinator for the New Orleans Office.

His significant contributions include being a part of numerous teams that handled mass or complex litigation matters and representing pro bono clients in intra-family adoptions.

Mr. Potts earned a B.A. from the University of Texas at Arlington and his Juris Doctorate from Loyola University School of Law, where he was selected to the Order of the Barristers for excellence in oral and written advocacy. He was also selected as a member of Loyola's Moot Court National Team and argued at the Willem C. Vis International Moot Court in Vienna, Austria.

His memberships and affiliations include the Federal Bar Association, Louisiana Association of Defense Counsel, Louisiana State Bar Association, and Thomas More Inn of Court. Mr. Potts was named to the Louisiana Rising Stars list in 2012 and 2013.

Pascal Ray  
Senior Vice President, Marine and Energy Practice Leader  
USI Insurance Services

Mr. Ray joined USI Insurance Services as marine and energy practice leader in March 2015. Prior to joining USI, he was the Upstream Energy practice leader for AmWINS Group, Inc., and a national resource in those areas. His experience includes developing and managing energy and marine underwriting programs. He has created, developed, and managed energy and marine binding authorities on behalf of the US domestic, the London, and the Bermudian insurance markets for the last 25 years.

Mr. Ray is an instructor for energy and marine insurance continuing education courses in his local community and has written and participated in articles involving energy and marine industry insurance issues. Current topics of issue include emerging with hydraulic fracturing in the oil and gas industry and the changing legal environment and risk for the maritime industry.
Mark J. Spansel  
Partner  
Adams and Reese LLP

Mr. Spansel is a partner with Adams and Reese LLP. He joined Adams and Reese in 1977 and has held numerous leadership positions within the firm, including serving four terms as a member of the Executive Committee, chairman of the Executive Committee, practice team leader, and member of the Expansion Committee.

Mr. Spansel also has formerly chaired the Strategic Planning Committees for the New Orleans/Baton Rouge, Houston, and Birmingham offices. In response to Hurricane Katrina, Mr. Spansel established the New Orleans/Baton Rouge Business Team and served as its first chairman.

As a senior trial lawyer, Mr. Spansel concentrates his practice in the areas of environmental and toxic tort litigation, energy and maritime litigation, commercial litigation, and complex litigation. By applying the highest analytical skills to determine the best strategic position and using his sophisticated trial and negotiation skills, Mr. Spansel is able to deliver the best outcome for his clients.

He frequently lectures on maritime law and offshore/oilfield liabilities at professional and industry seminars, including the IRMI Construction Risk Conference, the Petroleum Insurance & Environmental Protection Conference, the Loyola Longshore Conference, and the PSAM-II, an international conference devoted to the design and operation of technological systems and processes, among others.

Mr. Spansel was honored with the “Words of Wisdom” speaker’s award presented by IRMI at the Construction Risk Conference in 2007.

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.
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

Status of the Defendant

• Employer
• Non-Employer
• Vessel Owner
• Non-Vessel Owner
IDENTIFICATION OF AVAILABLE REMEDIES

Situs of Accident

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

JONES ACT

Elements of Claim

• 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
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
- Duties contribute to function of vessel or accomplishment of its mission
- Member of vessel’s crew or land-based employee who happens to be working on a vessel?

VESSEL STATUS

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

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.

Stewart v. Dutra Construction, U. S. Supreme Court (2005)

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 loss of consortium or society
- 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
JONES ACT DEFENSES

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

UNSEA WORTHINESS

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.
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

Damages
- Loss of past and future wages
- Impairment of future earning capacity
- Medical expenses
- Past and future pain, suffering, disability, humiliation and mental anguish
- Loss of consortium or society
- Prejudgment interest is discretionary, but generally awarded
- Punitive damages may be recoverable against non-employer vessel owner or bareboat charter
- If the claim is coupled with a Jones Act claim, then Jones Act damages govern
UNSEA WORTHINESS

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

WAGES, MAINTENANCE & CURE

Elements of the Claim

• Right is implicit in the contractual relationship between the seaman and the employer (“Liability without fault”)
• Designed to ensure recovery for seaman injured or who falls ill while “in the service of the vessel”
• “Answerable to the call of duty”
• No jury unless coupled with Jones Act claim
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

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 5th Circuit
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

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
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
- Damages are the same as for unseaworthiness

MARITIME TORT

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
Defenses

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

PUNITIVE DAMAGES

Punitive damages under General Maritime Law may not exceed compensatory damages if the defendant’s conduct was knowing and reckless but not intentionally malicious.

The Fifth Circuit issued its en banc decision in *Estis v. McBride Well Service, LLC*, 768 F.3d 382 (5th Cir. 2014) and ruled that a Jones Act seaman’s recovery is limited to pecuniary losses where liability is predicated on the Jones Act or unseaworthiness. Because punitive damages are non-pecuniary losses, punitive damages are not recoverable under the Jones Act or for unseaworthiness.

Plaintiffs filed a petition for a writ of certiorari to the U.S. Supreme Court on December 30, 2014, and the writ was subsequently denied.

A seaman with a Jones Act claim may also seek punitive damages under General Maritime Law for his employer’s willful and wanton refusal to pay maintenance and cure.

*Atlantic Sounding Co. v. Townsend*, U.S. Supreme Court (2009)
LONG SHORE AND HARBOR WORKERS’ COMPENSATION ACT (LHWCA)

• Compensation remedy against employer
• Injury or death
• Course and scope of employment

33 U.S.C. Sec. 901, et seq.

LHWCA

Jones Act and Longshore Act
Benefits are mutually exclusive.
LHWCA

Longshoreman
Status:
• Engaged in maritime employment
Situs:
• Upon navigable waters of the United States and adjoining areas

Status by Statute
• Longshoremen
• Workers in longshoring operations
• Harbor-Workers
• Ship repairmen
• Shipbuilders
• Ship-breakers
LHWCA

No Status by Statute

- Employees performing clerical, secretarial, security, data processing
- Employees of a club, camp, recreational operation, restaurant, museum or retail outlet
- Marina workers not engaged in marina construction
- Employees of suppliers, transporters or vendors who are temporarily performing their job on your premises
- Aquaculture workers
- Personnel building, repairing or dismantling recreational vessels under 65 feet in length or repairing small vessels under 18 tons
- Master or member of crew of any vessel (seaman)

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
LHWCA

Benefits
• Medical
• Compensation
  – Temporary
  – Permanent Partial
  – Permanent Total
• Death

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
**LHWCA**

**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

33 U.S.C. Sec. 905 (a)

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**PENALTY FOR FAILURE TO SECURE PAYMENT OF COMPENSATION**

**Misdemeanor:**
- Fined up to $10k and/or
- Imprisoned for up to one year

**Corporate president, secretary and treasurer:**
- Severally liable for such fine or imprisonment
- Severally personally liable, jointly with such corporation, for any benefits owed to any employee

33 U.S.C. Sec. 938 (a)
WHY SEAMEN AND MARITIME EMPLOYEES ARE TREATED DIFFERENTLY FROM OTHER OCCUPATIONS

1. **Waterborne commerce**: unique and necessary contribution to America’s economy

2. **US Merchant Marine**: a critical component of the US national security strategy; a significant contribution to wartime efforts and times of emergency unlike any other occupation

3. **Maritime perils**: risks in this occupational workplace unlike any other

4. **Unique history**: as the history of seamen’s rights evolved in America, so did maritime law

5. **Special treatment**: seamen are treated differently under the maritime laws that govern seamen’s rights

THE UNITED STATES IS A LEADING MARITIME NATION AND THE US MERCHANT MARINE FLEET IS THE BACKBONE OF THE US MARITIME INDUSTRY.

- The United States is home to some of the largest ports in the world.
- Over 40,000 vessels make up the US Merchant Marine fleet.
- Transports over 100 million passengers on ferries and other forms of maritime transport.
- Millions of jobs created by the various maritime industries.
- $29 billion in maritime wages.
- Contributes $11 billion in taxes.
- $100 billion in annual economic output.
America’s marine highway system is made up of 21 maritime routes.

To understand seaman status in the United States, you must understand the contributions and sacrifices our Merchant Marines have made in the last two World Wars.

Many thousands of Merchant Marines have given their lives to America’s war efforts.
THE US MERCHANT MARINES WERE A VITAL PART OF THE WWI AND WWII WAR EFFORTS.

WWII MERCHANT MARINE LOSSES

Number of ships lost: 1,614
Number of sailor deaths: 9,521
Number wounded: 12,000
Number rescued: 67,700
SPECIAL TREATMENT OF SEAMEN

- All Merchant Marines had free medical and dental care until 1981.
- Any public hospital.
- Any Merchant Marine Hospital.
- Maintenance and cure was easier to understand at this time.

SEAMEN USED TO BE TREATED HARSHLY AND SUFFERED SOME OF THE WORST WORKING AND LIVING CONDITIONS IMAGINABLE.
WALKING THE PLANK WAS AN ACTUAL PUNISHMENT FOR SAILORS FOR SERIOUS OFFENSES.

THE JUDICIARY ACT OF 1789*
EXCESSIVE FLOGGING OUTLAWED

“... or upon the high seas; where no other punishment than whipping, not exceeding thirty stripes ...”

Also gave federal courts exclusive jurisdiction in admiralty matters
IN 1850, CONGRESS ABOLISHED FLOGGING AS A SYSTEM OF DISCIPLINING SAILORS.

THE PROGRESSIVE ERA AND ITS INFLUENCE ON MARITIME LAW
SEAMEN ARE WARDS OF THE COURT

“Seamen are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labor. They are generally poor and friendless, and acquire habits of gross indulgent, carelessness, and improvidence. If some provision be not made for them in sickness at the expense of the ship, they must often in foreign ports suffer the accumulated evils of disease and poverty, and sometimes perish from the want of suitable nourishment …”

Harden v. Garden, 11F. CAS 480 (C.C.D. Me. 1823) (No. 6,047)

MARITIME EMPLOYERS HAVE A HIGHER DUTY OF CARE TO MARITIME EMPLOYEES

“The vessel owner owes his seamen an obligation of fostering protection, which typically translates into a higher duty of care than that accorded to land based torts”

MARITIME INJURY CLAIMS ARE LIBERALLY INTERPRETED BY COURTS

“The Jones Act is entitled to a liberal construction to accomplish its beneficent purposes.”

_Rannals v. Diamond Jo Casino, 265 F.3d 442 (6th Cir. 2001)_

GREATER PROTECTIONS FOR SEAMEN

“Furthermore, as the Supreme Court noted in Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424, 83 L. Ed. 265, 59 S. Ct. 262 (1939), the Jones Act was intended to expand—not limit—protections for seamen, and usually disallows ‘the application of rules of common law which would affect seamen harshly.’”

6th Circuit in _Rannals v. Diamond Jo Casino, 265 F.3d 442 (6th Cir. 2001)_
SEAMEN HAVE MUCH LESS BURDEN OF PROOF

“The ‘quantum of evidence necessary to support a finding of Jones Act negligence is less than that required for common law negligence,… and even the slightest negligence is sufficient to sustain a finding of liability.’”

Ribitski v. Canmar Reading & Bates, 111 F.3d 658 (9th Cir. 1997)

KEY DIFFERENCE BETWEEN SEAMAN AND ALL OTHER CLASSES OF EMPLOYEES

Working on a vessel exposes maritime employees to the perils of the sea.
THOMAS JEFFERSON IS THE FATHER OF MARITIME LAW IN THE US

EVOLUTION OF MEL INSURANCE

- Ancient Rights of a Seaman
  - Maintenance and Cure
  - Law of Seaworthiness
DEVELOPMENT OF THE US MARITIME LAW

- 1784 US Constitution
- 1823 Maintenance and Cure
- 1851 Limitation of Liability Act
- 1903 Law of Seaworthiness
- 1920

Death on the High Seas Act
Merchant Marine Act aka Jones Act

MEL IS THE BROADEST WORKER COMPENSATION SYSTEM IN AMERICA

- No limits on claims
- Not regulated

MEL typically gives a much greater benefit to an injured worker.

