No. 20-

IN THE

Supreme Court of the United States

BRIAN DOTY,

Petitioner,

v.

TAPPAN ZEE CONSTRUCTORS, LLC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL T. HOFMANN
Counsel of Record
HOFMANN & SCHWEITZER
212 West 35th Street, 12th Floor
New York, NY 10001
(212) 465-8840
paulhofmann@hofmannlawfirm.com

Counsel for Petitioner

304566

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

The questions presented are:

1. Where, in this case, it is undisputed that the injured worker spent 90% of his working time on vessels in navigation, operating cranes and excavators on barges, repairing vessel appurtenances, transporting by vessel tools and materials to his employer's fleet of 100+ vessels which were building the new, and demolishing the old, Tappan Zee Bridge across the 3 mile-wide Hudson River, and where admittedly his work contributed to the function of, and accomplishment of the mission of that fleet, did the Second Circuit err by holding, *as a matter of law*, he was not entitled to a jury determination of his status as a Jones Act seaman, thus violating Supreme Court precedent, and conflicting with at least six other Circuit Court decisions?

2. Should the Second Circuit's decision be overturned because application of it going forward virtually would improperly exclude from Jones Act seaman status those maritime workers whose work vessels are located at stationary construction or mineral resource recovery sites?

RELATED DECISIONS

1. Brian Doty v. Tappan Zee Constructors, LLC., 7:17-cv-07947-KMK-LMS before the Southern District of New York. Decision entered on December 18, 2019.

2. Brian Doty v. Tappan Zee Constructors, LLC., 831 Fed. Appx. 10 (2nd Cir 2020), Case 20-36, appeal of District Court's order and decision brought before the United States Court of Appeals for the Second Circuit, Decision entered on October 22, 2020. Brian Doty v. Tappan Zee Constructors, 20-36, decision denying petition for panel rehearing, or in the alternative, for rehearing *en banc* brought before the United States Court of Appeals for the Second Circuit, entered on December 23, 2020.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

Page

U.S. Supreme Court Decisions

United States Courts of Appeals Decisions

Cited Authorities

Page

Page

State Court Authorities

Federal Statutes

OPINIONS BELOW

The transcript of the Oral Decision and Opinion of the United States District Court for the Southern District of New York dated December 17, 2020, is included in Petitioner's Appendix B. The United States Court of Appeals for the Second Circuit Decision and Order affirming the grant of summary judgment, dated October 22, 2020, is reported and published at 831 Fed. Appx. 10 (2nd Cir. 2020), and is included in Appendix A. The United States Court of Appeals for the Second Circuit Order Denying Panel Rehearing or Rehearing *en banc*, dated December 23, 2020, is unreported and is included in Appendix C.

JURISDICTION

The Second Circuit issued its decision denying the appeal of the District Court grant of summary judgment to the defendant in the underlying action below. This Court has jurisdiction under 28 U.S.C. § 1257. In addition, the jurisdiction of the Supreme Court of the United States is also based on COVID Order List: 589 of the Supreme Court of the Untied States, dated March 19, 2020, which extended the deadline to file any petition for a writ of certiorari to 150 days.

THE STATUTES INVOLVED IN THE CASE

The Longshore and Harbor Workers Compensation Act ("LHWCA"), 33 USC § 901 et seq., the pertinent provisions of which are reproduced in Appendix D.

The Jones Act, 46 USC § 30104 et seq., the pertinent provisions of which are also reproduced in Appendix D.

INTRODUCTION AND STATEMENT OF THE CASE

This appeal seeks to overturn the decision of the Second Circuit which ignored the means the Supreme Court established for determining the demarcation line between a Jones Act seaman and a covered worker under the Longshore and Harbor Workers Compensation Act, that is, allowing a jury to determine his status.

Application of the decision below virtually would exclude most maritime workers engaged in maritime construction or resource extraction (such as dredge workers or drill rig roustabouts) whose work vessels locate at on-site, near stationary construction or extraction sites, from being determined to have Jones Act seaman status, *as a matter of law*, because the Second Circuit now essentially is imposing a condition upon seaman status that these workers' vessels must routinely travel between port to port or at least some substantial measurable distance within a situs.

The Second Circuit's decision violates the Supreme Court precedent developed over the past 30 years, starting with *Southwest Marine v. Gizoni*, 502 U.S. 81 (1991), through *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995) and ending with *Harbor Tug and Barge Co. v Papai*, 520 U.S. 548 (1997),and conflicts with at least six other Circuit court decisions.

Here the injured worker, Brian Doty, was a marine Operating Engineer whose undisputed work for his employer, Tappan Zee Constructors, LLC ("TZC") six days a week, 12 hours a day, spent 90% of his working time on vessels in navigation, operating cranes and excavators on barges, repairing vessel appurtenances, transporting tools and materials to his employer's fleet of 100+ vessels building the new and demolishing the old Tappan Zee Bridge across the 3 mile wide Hudson River. The court below and employer conceded that his work contributed to the function of the vessels he worked on, and the accomplishment of the mission of that fleet. Yet, in the Second Circuit's view, affirming the District Court's finding as a matter of law, Doty was not entitled to a jury determination of his status, because he "did not operate or otherwise assist in the navigation of any vessel", when he did his repair work on the fleet of TZC's vessels which were "stationary" and "not navigating over water" and because he "went home at the end of an hourly shift and never slept aboard a vessel." (Pet. App. A at 4a). Thus, it found he was covered exclusively by the provisions of the Longshore and Harbor Workers Compensation Act, 33 USC § 901 et. seq. (hereinafter sometimes "LHWCA" or the "Act"). (See, Pet. Appdx. D).

In *Gizoni* and *Chandris, Inc. v. Latsis*, this court made it perfectly clear that determining who may be entitled to seaman status is a jury question in all but the most clear cases where the court could find that under no circumstances could a jury find in favor of the worker on summary judgment. Ignoring that constitutionally based decision, the Second Circuit in the case *sub judice*, affirmed a district court summary determination that the maritime worker in question was covered exclusively

by LHWCA in its decision which relied on the flawed reasoning noted above.

This appeal seeks to have the Court reinstate this maritime engineer's claim, by reiterating that the status decision tool is a decision making function of a jury. In so doing, the Court would also resolve conflict between the Second Circuit and numerous other Circuits on this point by finding that construction workers' work on primarily stationary vessels at sea fulfills the status requirement of the multi-pronged test to be considered a seaman under the Jones Act.

A. The Undisputed Facts Giving Rise to this Claim.

The following facts were uncontradicted on appeal. Tappan Zee Constructors, LLC, ("TZC") contracted with the New York State Thruway Authority ("NYSTA") to construct a new twin-span Tappan Zee bridge to demolish the aged one being replaced. The bridge crosses the three mile wide Hudson River connecting Rockland and Westchester Counties. TZC created a fleet of about 100+ owned or leased vessels, including tugboats, 26 crane barges, various material barges and work boats to accomplish this mission. The site had four "ringer crane barges", large deck barges with huge cranes affixed to the barge decks with a ring made of steel beams to support extremely heavy counterweights that could ride on and rotate 360 degrees around the 'ring' so its cranes could lift massive piece of materials. One of the crane barges was the "Strong Island" upon which plaintiff was injured. (Pet. Appdx. A at 2a).

Mr. Doty was hired by TZC in May 2014 as a marine operating engineer to work as barge based equipment operator and mechanic dedicated to work on the TZC vessel fleet. His union supplied the operating and maintenance crews for the fleet, including tugboat captains and deckhands. He operated construction equipment, maintained and repaired tug-boats, work-boats, crew-boats and crane barges. These work barges were moved along the bridge by TZC tug boats, which at times Doty helped maintain. He worked typically 12 hours a day five and six days a week for his employer, TZC. He was injured six months later, on November 14, 2014, when he fell from a 6' height, causing spinal fractures, while working on a huge crane barge in the middle of the Hudson River.

On this project, at the beginning of the work day, the workers were transported by crew boat from the shore to the 'mechanics barge', which stored tools and equipment, situated about two miles out in the river where they received their work assignments for their vessel repair work.

Doty worked at the bridge for 6 months during 12 hour night shifts, 5-6 days a week. He spent at least 90% of his working time on vessels in the river. On the barges he operated cranes and other equipment. He maintained and repaired vessels, and their appurtenant equipment such as water pumps, light towers and generators and cranes. He performed oil changes, replaced filters and hydraulic hoses, repaired exhaust equipment, addressed system air leaks and changed crane cable wires, and pumped out barges to keep them afloat. Such equipment is all considered vessel appurtenances *Jerome B. Grubart, Inc. Great Lakes Dredge & Dock.*, 513 U.S. 527, 535 (1995).