Because of this injured workers will try to claim seaman status even though they may not qualify.
MEL claim payouts are typically larger than Workers Compensation or LHWCA.

- P&I Insurance
- MEL Insurance
  - Hard MEL
  - Soft MEL
Maritime Employers Liability
Also Known As:

- Marine Employers Liability
- Jones Act Coverage
- Crew Coverage
- Maritime Coverage
- Admiralty Coverage

Unlike WC and LHWCA Insurance

- There is no law requiring maritime employers to buy MEL
- Consequences of not buying MEL:
  1. Transportation, wages, maintenance and cure paid out of pocket
  2. Defense of Jones Act negligence and or unseaworthiness claims out of pocket
  3. Payment of judgment out of pocket
  4. Probable E&O claim against the insurance agent
UNLIKE WC AND LHWCA INSURANCE

- Maritime employers liability insurance is not regulated either on the state or federal levels.
- There is no standard MEL policy form.
- There are no standard rates.
- Coverage can vary greatly among MEL products.

MARITIME EMPLOYERS LIABILITY

- MEL is tort-based and injured workers can sue their employers for damages.
- There is no legal cap or limit to how large a claim can be.
- The laws involved greatly work in favor of injured parties.
- Attorney fees do not have to be approved by a governing body.
- MEL claims are very attractive to plaintiff attorneys and they pursue clients with vigor.
• Maritime Employers Liability insurance is based on numerous laws and acts that are complicated, cumbersome, and confusing.
• Maritime law can change.
• There is no certainty or control with MEL claims like with other workers compensation insurances.
• There is no precise way to value MEL claims because there are so many variables involved.
• State courts can in some cases apply maritime law that is not consistent with Federal case law resulting in unexpected judgments.

UNLIKE WC AND USL&H INSURANCE

With MEL there are only two ways a claimant can recover compensation for his claim:

1. Through agreement with the employer for the amount of and extent of compensation by both parties.
2. By suing the employer under maritime law.
COVERAGE INTENT OF THE MEL INSURANCE POLICY

• Covers loss of life, illness, and injury to those employees classified as **seamen** in the service of a **vessel**.
• MEL insurance coverage responds through a puzzle of general maritime laws and acts.

KEY MEL REMEDIES AVAILABLE UNDER THE POLICY
1. Understand the account and its exposures.
2. Quality submissions do the best job with underwriters and for the client.
3. MEL insurance is negotiable. Know what your client needs and negotiate terms for it.
4. Get the proper navigation/territorial limits for your client.

5. Use “if any” for payroll instead of zero or make sure this is clarified in the application.
6. Get accurate payroll for the submission and be prepared to explain it.
7. Never accept a “named crew” endorsement.
8. Zone of uncertainty. For accounts with uncertain MEL and USL&HW exposures, always offer both.
9. Advise your clients of punitive damages and how serious the consequences can be.
10. If it floats, impress upon your client the new legal realm they will be entering if they buy a vessel and to seriously consider renting or leasing a vessel.
I. SEAMAN STATUS

_Citation_:

_Alexander v. Express Energy Services Operating, L.P., 784 F.3d 1032 (5th Cir. 2015)_

Plaintiff was employed as a lead hand/operator in the plug and abandonment (“P&A”) team at Express Energy Services Operating, which specialized in plugging decommissioned oil wells on various platforms off the coast of Louisiana for Express’s customers. This particular case arose from an injury sustained by the plaintiff while working on a P&A project on a platform owned by Apache Corporation which had four wells on it. At the time of the accident, a liftboat (owned by Aries Marine Corporation) was positioned next to the Apache platform, with a catwalk connecting the vessel to the platform. The record shows that the permanent crane, which was operated by an Aries employee for the benefit of the P&A crew, was located on the liftboat, while other equipment, including wireline equipment, was located on the platform. Plaintiff testified that he and the P&A crew had set up the equipment on the platform before work began, and he was working on the platform. Plaintiff was injured when a wireline from the crane snapped, dropping a bridge plug/tool combination which had been suspended a foot above the deck, which then rolled onto his foot.

Plaintiff filed suit under the Jones Act. His employer, Express, filed a motion for summary judgment on seaman status, arguing that the plaintiff was a platform-based worker who failed to satisfy either prong of the _Chandris_ seaman status test. With respect to the first prong, Express argued that the plaintiff did not contribute to the function of a vessel or the accomplishment of its mission because he worked on non-vessel fixed platforms. With respect to
the second prong, Express argued that even though the plaintiff had demonstrated that approximately 35% of his P&A jobs involved the use of an adjacent liftboat, he had failed to demonstrate that he spent at least 30% of his total work time on the adjacent liftboat. In response, the plaintiff argued that he did contribute to the function of the liftboat, and that that all of his time spent on jobs that used an adjacent vessel (here, at least 35%) should be allowed to count toward the Chandris temporal requirement, without regard to how much time he actually spent on the vessel itself. The plaintiff never offered any evidence that he actually spent 30% or more of his work time on a vessel. The district court granted Express’s motion for summary judgment on the first prong, concluding that the plaintiff’s duties did not contribute to the function of a vessel because they related to the fixed platform, not the vessel. The district court opined that the plaintiff had also failed to meet the second prong.

On appeal, the U.S. Fifth Circuit determined that the undisputed evidence showed that approximately 64% of the plaintiff’s jobs involved a fixed platform only, without any use of an adjacent vessel. Even for the remaining jobs, which did involve a vessel adjacent to the platform, the plaintiff’s work occurred mostly on the platform. The Fifth Circuit held that “[i]t is not sufficient under Chandris (or indeed under Barrett) that [the plaintiff] was merely near a vessel on more than 30% of his jobs or that he performed some incidental work on a vessel on those jobs; to be a seaman, he must show that he actually worked on a vessel at least 30% of the time.” Because the plaintiff had failed to produce sufficient evidence to prove that point, which is an essential element of seaman status, the appellate court affirmed the district court’s ruling that the plaintiff was not a seaman.
Wilcox v. Wild Well Control, Inc., 794 F.3d 531 (5th Cir. 2015), as revised (Aug. 11, 2015)

 Plaintiff was a welder employed by a welding contractor that provided various offshore construction, fabrication, and repair services. Over the course of his employment, the plaintiff worked in numerous locations, including a fabrication yard and on various rigs, barges, and vessels owned by customers of his employer. The plaintiff estimated that he spent less than thirty percent of his time in the service of any one vessel of group of vessels.

 The defendant, Wild Well Control, Inc., contracted with the plaintiff’s nominal employer to obtain some welders to assist with the decommissioning of a well in the Gulf of Mexico, and the plaintiff was included among the welders selected to work for the defendant. The job was expected to last two months, during which time the plaintiff was considered to be a borrowed employee of the defendant. The plaintiff was required to live on the defendant’s barge, which was on site at the well to provide support for the decommissioning work. While working on this job, the plaintiff sustained injuries when gasses exploded while he was welding inside on the well platform.

 The plaintiff filed suit against his borrowing employer for negligence under the Jones Act, claiming that he had a substantial connection to the barge that provided support for the decommissioning project. The borrowing employer subsequently filed a motion for summary judgment to dismiss the plaintiff’s Jones Act claim, arguing that the plaintiff was not a seaman. The district court granted summary judgment in favor of the borrowing employer on the basis that the plaintiff was not able to satisfy the substantial-connection prong of the Chandris test.

 On appeal, the plaintiff argued that the district court erred in its substantial-connection analysis by determining his seaman status by referring only to his entire employment with his nominal employer, rather than to his more limited period of employment with the borrowed
employer only. Plaintiff argued that he should be considered as having “started a new job with a
ew employer” when he began work as a borrowed employee, thereby making his borrowing
employer his current employer for the purposes of the seaman-status inquiry. The plaintiff
argued that under this analysis, he has satisfied the substantial-connection prong because he
spent more than thirty percent of his employment with the borrowed employer aboard a vessel.

The only issue addressed on appeal was related to the second-prong of the *Chandris* test
for seaman status; namely, the requirement that “a seaman must have a connection to a vessel in
navigation (or to an identifiable group of such vessels) that is substantial in terms of both its
duration and its nature.” The court noted that the fundamental purpose of this second prong
inquiry is “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.” “Land-based maritime workers do not become seamen because they happen to be
working on board a vessel when they are injured, and seamen do not lose Jones Act protection
when the course of their service to a vessel takes them ashore.” The court further observed that it
had “generally declined to find seaman status where the employee spent less than 30 percent of
his time aboard ship.”

While recognizing that courts are not required to always look to a borrowed employee’s
entire employment with his nominal employer when determining seaman status, the Fifth Circuit
specifically declined to adopt a rule that borrowed-employee status automatically requires courts
to look only to the borrowed employee’s period of employment with the borrowing employer. In
this case, the court found that there was “good reason” to distinguish the plaintiff from the other
permanent employees who worked for the defendant. Over the course of his entire employment
with his nominal employer, the plaintiff had worked for 34 different customers on 191 different

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jobs, both offshore and onshore. He was only assigned to work for the borrowing employer for one specific project, and that project had a clear end date only two months after it began. Furthermore, the plaintiff’s essential duties never changed — his primary duty continued to be welding. The court noted that the plaintiff did no present any evidence which suggested a “fundamental change in status” had occurred.

After considering the facts and “focusing on the essence of what it means to be a seaman,” the Fifth Circuit concluded that the plaintiff had failed to demonstrate a genuine issue of material fact from which a reasonable jury could conclude that he qualified for seaman status under the Jones Act, and the summary judgment in favor of the defendant was affirmed.


Plaintiff was employed by Montco Oilfield Contractors (“MOC”) as an offshore welder engaged in the deconstruction of decommissioned offshore platforms. While performing this work, the plaintiff and other MOC employees were stationed aboard the L/B ROBERT, a lift vessel owned and operated by Montco Offshore, Inc. that was jacked down beside the platform being decommissioned. The MOC employees rode on the L/B ROBERT from one job site to another. The MOC employees ate and slept aboard the L/B ROBERT. Daily production and safety meetings were also held aboard the L/B ROBERT, and the MOC welders’ “field office” was a shipping container located on the L/B ROBERT’s deck.

The welders’ job responsibilities required them to work on the platform, a materials barge, and the L/B ROBERT. On the platform, the welders would cut material to be taken away and install lifting eyes on that material. Once the scrap metal was lifted to the material barge by the L/B ROBERT’s cranes, the MOC welders would weld it in place for transport. On the L/B
ROBERT the MOC welders did preparatory work related to the work on the platform or material barge.

During a two-week hitch, the plaintiff became ill and was ultimately sent ashore on a crewboat after repeatedly complaining to his supervisor and the L/B ROBERT’s captain and medic. Shortly after arriving on shore, he went the emergency room and was diagnosed with pneumococcal meningitis, causing him to miss approximately nine weeks of work. The plaintiff subsequently filed suit against MOC and Montco Offshore alleging that he was a seaman and crew member of the L/B ROBERT when he contracted pneumococcal meningitis, that he sustained brain damage and other injuries because of the defendants’ failure to provide immediate medical care, and that the defendants were liable under the Jones Act and the general maritime law of unseaworthiness.

The defendants filed a motion for partial summary judgment arguing that the plaintiff did not qualify as a seaman because less than 30% of his work was performed on the L/B ROBERT. Defendants argued that the plaintiff was not a member of the L/B ROBERT’s crew, and instead characterized him as a platform-based worker and a passenger aboard the L/B ROBERT. They argued that the vessel’s mission was to serve as a “floating hotel” for the MOC employees who were working on decommissioning the platform. Defendants further argued that the precedents set by the U.S. Fifth Circuit in prior cases (including *Hufnagel* and *Alexander v. Express Energy Servs. Operating, L.P.*, discussed supra) are directly on point and dictate that the plaintiff could not satisfy the test for seaman status.

The court disagreed and found the plaintiff’s situation distinguishable from the plaintiffs in *Hufnagel* and *Alexander*. Specifically, the vessels at issue in those cases were owned and controlled by entities completely separate from plaintiffs’ employers. Further, neither Hufnagel
nor Alexander had any duties pertaining to the vessels at issue. However, in the instant case, the
court found genuine issues of material fact regarding the plaintiff’s precise relationship to the
L/B ROBERT. For example, the plaintiff was employed by MOC and permanently assigned to
the L/B ROBERT, which was owned and operated by Montco Offshore, a related entity.
Additionally, no evidence was introduced to evaluate whether MOC actually controlled the L/B
ROBERT, or whether MOC’s employees were Montco Offshore’s borrowed servants. Similarly,
the record was unclear as to whether the materials barges used in the work were controlled by
MOC. Furthermore, the plaintiff’s supervisor testified that the plaintiff would perform
maintenance work on the vessel when asked by the vessel captain, and the plaintiff also
performed some of his welding work while on board the L/B ROBERT. As a result, the court
concluded that these genuine issues of material fact precluded the granting of summary judgment
on seaman status.

Coffin v. Blessey Marine Servs., Inc., 771 F.3d 276 (5th Cir. 2014)

The plaintiffs, all of whom served as tankermen on a ship, brought an action against the
vessel owner, alleging violations of overtime pay provisions of Fair Labor Standards Act
(FLSA). The vessel owner filed a motion for summary judgment arguing that the plaintiffs were
exempt from the FLSA as seamen.

As tankermen, the plaintiffs had gained deckhand experience and received required
training in the loading and unloading of liquid cargo from a barge. The plaintiffs were vessel-
based tankermen and shared several duties also performed by deckhands, along with various
additional tasks related both to the maintenance of the barges and the loading and unloading
process. The parties agreed that most of the plaintiffs’ tasks were seaman work, with the
exception of the plaintiffs’ loading and unloading duties.
The vessel owner produced extensive evidence during discovery suggesting that the
Plaintiffs’ loading and unloading duties were done as part of the vessel crew and aided the
seaworthiness of the vessel. In response, the plaintiffs pointed to the case of *Owens v. SeaRiver
Maritime, Inc.*, 272 F.3d 698 (5th Cir. 2001), a case holding that a land-based tankermen did not
qualify for the seamen exemption. Plaintiffs also pointed to DOL regulations indicating that
seamen can lose that status if they spend a substantial amount of time (20% or more) performing
non-seamen duties, such as loading and unloading cargo. In response, the vessel owner argued
that *Owens* should be limited to land-based tankermen only and not apply to vessel-based
tankermen.

The lower court denied the vessel owner’s motion, holding that *Owens* found loading and
unloading were not seamen duties as a matter of law, and if a tankerman spent more than 20% of
his time loading/unloading, that tankerman was not exempt under the “seamen” exemption.

On appeal, the Fifth Circuit distinguished the *Owens* case, limiting it to land-based
tankermen only. In the case of vessel-based tankermen, the Fifth Circuit held that “loading and
unloading was seaman work when done by vessel-based Plaintiffs” who worked, ate, and slept
on board their assigned barges. The Fifth Circuit ordered the lower court to enter judgment in
favor of the vessel owner. This ruling strengthens the “seamen” exemption because duties that
have been categorized as “non-seamen” work are found to be seamen’s work if performed by
vessel-based seamen.


The plaintiff was a dockbuilder who was injured while replacing a crane block cable after
the crane block tipped over and crushed his left leg (a crane block is a large steel apparatus
weighing over one ton that is suspended from cables that hang from the crane’s boom).
The plaintiff sought to recover damages as a Jones Act seaman. In support of this claim, plaintiff argued that he spent more than half his working hours during a five-month period aboard barges, primarily transporting and assembling construction supplies, while working on the repair of a Staten Island pier. He would sometimes help the tugboat and barge crews with handling lines and moving spuds, and he occasionally helped bilge pump the barge. Although the barges were usually moored to a pier, they were occasionally unmoored and moved along the East River with plaintiff aboard, including a trip that took place the day before the accident.

The court found that the plaintiff did not qualify as a seaman. In rendering this decision, the court noted that the barges were almost always secured to a pier, that none of the plaintiff’s tasks involved sea-based activities, and that he never operated the barges or otherwise assisted in their navigation. Even assuming the plaintiff was present for and assisted with every barge movement, the court concluded that he still would have only spent 5–10% of his work time involved in navigation-related activities. The court also considered the fact that the plaintiff belonged to the dockbuilders’ union, had no Coast Guard license or other “seaman’s papers,” and never spent the night aboard any of the barges. The court found that this level of involvement with a vessel was not sufficient to make the plaintiff a “seaman” under the Jones Act.

**Wilcox v. Welders, 969 F. Supp. 2d 668 (E.D. La. 2013)**

Plaintiff suffered serious injuries while performing welding services on a fixed platform located on the Outer Continental Shelf in the Gulf of Mexico for the purpose of disassembling and demolishing the platform. The work assignment required that plaintiff live aboard a barge owned by the platform’s owner. Plaintiff alleges that he was injured when undetected gasses exploded as he was welding inside a pipe on the platform. Plaintiff sought to recover as a Jones Act seaman, and his employer subsequently filed a motion for summary judgment challenging
his alleged seaman status on the basis that plaintiff was nothing more than a land-based welder and that he did not have the requisite connection to a vessel for seaman status. Plaintiff argued that he meets the test for Jones Act seaman status because he believed himself to be “permanently reassigned” as a member of the barge crew for this particular assignment and that the totality of the time he spent working offshore during the course of his employment qualified him as a seaman.

The court held that the plaintiff did not qualify as a Jones Act seaman because he did not present sufficient evidence to show that at least 30% of his work was spent in the service of a vessel or identifiable group of vessels under common ownership of control. The court rejected the plaintiff’s argument that he had been “permanently reassigned” to the barge vessel. Rather, the court concluded that he was a land-based employee and that, in the absence of the aforementioned 30% requirement, such a classification could only be changed if he had received a new work assignment before his accident which permanently changed either his essential duties or his work location. Evidence that plaintiff received training in offshore work and safety, that he was treated as part of the crew, or that he was ordered to work a crew position is insufficient to meet this requirement. The court held that an otherwise land-based worker must show that his “essential duties” had “substantially or fundamentally changed,” and not merely that he had served on a boat sporadically, in order to obtain seaman status.


Plaintiff was assigned as a mechanic performing mechanical and welding on boats and barges that were moored to a floating dock, and he would occasionally assist in the repositioning of those vessels. He commuted to work each day and did not sleep aboard any vessels. Plaintiff
was injured after falling into an open manhole while aboard a barge, after which he sued seeking to be compensated as a Jones Act seaman.

In considering whether plaintiff’s connection to the ships was substantial enough to warrant seaman status, the court considered whether he was regularly exposed to the perils of the sea. Plaintiff argued that he was required to wear a life preserver at all times and that he faced hazards such as wind gusts, river turbulence, icy barge decks, inclement weather, and long stepping from barge to barge. However, the court reasoned that those activities and risks were associated with longshoremen and went on to list the following potential risks as more indicative of a seaman’s duties: the need to fight fires without outside assistance, the need to abandon ship, the need to survive exposure to inclement weather until help arrives, potential delay or inconvenience of being transported offsite for medical attention, and being stuck on a vessel for extended periods of time until the next port call.

**MacLay v. M/V SAHARA, 926 F. Supp. 2d 1209 (W.D. Wash. 2013)**

Plaintiff brought a maritime survival and wrongful death suit against the vessel owner following the death of her daughter after a fall from the vessel. The vessel was a decommissioned oceanographic research vessel that the defendant had purchased for conversion into a luxury floating hotel. The decedent was initially hired to perform clerical and administrative duties shore-side, but her office was moved onto the vessel a short time later. She routinely engaged in general labor to assist in the conversion process, including heavy cleaning and disposing of scrap metal. Plaintiff estimated that roughly fifty percent of the decedent’s daily activities involved general labor on the vessel. At the time of the decedent’s death, the conversion project was substantially incomplete, the vessel had not received stability letters or
been classed by a society, and millions of dollars of work remained before the vessel could be returned to service.

Plaintiff brought a summary judgment seeking a determination that the decedent was covered under the LHWCA, but the vessel owner argued that she was a Jones Act seaman and thus not eligible for LHWCA coverage.

The Court concluded that the decedent was not a Jones Act seaman. In support of this finding, the court noted that the vessel was not in navigation at the time of the accident and the majority of the conversion work remained substantially incomplete. It was also undisputed that the vessel was not yet in a condition to be used in commerce as a luxury floating hotel. The court further noted that the vessel was not seaworthy because it had not received stability letters or been classed.


Two ironworkers, employed by Boh Brothers, were injured in the reconstruction of I-10 across Lake Pontchartrain. The workers performed their work on a derrick barge and also performed part of their work from the bridge structure. The workers were injured while being transported by a crew boat, which one of the plaintiffs was operating. The district court ultimately determined that both workers were seaman because they contributed to the mission of the derrick barge and had a connection to it which was substantial in nature and duration. One of the plaintiffs in the case was an ironworker foreman who spent a substantial portion of his time, 30-95% on the derrick barge, which moved around the work site, and his work sufficiently exposed him to traditional maritime perils. All of the time that the plaintiff spent aboard the barge was devoted to the furtherance and supervision of the crane barge’s objective, which was the construction of the bridge. The plaintiff was also cross-trained to perform a variety of tasks related to the maintenance and function of the barge. The Fifth Circuit noted the fact that the
plaintiff returned home daily did not remove him from exposure to cognizable dangers of the sea. Nor did the fact that ironworkers are traditionally land-based negate the seaman status to which plaintiff would otherwise be entitled by virtue of his connection with the vessel.

The second plaintiff in the case was a similarly-situated ironworker who was injured in the same fashion, but the injury occurred on his first day of work. The Fifth Circuit held that the appropriate scope of the duration inquiry was not limited to the day of his injury, but included the full breadth of the intended scope and duties of his employment. The plaintiff was a full-time employee with an expectation that his employment would extend indefinitely until the bridge construction project was completed. He also presented testimony that his job responsibilities would have required him to work on the vessel between 40–60% of the time. Consequently, the Fifth Circuit affirmed the district court’s finding that the plaintiffs were seaman.

**Keller Foundation/Case Foundation v. Tracy, et al., 696 F.3d 835 (9th Cir. 2012)**

Plaintiff had been employed with Keller Foundation and sustained an injury while with a subsequent employer, Global International. As the “last employer”, under the LHWCA, Global could be held responsible for the full compensatory award for a cumulative trauma claim. There was no dispute that plaintiff was covered by the LHWCA while with Keller. Plaintiff was hired as a barge foreman by Global International, but his ship remained docked in a shipyard for the first three weeks of his employment. During this three week period prior to setting sail, the plaintiff performed maintenance and made modifications to his ship, along with assisting with the loading of other vessels in the shipyard. Once the ship set sail, the plaintiff served onboard as barge foreman while it was at sea. He was then assigned to another pipe-laying barge for 4-6 months as an anchor foreman. Thereafter he had land-based assignments for a couple of years until reassigned to a pipe-laying barge. He was working on the barge when he suffered a heart
attack. Plaintiff pursued a claim for benefits under the LHWCA for hearing loss and heart condition. The ALJ determined there was cumulative trauma, but found that he was not covered by the Act while with Global. In hopes of obtaining coverage under the LHWCA, the plaintiff argued that the initial three week period spent working in the shipyard precluded his obtaining seaman status. However, the Ninth Circuit held that he was a seaman because his onshore duties during those initial weeks still contributed to the function of the vessel and, under the totality of circumstances test, there were no grounds for separating his first three weeks from the rest of his assignment.