Given numerous assignments each day, from 5-7 times a day he boarded a TZC work boat on which he transported tools, equipment and materials to vessel work sites, traveling many miles per day on the river doing so.

The vessels were often in the navigation channel, but always subject to tides, currents, winds, storms and darkness on the open water. There was always heavy boat traffic around. Doty almost never worked on a vessel moored safely at a dock. He was exposed to many marine perils including tides and currents, rough choppiness with several foot high waves causing significant vessel motion and strong currents.

Several serious maritime accidents caused by these marine perils occurred on the river at the construction site. Two crew boats sank and a tug-boat sank during a bad storm. Several construction barges broke away from their moored location on the river. Several fatal collisions occurred at the bridge project. In July 2013, a power boat crashed into one of the barges moored on the Hudson River, killing two people. In March 2016, a tugboat crashed into one of the work barges at the bridge, causing the tug to sink, killing three people.

On November 19, 2014, Mr. Doty was injured repairing the Strong Island. After getting his assignment, he transported tools and equipment by work boat to the barge. While aboard, he slipped and fell off an unprotected 8"-10" wide steel beam, falling to the deck resulting in fractures to several vertebrae. Doty argues that defendant was negligent in failing to provide a safe place to work, that the vessel was unseaworthy due to the dangerous conditions existing at all times in the dangerous walking surfaces he was provided.

B. Proceedings in the District Court and Court of Appeals.

Plaintiff sued TZC claiming that he was a Jones Act seaman and was injured through his employer's negligence and the vessel Strong Island's unseaworthiness. In the alternative, he claimed if he were found not to be a seaman, he was entitled to claim for vessel negligence under LHWCA §§ 905(b) and 933. On the Jones Act seaman's claim, the District Court held as a matter of law Mr. Doty could not be found by a jury to be a seaman. (Pet. Appdx. B at 23a). It also rejected the § 905(b) claim alleging vessel negligence. (Pet. Appdx. B at 31a).

Petitioner appealed both decisions to the Second Circuit.

On October 22, 2020 the Second Circuit panel affirmed the District Court's order, stating:

> We agree with the district court that Doty is not a seaman. Like the plaintiff in *Buchanan*[1], Doty (1) performed maintenance work exclusively on stationary vessels rather than vessels navigating over water; (2) did not operate or otherwise assist in the navigation of any vessel; (3) held no maritime license; and (4) went home at the end of an hourly shift and

1. *Mattter of Buchanan Marine,* 874 F.3d 356 (2d Cir. 2017), cert denied, sub. nom *Volk v Franz*, __U.S.__, 138 S Ct 1442 (2018). *Buchanan Marine*, is eminently distinguishable as there, the worker participated in the loading of aggregate cargo into barges and clearly was a covered employee under the definition in 33 USC § 902(3) of a longshoreman or an "other person engaged in longshoring operations." (Pet. App. D. at 35a).

> never slept aboard a vessel. See id. at 366-67; see also *O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002) (finding lack of seaman status for dock worker who (1) worked only on vessels secured to a pier; (2) did not "operate a barge or otherwise assist in its navigation"; (3) "held no Coast Guard license or other seaman's papers"; and (4) "never spent the night aboard a barge." (internal quotation marks omitted)). Doty argues that his employment circumstances differ from those of the plaintiff in Buchanan in that Doty worked on vessels that were floating (though secured) in the middle of open water rather than moored to a riverside dock; accordingly, he claims that he had a greater exposure to certain maritime perils, such as choppy waters or heavy boat traffic. Even assuming that to be correct, however, that one factor would not tip the scales in his favor under the totality of the circumstances analysis. Considering all the circumstances, we conclude that Doty was not a seaman[2].

(Pet App. A at 4a).

That, of course, meant that Mr. Doty was a covered employee exclusively under the LHWCA. The Circuit Court then affirmed the dismissal of the claims made under § 905(b) of LHWCA. (Pet App. A at 7a).

The within petition to the Supreme Court only seeks reversal of the decision denying claimant's entitlement to have a jury determine his Jones Act seaman status.