**Beech v. Hercules Drilling Co., L.L.C., 691 F.3d 566 (5th Cir. 2012)**

Plaintiff died after his co-worker accidentally shot him aboard a Hercules-owned vessel. Plaintiff was a crane operator working aboard a jack-up drilling rig owned by Hercules. The co-worker had accidentally brought a firearm on board, which violated Hercules’ policy prohibiting weapons on the vessel. After discovering the firearm in some of his laundry, the co-worker did not tell anyone that he had inadvertently brought it aboard. Instead, he kept it hidden in his locker on the rig. On the night of the plaintiff’s death, this co-worker was the only crewman on duty. His duties that night were to monitor the rig’s generator, to check certain equipment, and to report any suspicious activity or problems. Hercules encouraged its crew to stay in the break room while performing these duties and to watch television and commiserate with fellow crew members (watching television was a method of monitoring the generator because if something were to go wrong with the generator, the television would turn off). The plaintiff was not on duty but was aboard the vessel and subject to the call of duty at any time. Both men were in the rig’s television room, watching television and chatting. Plaintiff mentioned that he was thinking about purchasing a small firearm, the co-worker left the break room and went to show him the gun he...
had. As the co-worker sat back down in the TV room, his arm bumped a part of the couch, and the firearm accidentally discharged, mortally wounding the plaintiff.

Plaintiff’s wife brought a wrongful death action against Hercules under the Jones Act. In order to hold an employer vicariously liable under the Jones Act for an employee’s injury caused by the negligence of a co-employee, a plaintiff must show that both employees were acting in the course of their employment at the time of the accident. Regardless of whether the injury-causing conduct was negligent or intentional, the test for whether a seaman was acting within the course and scope of his employment is whether his actions at the time of the injury were in furtherance of his employer's business interests. The Fifth Circuit held that leaving the break room to retrieve a loaded firearm took the co-employee outside the course and scope of his employment, and therefore no recovery was possible under the Jones Act. The Fifth Circuit also noted that the safety policy violation, while not dispositive in this case, was relevant because it provided guidance regarding what type of employee conduct is in furtherance of Hercules’ business interests.

**Naquin v. Elevating Boats, LLC, 842 F. Supp. 2d 1008 (E.D. La. 2012)**

Plaintiff was a repair supervisor who oversaw the repair of lift boats and cranes owned by his company and its customers. He was injured when the pedestal of the crane he was operating snapped and crashed into a neighboring building. This repair work was often done onboard the vessels while they were either jacked up or moored at the employer’s dock. Plaintiff estimated that he spent 70–75% of his working time aboard vessels at the employer’s dock, and only 25% of his time spent on land-based work. A “substantial part” of his work also involved deckhand duties, such as painting, repairing leaks, engine maintenance, fixing cracks in the hulls of the vessels, chipping, and cleaning the vessels, as well as other routine maintenance activities. The
plaintiff also routinely assisted in repositioning the ships in the docking facility (approximately 2–3 times per week), handling the ship’s lines, and tying the vessel off. He would also sometimes operate the cranes on board the lift boats to load or unload heavy pieces of machinery from the dock. In addition, plaintiff would prepare the vessels for Coast Guard inspections and personally walk through the vessels with Coast Guard officials during their inspections. Plaintiff was also aboard his employer’s vessels for various assignments, including sea trials for new vessels. The court noted that these duties are more closely akin to the duties of a seaman than a land-based ship repairman, denied the defendant’s motion for summary judgment seeking to dismiss the plaintiff’s claim of seaman status.


Plaintiff had been working as an excavator operator on a transloader barge for three weeks at the time of injury, and none of his previous positions or job responsibilities had ever required him to work on a barge or other floating equipment. He was injured when he fell into the river after unloading coal from the barge onto a platform. The excavator was located on the transloader barge, which was moored in a river, and was used to unload coal from customers’ barges. Plaintiff’s job responsibilities also included performing the same tasks as a deckhand. The plaintiff sued under the Jones Act and general maritime law for damages arising from his injuries.

The court found that the plaintiff was a “seaman” for purposes of the Jones Act and general maritime law because his reassignment to the transloader barge was permanent and he was regularly exposed to the perils of the sea. Additionally, plaintiff’s work as an excavator operator was vital to the unloading of coal, which was the sole purpose of the barge.

Plaintiff was a marine captain and ship master employed by Conoco Phillips. In 2009, he sued Conoco under the Jones Act for injuries and distress that allegedly arose from his emotional breakdown due to the stress of his job. However, plaintiff admitted in his deposition that the “majority” of his work involved construction of the vessels as opposed to time at sea. In fact, Conoco calculated that the plaintiff has spent only 95 days at sea in the 5 years preceding his breakdown (which totaled to only 19% of his employment).

The court found that the plaintiff was not a seaman under the Jones Act because the plaintiff spent “almost all of his time assigned to land-based construction tasks. The court noted that even if it were to disregard the 30% standard rule, the plaintiff would still not qualify as a seaman because he was at home and on leave from work at the time of his breakdown and was in no way exposed to the perils of the sea.


Plaintiff was hired by an independent contractor to perform sandblasting and painting services on petroleum platforms. He injured his shoulder while moving some pick boards on the platform. According to plaintiff’s supervisor, 80-90% of plaintiff’s work time was spent on platforms. On the other hand, the plaintiff testified that he slept and ate meals on a supply boat and that he also relied on that supply boat for transportation to the platforms. However, the court did not factor that time into its analysis because it was not spent “in the service of a vessel in navigation.” The court found that plaintiff lacked the substantial connection to a vessel that is required to obtain seaman status under the Jones Act. Furthermore, plaintiff was never actually assigned to a vessel except on a temporary and transient basis that formed far less than 30% of
his total work time on job. The court granted the defendant’s motion for summary judgment and
denied seaman status to the plaintiff.

Teaver v. Seatrax of Louisiana, Inc., 434 F. App’x 307 (5th Cir. 2011)

Plaintiff was hired as a crane operator/installer for Seatrax. On his very first assignment, he was permanently paralyzed while disassembling a crane on an offshore platform. For this initial assignment, which was expected to last only three days, the plaintiff was to take a transportation vessel to the platform, disassemble a crane located on the platform, and then load the disassembled crane onto the transportation vessel. The plaintiff also stored equipment, attended meetings, slept, and ate aboard a vessel. Plaintiff was injured less than 24 hours after starting his employment, and he had spent all but four hours onboard the transportation vessel.

The Fifth Circuit held that there was “no reasonable possibility” that plaintiff could demonstrate seaman status under the Jones Act. The court based its decision on the fact that plaintiff’s contemplated work assignment was to be performed on the platform, and he neither contributed to the work of the transportation vessel nor had a substantial connection to it.
II. VESSEL STATUS


In this case, the court was tasked with determining whether a floating, production, storage, and offloading unit (“FPSO”), which was used to produce oil and gas in the Gulf of Mexico, was a vessel for purposes of determining contractual indemnity liability for injuries sustained by the plaintiff. Each defendant argued that the other was liable pursuant to mutual indemnity clauses contained in separate master service agreements. In order to determine whether the contracts are to be interpreted under maritime law or must be interpreted under Louisiana law, the court was required to first decide whether the FPSO was a vessel.

At the outset, the court cited to the Supreme Court’s holding in Lozman, stating that “the word ‘vessel’ includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water” and that “a structure is not included in this definition unless a reasonable observer, looking to the structure’s physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.” “Indeed, a structure may qualify as a vessel even if it attached—but not permanently attached—to the land or ocean floor.” The court recognized that “longstanding precedent in this circuit establishes that mobile offshore drilling units are vessels under general maritime law,” including non-self-propelled drilling platforms, jack-up rigs, and semi-submersible deepwater drilling platforms that utilize dynamic positioning.

The court examined the specific characteristics of the FPSO. The FPSO was “ship shaped” and built on the base of a converted oil tanker. It maintained a full marine crew and flew the flag of Bermuda. Importantly, it possessed its own propulsion system and could detach.
itself from a well and relocate under its own power in as little as six hours. Though its primary purpose is oil production, the court noted that fact was not dispositive of the vessel status issue.

Based on the above facts, the court concluded that the FPSO was clearly a vessel. In doing so, it rejected the defendants’ argument that the FPSO should be treated similar to a spar platform (large oil production platforms that float on the ocean’s surface but are moored to large anchors in the seabed), which courts have repeatedly found not to be vessels due to their limited movement capabilities, the time and expense necessary to render them capable of marine transport, and the permanence of their attachment to the sea floor. However, the court pointed out that FPSOs are not only practically capable of maritime transport, but are also imminently capable of such transportation. They can detach from the well and relocate under their own power within six hours, transporting the crew, equipment, and stored oil along with them, which stands in stark contrast to the logistical hurdles presented by the relocation of a spar platform.

_Warrior Energy Servs. Corp. v. ATP Titan M/V, 551 F. App’x 749 (5th Cir. 2014)_

A tools and services supplier brought an action against the owners of a production facility seeking a declaratory judgment that the facility was a vessel. The facility was floating oil and gas production facility moored miles offshore of Louisiana on the Outer Continental Shelf.

In considering whether the facility should be classified as a vessel, the Fifth Circuit relied on the Supreme Court’s holding in _Stewart_ and reasoned that that the dispositive question was “whether the watercraft’s use as a means of transportation on water is a practical possibility or merely a theoretical one.” The court concluded that the facility did not constitute a vessel based upon the court’s prior precedent decisions addressing similar structures. First, the court noted that the facility was moored to the floor of the Outer Continental Shelf by twelve chain mooring lines connected to twelve anchor piles, each weighing 170 tons and each embedded over 200 feet
into the seafloor, as well as by an oil and gas production infrastructure. Second, the facility had not been moved since it was constructed and installed at its current location in 2010. Third, the facility had no means of self-propulsion, apart from repositioning itself within a 200-foot range by manipulating its mooring lines. Fourth, moving the facility would require approximately twelve months of preparation, at least fifteen weeks for its execution, and would cost between $70 and $80 million. In light of these characteristics, the court found that the facility was not “practically capable of transportation on water” and was therefore, as a matter of law, not a vessel.


Plaintiff Sean Gautreaux was employed by defendant Trinity Trading Group, Ltd., working as a deckhand/supervisor trainee on the Louisiana Midstream One (“LMO”), a non-self-propelled barge equipped with a conveyor system that performs midstream cargo transfer operations on the Mississippi River. Plaintiff alleges that he was injured in the course of his employment when a mooring line connecting a coal barge to the LMO snapped and struck him. Plaintiff filed an action against Trinity to recover damages under the Jones Act and general maritime law for his resulting personal injuries.

The parties filed cross motions for summary judgment on the issue of vessel status. In evaluating this issue, the court relied on the guidance provided by the Supreme Court’s recent decision in Lozman regarding “borderline cases where ‘capacity’ to transport over water is in doubt;” specifically, the Lozman Court’s holding that a watercraft is not practically capable of maritime transportation “unless a reasonable observer, looking to the [watercraft’s] physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.”
In this case, the court noted that the LMO was a non-self-propelled barge containing cargo handling equipment which it used to transfer coal and other products midstream between ships and barges in the Mississippi River. Each time the LMO performed an operation, it was moved by tugboat on the river from its temporary mooring location to one of three different buoys where it met the ships and barges to which it will transfer cargo. Therefore, to perform an operation, the LMO was required to travel on the river for what is a roundtrip of at least three miles. During these trips, the LMO regularly transported crew members and equipment. As for its physical characteristics, the LMO has a raked bow and an air-conditioned dining area onboard for its crew, along with life-saving equipment onboard. It was also registered as a vessel with the Coast Guard. Despite these characteristics, Defendant Trinity argued that the LMO was not a vessel because it lacked certain characteristics typically associated with a vessel, including navigational aids, means of mechanical propulsion, and a bilge pump.

The court found that the evidence established that the LMO traveled on the river and carried people and/or equipment with significant frequency and minimal expense or effort. For those reasons, the LMO possessed a “practical capability of maritime transportation,” thereby affording it vessel status as a matter of law.


Plaintiff brought a claim under the Jones Act after he suffered spinal injuries while working on the “Mad Dog” oil and gas spar platform after a lifeboat he was testing released prematurely. Defendants moved for summary judgment on the ground that plaintiff was not a seaman because he was not working on a vessel.
The central issue in this case was whether the oil and gas spar platform in the Gulf of Mexico where the plaintiff worked was a “vessel.” The court found several characteristics of the platform to be relevant to this inquiry:

- The spar was assembled onsite in 2005 to access eight wells and has no steering mechanism, system of self-propulsion, or raked bow.

- The spar was intended to be used at its current location for approximately 25 years.

- Eleven polyester rope and chain mooring lines connect the spar to eleven suction piles driven into the seabed 4,500 feet below. The spar is also connected to two pipelines on the floor of the Outer Continental Shelf that are designed to transport natural gas and oil. Although tethered to the floor of the OCS, the spar was capable of movement in a 180–to–221–foot radius with its crew and equipment on board. The range of movement between wells for drilling operations is approximately 180 feet, while the range of movement due to environmental conditions (e.g., wind, wave, or current) was approximately 221 feet.

- The spar had not moved wells in over four years.

Noting that “the relevant inquiry in determining vessel status is whether the watercraft’s use as a means of transportation on water is a practical possibility or merely a theoretical one,” the court concluded that this platform was not a vessel. The court found that in this case, the platform was not practically capable of maritime transportation (as opposed to mere movement). The platform’s infrastructure (specifically the multiple attachments to the seabed) restricted its range of movement, and the process of disconnecting and dismantling the existing infrastructure in order to move the spar to a new location would take at least sixteen months. Additionally, the court noted that moving the platform to another location would require “abandoning and
plugging the eight wells, removing each well’s jumpers, removing its eleven mooring lines, decommissioning the production drill site’s infield lines, and removing hydrocarbons from the jumpers, infield oil and gas risers, and sales lines.” Such a process would require heavy lift vessels and other specialized equipment needing up to two years of lead time. The court concluded that such a complex infrastructure rendered the platform “practically incapable of transportation,” and thus held that it was not a vessel.

**Lozman v. City of Riviera Beach, Fla., 133 S. Ct. 735 (2013)**

The City of Riviera Beach sought to obtain a maritime lien for unpaid dockage fees and damages for maritime trespass by the petitioner’s “floating home.” The Court described the structure as “a house-like plywood structure with French doors on three sides. . . . a sitting room, bedroom, closet, bathroom, and kitchen, along with a stairway leading to a second level with office space. . . . [and] an empty bilge space underneath the main floor kept it afloat.” In the approximately ten years the petitioner owned the house, it remained stationary except for two instances where it was towed to different marinas.

The Court held that the house was not a vessel. The Court acknowledged the traditional requirement that a vessel must be “capable of being used as a means of transportation on water,” and it held that “a structure does not fall within the scope of this statutory phrase unless a reasonable observer, looking to the home’s physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water.” In this case, the Court noted that the floating house had no rudder or steering mechanism, had an unraked hull, was incapable of self-propulsion, could not generate or store electricity when away from the dock, had French doors and ordinary windows (instead of portholes).
The Court also noted that it utilized this “reasonable observer” test in order to avoid considering any subjective elements, such as owner's intent, and only allow for consideration of objective evidence of a waterborne transportation purpose.

aff'd sub nom. Warrior Energy Servs. Corp. v. ATP Titan M/V, 551 F. App’x 749 (5th Cir. 2014)

Plaintiff filed suit asserting maritime liens against the ATP TITAN, a triple-column, deep-draft, floating production facility moored in a production field approximately 65 miles offshore of Louisiana. The dispute arose from fees allegedly owed for tools and services provided to the ATP TITAN. Defendants filed a motion to dismiss for lack of jurisdiction on the grounds that the ATP TITAN was not a vessel but a floating production platform, which would deprive the court of in rem jurisdiction over the ATP TITAN.

The ATP TITAN was considered to be a “hybrid semi-submersible/spar.” The court noted that semi-submersible drilling rigs are generally considered vessels, whereas production platforms and spars are not. In this case, the court rejected the notion that the ATP Titan qualified as a semi-submersible drilling rig or modular offshore drilling unit. Although at one time it had a modular drilling rig and been involved in drilling activities, it did not have a built-in capacity to drill and thus could not be considered a semi-submersible drilling rig for purposes of determining vessel status. Rather, the court found that the relevant inquiry was not whether the ATP TITAN had ever drilled but whether its capacity for movement distinguishes it from other structures designated as spars.

The ATP TITAN was securely moored to the floor of the Outer Continental Shelf in over 4000 feet of water by twelve moorings connected to mooring piles that are embedded over 205 feet into the sea floor, and it was also stabilized by flowlines, umbilicals, and pipeline systems.
It had no means of self-propulsion but could reposition itself over wells by manipulating its mooring lines. It had not been moved since 2010, and it was not anticipated that it will be moved until all surrounding fields are no longer productive (estimated 5-8 years). Moving the ATP TITAN to a new location would take “approximately 15–29 weeks after 12 months of preparation” and would cost $70–$80 million. It also had navigational features such as “a wave-rider hull, navigational lights, life boats, crew quarters, and an onboard generator and drinking-water plant,” as well as “hydrocarbon processing equipment to separate oil, gas and water, pumps to transport oil production into an oil export line, and gas compressors to transport gas production.”

Despite the ATP TITAN’s ability to shift laterally and to be moved, the court found that the ATP TITAN did not serve “a waterborne transportation function in any practical sense.” Specifically, the court noted that “a reasonable observer, in considering the infrastructure affixing the ATP TITAN to its present location, its function as a production platform, the way in which it was brought to its current location, and the enormous expense anticipated if it is moved, would likely find that the ATP TITAN is not practically capable of carrying people or things over water.” Accordingly, the ATP TITAN was found to not be a vessel. The U.S. Fifth Circuit affirmed the district court’s decision in January 2014. A summary of the court’s opinion and reasoning is included at the beginning of this section.

Mendez v. Anadarko Petroleum Corp., 466 Fed. Appx. 316 (5th Cir. 2012)

Plaintiff employee was injured while working on a spar of a floating gas-production platform. The spar floated on the ocean’s surface, but was moored to large anchors in the seabed below. A pipeline extended from the spar to a gas plant by way of a platform. The appellate court affirmed the district court’s decision that the employee was not a seaman for purposes of
the Jones Act liability because the spar upon which he was working when he was injured was not a Jones Act vessel. The spar was not a Jones Act vessel for two reasons: (1) the spar was permanently affixed to the sea floor and could only be moved after detaching the substantial moorings and pipelines that were joined to its structure, and (2) a relocation study showed at most that the spar was theoretically capable of maritime transportation but not practically capable.


The court determined that a transloader barge with attached excavator was a vessel. The barge had no living quarters, no means of self-propulsion, was accessed by a steel framed walkway, and was powered by electricity supplied via an onshore power cable. It had been moored for eleven months at the time of the incident, and it was used to unload coal from customers’ barges and then funnel it onto a conveyor belt that was integrated with land-based facilities. However, the court focused on the barge’s capability for transportation and concluded that its use in transportation was a practical (and not merely theoretical) possibility, thereby making it a “vessel.”

In re Oil Spill by the Oil Rig Deepwater Horizon in the Gulf of Mexico, on April 20, 2010, 808 F. Supp. 2d 943 (E.D. La. 2011)

The court determined that the Deepwater Horizon was “a dynamically-positioned semi-submersible deepwater drilling vessel.” The Deepwater Horizon rig utilized a satellite global positioning device and complex thruster technology to stabilize itself and remain stationary. The court noted that the rig had no legs or anchors connecting it to the seabed, and its only physical “attachment” to the wellhead was a 5,000 foot string of drill pipe. The court held that the Deepwater Horizon “was practically capable of maritime transportation, and thus is properly classified as a vessel.” The court observed that this determination was supported by clearly
established law and that longstanding case law has conclusively established that a mobile offshore drilling unit is a vessel for purposes of the Jones Act.


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 clam 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 onboard 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.

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.
III. MAINTENANCE, CURE, AND WAGES

(E.D. La. June 19, 2015)

Plaintiff was employed by REC Marine as a vessel captain. He alleges he was injured while participating in a Helicopter Underwater Escape Training exercise conducted by SafeZone Safety Systems, LLC (“STC”). During that training, plaintiff sat inside a helicopter simulator, which was inverted in a pool as part of the exercise. Plaintiff claims his safety belt failed to operate properly when the simulator was inverted, thereby trapping him underwater and causing him to struggle to escape, which resulted in injuries to his right shoulder. Plaintiff filed suit seeking maintenance and cure benefits from REC Marine for his right shoulder injury.

REC Marine subsequently filed a motion for summary judgment requesting the dismissal of the plaintiff’s maintenance and cure claim. REC Marine argued that plaintiff was precluded from receiving maintenance and cure benefits pursuant to the Fifth Circuit’s decision in McCorpen v. Central Gulf Steamship Corp. and its progeny because plaintiff concealed material medical facts relating to a pre-existing shoulder condition while filling out REC Marine’s pre-employment medical history questionnaires. Plaintiff responded by arguing that summary judgment was inappropriate because there were genuine disputes of material fact as to all three elements of the McCorpen defense.

The court noted that to rely on the McCorpen defense, an employer must establish three elements: (1) the seaman-plaintiff intentionally misrepresented or concealed medical facts; (2) the misrepresented or concealed facts were material to the employer's hiring decision; and (3) there exists a causal link between the pre-existing disability that was concealed and the disability incurred during the voyage.
Prior to being hired, REC Marine required plaintiff to complete two separate pre-employment medical history questionnaires and also required him to be examined by an REC Marine physician. REC Marine claimed that Plaintiff intentionally concealed his extensive history of shoulder problems and treatment, as well as other prior injuries and/or surgeries, when filling out the pre-employment questionnaires in order to avoid a negative result in the hiring process. This condition was confirmed by plaintiff’s prior medical records, which confirmed that a doctor had treated him for arthritis and recurrent bilateral shoulder pain with steroid injections into both shoulders and prescription medication. The pre-employment questionnaire specifically asked: “Do you have now or have you ever had in the past, injury or disease to” certain body parts, and the plaintiff checked “NO” for all body parts, including when asked about his shoulders.

Plaintiff argued that he had never injured his shoulder and did not consider arthritis to be an injury or a disease. However, the court held that even though the plaintiff testified that he did not intentionally misrepresent or conceal medical facts, the required inquiry into the intentional concealment prong of the McCorpen defense “does not require a finding of subjective intent.” In this case, the plaintiff failed to disclose on the pre-employment questionnaires his bilateral shoulder impingement diagnosis and the nature of his arthritis, as well as to explain his past treatment for shoulder pain, including injections and prescription medication. Because the pre-employment questionnaire was obviously designed to elicit such information, the court found that the plaintiff had intentionally misrepresented or concealed medical facts for purposes of the McCorpen defense. The court went on to conclude that the withheld information was material to their hiring decision and that the plaintiff’s complained-of injury — a right rotator cuff tear — was causally related to the pre-existing injury as it involved the same part of the body affected by
plaintiff’s shoulder impingement syndrome. With all three elements of the McCorpen defense satisfied, the court granted REC Marine’s motion for summary judgment.


Plaintiff was a vessel captain who brought suit against his former employer and supervisor seeking maintenance and cure and damages under the Jones Act and general maritime law after he injured his back while lifting a hatch cover to check the oil on the vessel. Defendants denied that the incident ever occurred and argued that the plaintiff forfeited his right to maintenance and cure by lying about his preexisting spinal injuries on his pre-employment application and medical questionnaire. Following a bench trial, the trial court ruled against plaintiff’s unseaworthiness and Jones Act negligence claims, but awarded him maintenance and cure after concluding that the plaintiff did not intentionally conceal his prior medical history.