---

2. The panel's Summary Order is reproduced in Appendix A.

REASONS FOR GRANTING THE PETITION

I

THE SECOND CIRCUIT, IN AFFIRMING THE DISTRICT COURT, ERRED IN NOT PERMITTING MR. DOTY A JURY DETERMINATION AS TO HIS SEAMAN STATUS

In denying Mr. Doty the right to have a jury determine whether he was entitled to be found to be a seaman, the Second Circuit ignored the import of the directives in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995) that generally Jones Act status is a jury question.[3] *Chandris* summarized the tests for what a maritime worker must show to be considered to have "Jones Act" seaman status. It noted that the determination is a fact intensive question for a jury, that the totality of the circumstances must be considered, and it is not for the court but a jury to decide seaman status. It held that unless under no circumstances could a jury find seaman status, that question should go to the jury. The court stated "if reasonable persons, applying the proper legal standard, could differ as to whether the employee was a member of the crew. . .it is a question for the jury." *Id.* at 369. Only in rare cases is the question taken from the jury or trier of fact even when the claims of seaman status appear to be relatively marginal. 515 U.S. at 369.

3. Indeed, Mr. Doty argued to the courts below that he was entitled to summary judgment in his favor on the issue of seaman status, that is, under no analysis of the agreed facts could he be found *not* to be a seaman.

The Second Circuit decision disregards the maritime law as enunciated by the Supreme Court, creates unnecessary conflict among the Circuits, ignores Second Circuit precedents and violates the paramount interest of uniformity of maritime law. There are certain requirements the Supreme Court over the past 30 years has designated for a maritime worker to qualify as a Jones Act seaman, many of which the Second Circuit ignored in its analysis, but which Mr. Doty fulfilled. They are:

1. There must be vessel related employment.[4]

2. On a vessel or a fleet of vessels.[5]

3. That contributes to the function of the vessel or the accomplishment of its mission.[6]

4. With said work being accomplished on a vessel at least 30% of the time by the worker.[7]

5. That the work be maritime related but not necessarily as an aid to navigation[8] nor related to inter-continental transportation.[9]

---

4. *Chandris Inc. v. Latsis*, 515 U.S. 347 (1995), *McDermott International, Inc. v. Wilander*, 498 U.S. 337 (1991)*; Jerome B. Grubart, Inc. Great Lakes Dredge & Dock*, 513 U.S. 527 (1995)

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

6. *Wilander*, *supra.*, *Chandris, supra.*

7. *Chandris*, *supra.*

8. *Wilander, supra.*

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

6. That a harbor worker's activities performing vessel repair work can qualify the worker for Jones Act seaman status should they show compliance with the above factors.[10]

The factors disclosed surrounding Mr. Doty's employment show each of these elements were fulfilled and he should have been found to be a Jones Act seaman, or at least have a jury decide the issue. Mr. Doty's work helped *vessels* navigate around the site to accomplish their mission by his repair of appurtenances thereto. He, further, navigated a half dozen times a day among those vessels scattered along the three mile wide river bringing tools and materials to those vessels so that they could be operated. Those vessels clearly had a transportation function. Those many vessels in the fleet carried huge cranes and construction materials to the site, installed it along the new bridge structure, removed the old structure and loaded and transported away the demolished materials. The panel said he did not aid to their navigation, which is a test jettisoned by the Supreme Court in *Wilander, supra.* where a paint foreman was found to be a Jones Act seaman even though his vessel only performed sand-blasting and painting on fixed platform structures. See, 498 US at 355 - 357. The decision also overlooks that the Supreme Court in *Chandris* specifically rejected a 'voyage' requirement to be covered by the Jones Act. See *Papai*, 520 U.S. at 561.

Marine, Inc. v. Gizoni, 502 U.S. 81 (1991) and see *Uzdavines v Weeks Marine, Inc.*, 418 F.3d 138 (2d Cir 2005).

10. *Southwest Marine, Inc. v. Gizoni* 502 U.S. 81 (1991).

As noted in *Wilander* and *Chandris*, to be a seaman, the laborer's work must be for the benefit of the vessel and the accomplishment of its mission. *Wilander*, 498 U.S. at 354–55; *Chandris*, 515 U.S. at 369. As the Court in *Grubart,* supra. makes clear, the work of, on and with the appurtenances of a vessel constitutes the work of the vessel. Here, 100% of the work Mr. Doty performed on a daily basis was for the benefit of TZC's vessels and their appurtenances, such as repairs of the vessels' appurtenant cranes, light towers, pumps and all other types of equipment on the fleet of TZC vessels. As *Papai* makes clear, vessel related employment to a fleet of commonly owned or operated vessels qualify the worker for seaman status equally as if he/she worked on a single vessel. *Papai*, 515 U.S. at 368.