The Fifth Circuit ultimately affirmed the dismissal of the Jones Act and unseaworthiness claims, but it reversed the maintenance and cure award. The defendant had argued that the Fifth Circuit’s holding from *McCorpen v. Central Gulf Steamship Corp.*, which concluded that a seaman who “knowingly fails to disclose a pre-existing physical disability during his pre-employment physical examination” may not recover maintenance and cure, precluded the plaintiff from obtaining maintenance and cure in this case. The court found that the trial court incorrectly applied the proper standard for determining concealment under *McCorpen* in finding the employer liable. Specifically, the trial court had applied the “subjective nondisclosure standard” instead of the purely objective “intentional/misrepresentation/concealment standard.” The court held that the intentional concealment prong of the *McCorpen* defense does not require subjective intent to conceal; rather, the employer need only show that the seaman “failed to
disclose medical information in an interview or questionnaire that is obviously designed to elicit such information.”

The defendant-employer in this case had acquired the company for which the plaintiff worked, and it did not itself conduct a pre-employment medical examination of the plaintiff following its acquisition of the company which originally hired him. Importantly, the plaintiff had not disclosed his prior medical issues to the predecessor company. The Fifth Circuit concluded that the misrepresentation to the predecessor company was “tantamount to a misrepresentation to the [successor] for purposes of the McCorpen defense,” thereby precluding the plaintiff from recovering. In support of its holding, the court noted that “it makes little economic or logical sense to require a successor company to reexamine its predecessor’s employees solely for the purpose of avoiding maintenance and cure liability for their previously concealed medical conditions. . . . More importantly, an intervening asset sale does not reduce the risk of injury to the seaman or to others resulting from the injured seaman's presence on the ship. Employers need to be certain that each employee is physically able to do the work, not only to protect the employer from liability, but also to protect the employees. This is the purpose of the pre-employment health questionnaire, and of the McCorpen defense.” The Fifth Circuit concluded by stating that “an intervening asset sale does not automatically relieve a seaman from the consequences of his or her prior intentional concealment of material medical information.”


Plaintiff was employed as the captain of the M/V St. June. As the plaintiff was descending the stairs to investigate a matter in the engine room, a wave hit the vessel, and because there were no handrails on the stairwell for plaintiff to grab onto, he alleges that he fell down the stairs, injuring his back and neck. Plaintiff filed suit against the owner of the vessel
under the Jones Act, claiming that vessel owner’s negligence in “failing to furnish complainant a safe place to work” proximately caused his injuries.

The defendant filed a counterclaim against the plaintiff seeking reimbursement of all sums it may be required to pay for purposes of maintenance and cure, as well as recovery of all expenses incurred in defending the main claim. In this case, the defendant had never requested that the plaintiff submit to a pre-employment medical examination or complete a medical questionnaire. However, during an interview with the plaintiff at the time of his hiring, the plaintiff voluntarily informed the defendant that he had neck and shoulder surgery two years earlier, and that the injury had since “healed.” However, the defendant pointed out that the plaintiff “did not disclose that he had been experiencing chronic neck and low back pain since 1986,” or “that he was under doctor's care for his neck and back pain” at the time of the interview. The defendant argued that this intentional failure to disclose facts material to its decision to hire the plaintiff, as well as plaintiff's decision to place himself in a work environment he was well aware could cause him “injury or re-injury,” makes him “guilty of negligence in causing his own injury.” Additionally, because of the plaintiff's intentional misrepresentation regarding the existence and extent of his pre-existing injuries, the defendant invoked the \textit{McCorpen} defense and argued that the plaintiff should be precluded from recovering damages for maintenance and cure.

Defendant subsequently filed a motion for summary judgment, arguing that the \textit{McCorpen} defense should apply and seeking to have the plaintiff's claims for maintenance and cure dismissed. In response, the plaintiff argued that the \textit{McCorpen} defense was not applicable because he was never expressly asked to disclose information regarding his pre-existing back and neck injuries. Plaintiff also argued that because the defendant had never requested a medical
examination or questionnaire, information regarding those preexisting injuries was not material to its decision to hire the plaintiff.

The court found that the plaintiff should have known that information regarding his recent surgery and a history of neck and back pain would have been material and desired by the employer. The court noted that the plaintiff had extensive experience in the boating industry, having worked on shrimp boats for 42 years and even stated in his deposition that “every oilfield company he ever worked for” had asked him “if he ever had any injuries or medical problems with his neck and back.” As such, the plaintiff should have been familiar with expectations of potential employers regarding the disclosure of past medical history and was aware that the defendant would be interested in learning of his pre-existing back and neck injuries, even if the defendant failed to specifically ask about them during the employment interview. The court held that because the plaintiff knew that the disclosure of his pre-existing back and neck injuries was “plainly desired” by the defendant and yet still intentionally concealed and misrepresented the existence and extent of these injuries, the first element of the McCorpen defense was met, and summary judgment was ultimately rendered in favor of the defendant vessel owner.
IV. MARITIME JURISDICTION

In Re Louisiana Crawfish Producers, 772 F.3d 1026 (5th Cir. 2014)

The Louisiana Crawfish Producers Association and some commercial fishermen operating in Louisiana’s Atchafalaya Basin sued a number of oil and gas companies and their insurers, claiming aspects of the companies’ pipeline activities impeded water flows and commercial navigation, thereby allegedly causing economic damages. The trial court determined granted Rule 12(b)(6) motions filed by two of the defendants on the basis that maritime jurisdiction did not exist, and the plaintiffs appealed.

The plaintiffs’ alleged that the defendants had engaged in activities that constitute maritime torts. Specifically, the defendants had placed cement mats on exposed sections of an existing pipeline and obstructed gaps in an existing spoil bank through its construction of a pipeline — actions which allegedly impeded water flows and commercial navigation in the area.

The court held that to state a claim for a maritime tort, the plaintiffs must allege facts sufficient to satisfy the “location test” and “connection test” which were set forth in Grubart. The location test is satisfied if the tort occurred on navigable waters or if the injury occurred on land but was caused by a vessel on navigable waters. In this case, the plaintiffs’ allegations “easily satisfied” the location test since plaintiffs allege the defendants’ activities impeded water flows and commercial navigation, meaning the harm “took effect” on navigable waters. The “connection test” would be satisfied if two conditions are met: (1) “the general features of the type of incident involved” must have “a potentially disruptive impact on maritime commerce;” and (2) “the general character of the activity giving rise to the incident” must show “a substantial relationship to traditional maritime activity.” In this case, the court found that the first prong of this test was met, but that the plaintiffs had failed to allege facts sufficient to satisfy the second
prong. The court found that the general character of the allegedly negligent activity was “pipeline construction and repair,” and it concluded that the established case law shows that such activity does not qualify as having “a substantial relationship to traditional maritime activity.” As a result, the trial court’s holding was affirmed due to the plaintiffs’ failure to state a claim under maritime law.


The wife of a deceased employee brought claims for negligence and unseaworthiness after her husband died while working on an offshore oil well. Plaintiff claimed that her husband suffered a cardiac arrest and defendants failed to provide proper medical assistance and did not have a helicopter available to bring plaintiff back to shore. Defendant removed that case to federal court, but the plaintiff moved to remand it back to state court by arguing that 28 U.S.C. § 1441 precluded the removal of general maritime claims.

The court ultimately concluded that recent amendments to § 1441 now allowed for the removal of general maritime claims involving nondiverse parties. Specifically, the court found that revised § 1441(b) no longer prohibited federal courts from exercising removal jurisdiction over cases for which they have original jurisdiction. Instead, the court interpreted the revisions to indicate that § 1441(b) should only apply to cases removed on the basis of diversity jurisdiction, and it cited to the new title of the section, “Removal based on diversity of citizenship,” in support of this holding.

Since federal courts have original jurisdiction over admiralty claims pursuant to 28 U.S.C. § 1333 and the revised removal statute (28 U.S.C. § 1441) no longer limits the removal of these claims, the court held that removal of the plaintiff’s maritime claims was proper pursuant to section 1441(a), even in the lack of diversity of citizenship.

Plaintiff was a former naval shipyard worker who was exposed to asbestos while working on vessels that were drydocked at a naval shipyard. He brought an action against manufacturers of asbestos-containing products for use on United States Navy ships. Plaintiff sought to have Hawaii state law apply to his claims, but defendants argued that admiralty jurisdiction was present and that maritime law should apply.

The parties agreed that the “locality” prong of the situs test was satisfied as it is well settled that vessels in drydock are still considered to be in navigable waters for jurisdictional purposes. However, the parties disputed the “connection” prong of the situs test concerning whether the incident had a significant relationship with traditional maritime activities. In considering this issue, the court noted that injuries to workers on Navy ships caused by defective parts have the potential to disrupt ships engaged in maritime commerce. Specifically, Navy vessels engage in some degree of commerce by protecting shipping lanes, transporting mail, transporting goods under bills of lading issued by the officers of such vessels, and transporting commercial merchandise which is sold as an ordinary transaction at a profit to those on board.

The court also concluded that the Applying these principles, the court finds that “the general activity giving rise to the incident is the manufacture of products for use on vessels,” and because the products at issue were necessary for the proper functioning of the vessels, the alleged defective products “bear a substantial relationship to traditional maritime activity.” Accordingly, the court held that admiralty jurisdiction applied and denied the plaintiff’s request for the application of state law.
Mala v. Crown Bay Marina, Inc., 704 F.3d 239 (3d Cir. 2013)

Plaintiff was refueling his powerboat at the defendant’s dock when the fuel pump malfunctioned and overflowed the boat’s tank, causing fuel to spill onto his engine and boat. The plaintiff and some marina’s employees attempted to clean up the spilled gasoline. However, the boat’s engine exploded shortly after leaving the dock, resulting in severe burns and injuries to the plaintiff. Court held that maritime jurisdiction clearly applied because “the alleged tort occurred on navigable water and bore a substantial connection to maritime activity.”

Hamm v. Island Operating Co., 450 Fed. Appx. 365 (5th Cir. 2011)

Plaintiff seaman was working on the deck of a vessel that was delivering equipment to and picking up equipment from a permanent oil platform off the coast of Louisiana, on the Outer Continental Shelf. A crane was moving equipment to and from the platform and the vessel. The seaman was helping to guide the equipment and to connect it to or disconnect it from the crane when a cargo basket became caught on the hook of the crane and swung toward the seaman, pinning him between the cargo basket and the side of the vessel. The seaman brought suit asserting that his claim fell within the district court’s admiralty jurisdiction. According to the crane operator, Louisiana’s substantive law applied to the seaman’s claims against it because the Outer Continental Shelf Lands Act (OCLSA) adopted the law of the adjacent state. The seaman countered that the district court correctly held federal maritime law to be the applicable substantive law and his argument was successful. The location element of Grubart was satisfied because the injury was suffered on the deck of a vessel afloat on navigable water. The connection element of Grubart was met because the incident was potentially disruptive of maritime commerce. Accordingly, maritime jurisdiction was present and federal maritime law applied.
V. PUNITIVE DAMAGES


The plaintiff was injured during a personnel-basket transfer from the M/V Contender to the deck of the L/B Janie. At the time of the accident, the plaintiff was employed by Offshore Liftboats, LLC, ("OLB"), the owner and/or operator of the L/B Janie. The M/V Contender was owned and/or operated by K & K Offshore, LLC. The plaintiff filed suit against OLB— his Jones Act employer—alleging, inter alia, negligence under the Jones Act and seeking punitive damages. Raymond and Calvin also sued K & K Offshore, a non-employer third party, under the General Maritime Law for negligence and unseaworthiness, as well as for punitive damages. Both defendants filed motions to dismiss the plaintiff’s claims for punitive damages.

The defendants argued that controlling Fifth Circuit precedent, namely McBride v. Estis Well Services, LLC, expressly precluded awards for punitive damages related to claims arising under the Jones Act and General Maritime Law. The plaintiffs, relying on the U.S. Supreme Court’s decision in Townsend, argued that punitive damages should be available under general maritime law against a non-employer third party. However, the court rejected this argument and held that “the Townsend decision is specific to the maintenance-and-cure context and does not address whether punitive damages are available for claims of unseaworthiness,” and further noted that the U.S. Fifth Circuit’s decision in Scarborough (which held that a seaman may not recover punitive damages against either his employer or a non-employer) precludes an award of punitive damages under the Jones Act.

punitive damages against a non-employer third party under general maritime law if the Jones Act is not implicated).


The plaintiff was employed as a roustabout who developed a disabling skin condition while working as a seaman aboard the IDB CAILLOU. While working on the drill floor, he began to experience an intense burning sensation, after which he discovered that severe and disabling blisters had developed on his feet, arms, and fingers. Upon seeing the open wounds, the HSE coordinator ordered that he be brought back to shore immediately. He was unable to walk by the time he reached shore, so he was carried off the crewboat and placed on a tree stump to wait for a ride. However, due to the unexpected timing of his return to shore, the plaintiff had no one to meet him to provide a ride home or to the hospital. Despite his condition, no medical attention was requested by the plaintiff’s employer. When his friend finally arrived to pick him up five hours later, the plaintiff was found lying on the sidewalk in pain. His friend immediately called an ambulance, and the plaintiff was ultimately diagnosed with a disabling skin condition after arriving at the emergency room.

The plaintiff’s employer refused to provide maintenance and cure based on its human resource manager’s conclusion that the plaintiff’s injuries were caused either by a pre-existing condition related to herpes or by a reaction to some medicine he had allegedly brought aboard the IDB CAILLOU. This conclusion was derived from a telephone interview of the plaintiff and a review of some incident reports. The plaintiff’s employer did not test him for herpes, review his medical records, or conduct any further investigation prior to denying maintenance and cure.

The plaintiff subsequently filed suit against his employer, seeking maintenance and cure, compensatory damages, punitive damages, and attorneys’ fees. The case proceeded to a bench
trial, at which the court was required to determine (1) whether Plaintiff is entitled to maintenance and cure, and, if so, (2) whether the denial of benefits was unreasonable or willful and wanton. The court immediately determined that the plaintiff was entitled to maintenance and cure, and then turned its attention to whether the denial of benefits was unreasonable. The court noted that, rather than arrange treatment for those injuries, the defendant had “banished Plaintiff from the vessel without warning” and exhibited “callous disregard for Plaintiff's well-being.” The court further found the employer’s investigation to be “impermissibly lax under any reasonable standard” and that the employer had “made a medical determination without medical evidence.” The court concluded that “an award of punitive damages is necessary to ensure the next worker who falls ill aboard one of Defendant’s vessels receives the treatment he deserves, as a seaman and as a human being.” Accordingly, the plaintiff was awarded compensatory damages, punitive damages, and attorneys’ fees.


Plaintiff’s husband was a rig worker who was killed after being pinned between a derrick and mud tank while working on a rig in a navigable waterway in Louisiana. Plaintiff brought claims of unseaworthiness under general maritime law and negligence under the Jones Act, seeking both compensatory and punitive damages. Defendant moved to dismiss the claims for punitive damages, arguing that punitive damages were not an available remedy for unseaworthiness or under the Jones Act.

Following the district court’s granting of defendant’s motion, the decision was immediately certified for appeal to the Fifth Circuit on the issue of the availability of punitive damages. A panel of the Fifth Circuit held that punitive damages were available to seamen for unseaworthiness claims upon a showing of willful and wanton misconduct in connection with the charitable activities of the seaman.
unseaworthy condition. The Fifth Circuit panel based this holding on the U.S. Supreme Court’s decision in *Atlantic Sounding Co., Inc. v. Townsend*, 557 U.S. 404 (2009), which the panel interpreted as explicitly abrogating prior prohibitions against punitive damages for maintenance and cure claims under general maritime law. The panel concluded, through reliance on *Townsend*, that because the unseaworthiness cause of action and the punitive damages remedy pre-existed the Jones Act, then the remedy for punitive damages was available to injured seaman and the survivors of deceased seaman. “[I]f a general maritime law cause of action and remedy were established before the passage of the Jones Act, and the Jones Act did not address that cause of action or remedy, then that remedy remains available under that cause of action unless and until Congress intercedes.” 731 F.3d at 515.

The full Fifth Circuit granted a rehearing *en banc* to address the issue of whether a seaman can recover punitive damages for breach of the warranty of unseaworthiness. The *en banc* court reversed the panel decision and upheld the district court’s original decision, concluding that the Supreme Court’s decision in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), preclude seamen or their survivors from recovering non-pecuniary damages, which includes punitive damages, under the Jones Act or the general maritime law for unseaworthiness. *Miles* provided that a deceased seaman’s survivors under the Jones Act are limited to the recovery of only pecuniary damages, and it established a uniform rule applicable to all actions for the wrongful death of a seaman. The Fifth Circuit explained that the same rule applies to the claims of an injured seaman, even though *Miles* involved a wrongful death action.


Plaintiff was a marine operating company who sought punitive damages from defendant for gross negligence, recklessness, fraud, and breach of contract after the defendant repair
company allegedly improperly repaired plaintiff’s ships. Defendant sought to have the plaintiff’s request for punitive damages dismissed on summary judgment. However, the court denied the motion for summary judgment. It noted that although punitive damages are available for claims involving willful nonpayment of maintenance and cure (as held by the Supreme Court in Townsend), there is still uncertainty regarding whether punitive damages are available for other non-Jones Act claims which stem from general maritime law. The court observed that “[t]he trend appears to be that post-Townsend, courts have carefully considered the Supreme Court's holding that punitive damages have long been available at common law, that the common-law tradition of punitive damages extends to maritime law, and that unless evidence exists that the claim is to be excluded from this general admiralty rule (like the Jones Act, which explicitly limits damages), punitive damages are available.” Although the court allowed the claim for punitive damages to proceed past summary judgment, it stressed that the plaintiff would still have to show that the defendant acted “willfully and wantonly” in order for punitive damages to ultimately be awarded.


In a case involving the willful failure to pay maintenance and cure, the Washington Supreme Court upheld punitive damages award of $1.3 million, which was nearly 35 times the compensatory award of $37,420 (U.S. Supreme Court subsequently denied petition for certiorari). The Washington Supreme Court held that the 1:1 ratio (punitive to compensatory damages) used by U.S. Supreme Court in Exxon does not apply to cases involving the willful withholding of maintenance and cure. The court understood the Supreme Court’s holding in Exxon to be “expressly limited . . . to the facts presented” and noted that the Exxon holding

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“seemed to embrace an approach of applying a variable limit based on the tortfeasor's culpability.”

The jury found and the trial court described in depth that the defendant’s actions were far from reckless and nearer the “most egregious” end of the culpability scale. The jury in this case found that the defendant had “acted callously or willfully and wanton in its failure to pay maintenance and cure.” The court found that defendant deliberately made false statements in its federal court complaint seeking to terminate plaintiff’s maintenance and cure; that defendant’s conduct was motivated by profit; and that the size of the punitive damages award was required as a substantial deterrence.

**Manderson v. Chet Morrison Contractors, Inc., 666 F.3d 373 (5th Cir. 2012)**

Plaintiff sought attorney fees as a result of employer’s failure to pay maintenance and cure. In this case, the plaintiff claimed that was hospitalized for ulcerative colitis, diabetes, and a liver condition while aboard his employer’s vessel. The Fifth Circuit noted that although the denial of a request for maintenance and cure can result in the employer’s liability for attorney’s fees, the plaintiff must show that the employer’s conduct was arbitrary and capricious. The Fifth Circuit found that in order to meet this standard, the plaintiff “must do more than prove the employer’s conduct was unreasonable,” but must also show that the employer “has exhibited callousness and indifference to the seaman's plight.” The Fifth Circuit has described this higher degree of fault as “egregiously at fault”, “recalcitrant”, “willful”, and “persistent”.

In this case, the Fifth Circuit held that the employer's failure to pay was not egregious, willful, persistent, recalcitrant, etc. It noted that the plaintiff had experienced similar flare-ups of his ulcerative colitis before working for defendant and that he had previously claimed that his ulcerative colitis was not work-related when he filed for short-term and long-term disability.
(which included a form filled out by plaintiff’s doctor stating the same). Also, plaintiff had failed to reveal his pre-existing history of high glucose levels and diabetes at the time he was hired. Furthermore, upon receiving a formal demand for maintenance and cure from plaintiff's counsel, defendant-employer promptly referred the matter to its underwriter to investigate the claims, and the underwriter did so. Finally, the court observed that plaintiff had filed this suit only two months after initially requesting maintenance and cure, which also militated against finding that the employer was arbitrary-and-capricious. Consequently, the plaintiff’s request for punitive damages was denied.


Plaintiff vessel owner brought an action for breach of contract and fraud against defendant repair company who had allegedly overbilled it. For the fraud claim, the plaintiff alleged that the defendant misrepresented the materials used in the repair, the amount of time spent repairing the boat, and the qualifications of the employees who were performing the repairs. The plaintiff further asserted that the defendant committed these acts “with a degree of culpable mental state including malice.”

The court noted that although the U.S. Supreme Court in *Townsend* allowed for punitive damages for personal injuries caused by wanton and reckless behavior, it was unclear whether they were available in cases not involving personal injury. The court observed that it had been unable to locate any opinion from any other circuit addressing the scope of *Townsend* in a contract case.

The court ultimately held that punitive damages are not recoverable in a breach of contract case unless the conduct constituting the breach is also a tort for which punitive damages are recoverable. In reaching its decision, the court relied on various treatises and commentators,
as well as the Fifth Circuit’s decision in *Guevara v. Maritime Overseas Corp.*, 59 F.3d 1496 (5 Cir. 1995), which held that punitive damages are generally unavailable for breach of contract.


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.


Defendants employed a relapsed alcoholic to captain its oil tanker through a narrow Alaskan strait. While the captain was drunk, the oil tanker ran aground, causing a major oil spill. The district court found defendants liable for $507.5 million in harm, and a jury assessed $5 billion in punitive damages, which was later reduced to $2.5 billion. 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. 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 $2.5 billion punitive damages award against Exxon arising from the 1989 Exxon Valdez oil spill was reduced to $507.5 million, a one-to-one ratio, which the court ruled as a fair upper limit in such maritime cases. The 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 option of setting a hard-dollar punitive cap 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. 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.
VI. LONGSHORE SITUS AND STATUS


The plaintiff Johnson was a payroll employee of Wood Group PSN, Inc. and was assigned to work as a mechanic for Apache Corporation on their production platform off the coast of Louisiana. At the time of Johnson’s employment, Apache and Wood Group’s relationship was governed by a Master Service Contract. Johnson’s crew was scheduled to make a crew change and leave the platform aboard a vessel owned by Apache. On its way to shore, the vessel collided with a vessel owned by Abe’s Boat Rentals, and Johnson claims that the collision caused severe and painful injuries that have limited his everyday activities and ability to work. Johnson filed a claim under the Longshoremen’s and Harbor Worker’s Compensation Act and filed suit against Abe’s under general maritime law. Abe’s subsequently filed a third-party action against Apache.

Apache filed a Motion for Summary Judgment seeking to dismiss Abe’s claims on the grounds that Abe’s is legally barred by the LHWCA from recovery against Apache. Apache argued that because Johnson was covered by the LHWCA, Abe’s was precluded from recovering against Apache. In response, Abe’s argued that Johnson was not covered by the LHWCA because he failed to satisfy the LHWCA’s “situs” and “status” requirements due to the nature and location of his work (mechanic on a fixed platform). Specifically, Abe’s argued that the fixed platform that Johnson worked on was not a covered “situs,” and that his presence on the MISS SYDNEY vessel was only transient and fortuitous under the “status” test.

The court denied Apache’s Motion for Summary Judgment, finding that Abe’s had sufficiently established that there were material issues of fact related to whether Johnson’s presence on the MISS SYDNEY was “transient or fortuitous.” Although Johnson appeared to
have stated that he maintained the MISS SYDNEY and spent approximately 25% of his time operating a boat for work purposes, his statement was in reference to “boats” generally, not work done specifically aboard the MISS SYDNEY; and as to the work Johnson performed specifically on the MISS SYDNEY, the record did not clearly support Johnson being aboard that vessel for the purpose of anything other than traveling to and from the work site. Additionally, Johnson’s statement about his work done on boats was somewhat vague and indicated that he mostly moved gear and personnel for work on the platform, which would not count towards satisfying the “status” test. Since key facts related to whether or not Johnson was covered by the LHWCA remained in dispute, the court was not willing to grant Apache’s motion for summary judgment.

_Malta v. Wood Group Production Services, BRB No. 14-0312 (2015); 2015 DOLBRB LEXIS 92 (BRB, May 29, 2015)_

The plaintiff worked as an offshore warehouseman on the Black Bay Central Facility, which was a fixed platform located in Louisiana state territorial waters. The Central Facility platform contained a warehouse and three cranes used for loading and unloading vessels with supplies and equipment used for oil and gas drilling. The uncontroverted testimony of both the plaintiff and the employer’s project manager established that loading and unloading vessels at the Central Facility was a large part of the plaintiff’s job and that he performed these activities on a daily basis.

The plaintiff was injured in the course of unloading a vessel at the Central Facility platform. Plaintiff subsequently filed a claim under the LHWCA, but his employer contested that he was covered under the Act. After due proceedings, the administrative law judge found that claimant’s injury did not occur on a covered situs; specifically, the judge found that the Central Facility was not an “other adjoining area” for purposes of coverage under the LHWCA.
because of the nature of the cargo that was loaded and unloaded at the facility. Plaintiff appealed to the Benefits Review Board.

The Benefits Review Board noted that the plaintiff’s injury occurred on a fixed platform, which is considered to be an artificial island for purposes of the LHWCA. Thus, since the plaintiff was not injured on navigable waters or on one of the other enumerated sites, the situs requirement is satisfied “only if his injury occurred in an ‘other adjoining area customarily used by an employer’ in loading or unloading a vessel.” In order to establish the Central Facility platform was an “other adjoining area,” the plaintiff must satisfy two distinct situs components: (1) a geographic component (the area must adjoin navigable waters) and (2) a functional component (the area must be ‘customarily used by an employer in loading [or] unloading…a vessel’). It was undisputed that the platform on which claimant was injured satisfied the geographic component of the situs test, thus the sole issue was whether the functional component was met.

The Benefits Review Board held that the platform was a covered situs. The BRB rejected the administrative law judge’s finding that, because the cargo that was loaded and unloaded at the platform consisted of supplies and equipment used for oil and gas drilling, the platform was “divest[ed] . . . of a maritime purpose.” The BRB noted that the where the site of claimant’s injury was customarily used for loading and unloading vessels, the nature of the cargo that was loaded and unloaded was not determinative of the situs inquiry. The BRB observed that “loading and unloading vessels are traditional maritime activities, and therefore those activities are necessarily related to maritime commerce.” The BRB concluded that, in a case where a claimant is injured in an area that is customarily used for loading and unloading vessels, the requisite relationship with maritime commerce is established for purposes of the functional component of
the situs test, and any further inquiry into whether there is an “independent connection to maritime commerce” is “superfluous.”


This dispute arose between a temporary employment agency and its workers compensation carrier and involved the issue of whether an injury to one of the agency’s workers was covered by a workers’ compensation policy that excludes work “subject to” the LHWCA. The worker was injured while lifting a bag of oil-laden sand that would later be loaded onto a truck and transferred to a vessel for removal. He spent up to two hours per day loading and unloading the vessel at the pier, and six or seven hours cleaning beaches located just a few feet from Gulf waters. The carrier moved for summary judgment arguing that the injury is subject to the policy’s longshoreman exclusion. The district court entered summary judgment in favor of the workers’ compensation carrier.

On appeal, the Fifth Circuit addressed whether the beach was a covered situs under the LHWCA as an “other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.” The court concluded that the beach at issue was not a site customarily used for longshore work, and it reversed the trial court’s ruling. In support of this finding, the court observed that there were no structures on the beach and that the beach had never been used by longshoremen. The workers only activity was gathering spill-related debris and refuse into bags, and then throwing them into a designated area where they would be loaded onto a truck for daily transport to a vessel for removal. In light of those facts, the court concluded that the injury was not sustained at a location customarily used for “loading, unloading, repairing, dismantling, or building a vessel,” as required for the statute to apply; therefore, the policy exclusion did not apply.
New Orleans Depot Servs., Inc. v. Dir., Office of Worker’s Comp. Programs, 718 F.3d 384 (5th Cir. 2013) (en banc)

The Fifth Circuit granted rehearing en banc following an employer’s petition for judicial review of a decision in which Benefits Review Board found it liable for award of workers’ compensation benefits under the LHWCA following an employee’s hearing loss due to exposure to loud noises at his worksite. The Fifth Circuit concluded that the employee was not eligible for benefits on the grounds that he was his worksite was not considered to be “adjoining navigable waters” for purposes of satisfying the situs requirement of the LHWCA.

The employee had worked at “Chef Yard,” which the court described as a small industrial park located approximately 300 yards from the Intracoastal Canal. It was surrounded by a carwash, a radiator shop, an automobile repair shop, a bottling company, and a company that manufactures boxes. The bottling company’s facility was located between the Intracoastal Waterway and Chef Yard.

The court noted that the LHWCA extends coverage for “injuries occurring upon the navigable waters of the United States (including any adjoining pier, wharf…or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel) and that most courts addressing this issue understand that an “other adjoining area” must satisfy two distinct situs components: (1) a geographic component (the area must adjoin navigable waters) and (2) a functional component (the area must be “customarily used by an employer in loading [or] unloading a vessel”). In evaluating this case, the court was considering whether the location of employee’s alleged injury satisfied the first geographic component.

After a detailed overview of other circuits’ jurisprudence regarding the geographic component, the court expressly adopted the Fourth Circuit’s standard as expressed in Sidwell v. Express Container Services, Inc., 71 F.3d 1134 (4th Cir.1995) Specifically, it held that the
definition of “adjoining” navigable water was to be interpreted as “bordering on” or “contiguous with” navigable waters.

In adopting this definition, the court made clear that this literal definition of adjoining could not be circumvented by a broad interpretation of the word “area” and that in order for an area to constitute an “other area” under the statute, it must be a discrete shoreside structure or facility. The court also noted that “it is the parcel of land underlying the employer’s facility that must adjoin navigable waters, not the particular part of that parcel upon which a claimant is injured.”

Applying this definition of “adjoining” to the Chef Yard where the employee in this case worked, the court concluded that the Chef Yard did not border upon and was not contiguous with navigable waters; thus, the worksite was not “adjoining” and not an LHWCA-covered situs.

BPU Mgmt., Inc./Sherwin Alumina Co. v. Dir., Office of Workers’ Comp. Programs, U.S. Dep’t of Labor, 732 F.3d 457 (5th Cir. 2013)

Plaintiff, a dockworker at a waterside ore processing facility, was injured in one of the facility’s underground ore transport tunnels while shoveling fallen bauxite onto a conveyor. Benefits Review Board granted his request for benefits after finding that both the location and functional prongs of the situs test had been satisfied. The Fifth Circuit subsequently granted the employer’s petition for the purpose of reviewing the whether the place of the injury was a covered situs under the LHWCA.

The court determined that the location prong of the situs test was satisfied because the employer’s entire facility adjoined a navigable waterway. However, the court concluded that the functional prong of the situs test was not satisfied in this case because the underground tunnels were not customarily used for the unloading of vessels. The court specifically noted that “the fact that surface-level storage buildings are connected to the unloading process does not
automatically render everything above and below the buildings a part of the unloading process.”

In this case, the underground tunnels were primarily used for transporting previously stored raw materials to another facility for further processing. In further support of this finding, the court recognized that “the surrender of cargo for land transport marks the end of the maritime unloading process because it is the point where the longshoreman’s duty to unload and move the cargo ceases.” In this case, once the ore was removed from the ship and deposited into a storage pile, the unloading process was complete, and any further activities involving the ore were unrelated to the unloading of the vessel.


Benefits Review Board held deceased employee was not injured at location which satisfied maritime situs requirements and could not receive LHWCA benefits, but the case was remanded by the Supreme Court. The Supreme Court held that the OCSLA extends coverage to an employee who can establish a “substantial nexus” between his injury and his employer's extractive operations on the OCS. Decedent worked for a company that operated two drilling platforms on the OCS, and he performed most of his duties on those platforms. However, he was killed in a forklift accident while working at the company's facility onshore which served as receiving point for petroleum products from employer's offshore drilling platforms and also as a storage yard for scrap metal from platforms and employer's plant. Facility was not on navigable waters (250-300 feet from ocean) and was not "adjoining area" used for loading, unloading, building, or repairing vessels. Supreme Court held that the widow could receive compensation under the LHWCA and OCSLA if she could establish that there was a "substantial nexus" between her husband's death and the company's extractive operations on the OCS, overruling the
“situs-of-injury” test adopted by the Fifth Circuit in Mills v. Director, Office of Workers' Comp. Programs.


Plaintiff satisfies both the situs and status test for LHWCA coverage. At the time of the incident at issue, plaintiff was working on a barge that was moored to a barge-cleaning facility, while that barge was afloat in navigable waters. Plaintiff was a shore-based barge washer, washing a vessel moored to a river bank. Second, plaintiff satisfies the status requirement. Plaintiff admitted that while he did not load or unload any cargo, his barge-cleaning work was important to the loading and unloading of the vessel because crewmembers could walk without slipping and falling and the cleaning mitigated cargo from being contaminated by algae, dirt, grease and/or foreign substances.

**Gary v. The Bayou Companies, LLC, BRB No. 11-0600 (2012); 2012 WL 1391763**

Claimant failed to establish that he spent at least “some” time in covered work to satisfy the status requirement. Claimant was a yard foreman whose regular duties consisted of loading trucks, building pipe racks, and cleaning the yard. Claimant worked the barges approximately only ten times over the course of three years usually when the barge crew was short-handed. Claimant was part of the truck crew, which was separate from the barge crew and his activities on the barges were sporadic and too brief and fortuitous to confer longshore jurisdiction.

**Ramos v. Director, DWCP, 45 BRBS 61 (2011); 486 Fed. Appx. 775**

The site of the facility where injury took place is over three miles from another facility on the river, over bridges and highways, in a mixed use area that was not used by other maritime enterprises. The administrative law judge found that the facility is as close as feasible, and thus is a covered “adjoining area.” However, the Board reversed, holding that a facility must have a
geographic nexus and a functional nexus with navigable water, and even a facility that “is as close as feasible” must be “within the vicinity” of that navigable water or within the geographic perimeter of sites involved in maritime commerce. Employer chose this site over other sites closer to navigable water, and this facility is over three miles from the river where there is no other maritime enterprise, and thus not within the vicinity of navigable water to satisfy the geographic element of the situs requirement.


Claimant’s exposure most likely occurred on the containment area of the bridge and not in the open air on the barge, based on testimony that histoplasmosis is typically seen in people who have been exposed to the fungus in confined spaces. Because claimant was not injured on the navigable waters, he would have to satisfy the status and situs requirements of the Act in order to establish coverage. Claimant’s activities did not satisfy the status requirement because debris being sucked from a vacuum on a bridge, with the vacuum being attached to a barge, did not qualify as “loading” of a barge, and did not enable a barge to engage in maritime commerce.
# H4. UNDERSTANDING MARITIME EXPOSURES AND INSURANCE

**Rating scale for all questions:**

4 = Excellent  
3 = Very Good  
2 = Average  
1 = Somewhat Disappointing  
0 = Very Disappointing

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<th>4</th>
<th>3</th>
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**Kyle L. Potts**

Preparation and quality of information: 4 3 2 1 0

Energy and enthusiasm of delivery: 4 3 2 1 0

Educational focus (not a sales pitch): 4 3 2 1 0

**Pascal Ray**

Preparation and quality of information: 4 3 2 1 0

Energy and enthusiasm of delivery: 4 3 2 1 0

Educational focus (not a sales pitch): 4 3 2 1 0

**Mark J. Spansel**

Preparation and quality of information: 4 3 2 1 0

Energy and enthusiasm of delivery: 4 3 2 1 0

Educational focus (not a sales pitch): 4 3 2 1 0

**Comments:**

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