Additionally, the panel overlooked the import of the work Mr. Doty performed transporting aboard TZC vessels equipment and materials to aid in the maintenance and repair of the vessels so that they could function.[11] This was a critical factor in *Gizoni* in finding that maritime repair work to be able to present a jury question about seaman status. In *Gizoni,* the marine repairman similarly transported tools and materials to service the vessels (notably not even in his employer's own fleet) to which he was assigned to work on. Nor did the Second Circuit even mention that Mr. Doty's time spent working with vessels was triple that of the 30% minimal time threshold required by *Chandris* to support a finding of seaman status.

---

11. Some 5-7 times per day he transported tools, equipment and materials by boat. (A18-A19).

The Supreme Court in *Gizoni* recognized that some maritime workers may be Jones Act seamen who are injured while also performing a job specifically enumerated under the LHWCA. The Court stated:

> While in some cases a ship repairman may lack the requisite connection to a vessel in navigation to qualify for seaman status ... not all repairmen lack the requisite connection as a matter of law. This is so because it is not the employee's particular job that is determinative, but the employee's connection to a vessel. By its terms the LHWCA preserves the Jones Act remedy for vessel crewmen, even if they are employed by a shipyard.

Gizoni, 502 U.S. at 89 (citations, footnote, and internal quotation marks omitted).[12]

Significantly, the Second Circuit's decision improperly failed to recognize that performing sea-based, long term maritime construction work for an employer's fleet of barges is itself of a 'sea-going nature' as a seagoing activity, fulfilling the final leg of the *Chandris* test that his work be both substantial in terms of nature and duration.

---

12. Other courts, relying on *Gizoni*, have also found that construction company repair workers could attain Jones Act status. See, *Gibson v Am. Constr. Co., Inc.*, 200 Wash App 600, 604, 402 P3d 928, 932 (Wash Ct App 2017)(mechanic in a construction company's marine construction department fell through a hatch while working on a crane barge moored at the company's dock entitled to adjudication of Jones Act status).

A. Second Circuit Improperly Classified Plaintiff as a Harbor Worker

The Second Circuit improperly classified Mr. Doty as a covered "harbor worker" under the Longshore and Harbor Workers Compensation Act. Obviously he was not a longshoreman, as he had nothing to do with loading or unloading ships, thus to prohibit him from having Jones Act status it had to say he was a harborworker. But clearly, he was not working in a harbor while participating in building this bridge in the 3 mile wide, tidal Hudson River. The Act provides no definition of harbor worker, but does in various provisions give clues as to who should be so considered. Maritime construction workers and maritime mineral resource extractors are not listed as covered by the Act, but the following are:

- any longshoreman or other person engaged in longshoring operations, § 902(3) (Pet. App. D at 35a);

- ship repairman, shipbuilder, and ship-breaker, § 902(3) (Pet. App. D. at 35 a)

The list of those the Act excludes is also informative. Thus, § 902(3) excludes coverage for the following class of workers working in a harbor, if they are subject to coverage under a State workers' compensation law :

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

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

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

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

(E) aquaculture workers;

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

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

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

Additional exclusions in the Act point to the intent of the Act to provide coverage for those workers working in safe harbor facilities not exposed to the open water marine

environment as was Mr. Doty and other maritime heavy construction workers employed on vessels in the open waters. Thus, in § 903(d)(1), most workers at small boat construction, repair or dismantling facilities are excluded from coverage if otherwise covered by state workers compensation. That provision states, "[n]o compensation shall be payable to an employee employed at a facility of an employer if, as certified by the Secretary, the facility is engaged in the business of building, repairing, or dismantling exclusively small vessels ... unless the injury occurs while upon the navigable waters of the United States or while upon any adjoining pier,wharf, dock, facility over land for launching vessels, or facility over land for hauling, lifting, or drydocking vessels." (Pet. Appx. D. at 42a).

The inclusion of coverage under the Act of only marina construction workers (§ 902(3)(C)) is also indicative of an intent that other maritime construction workers working heavy construction in open waters, such as Mr. Doty, are not to be included under the general rubric of "harbor worker." (Pet. Appdx. D at 36A).

That maritime construction workers are not statutorily included in what is a 'harbor worker' is further shown by those who are categorized as an "employer" in § 902(3)[13] (Pet. Appdx. D at 36A), which includes those whose workers are covered by the Act because of employment at a pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel. None of these tasks remotely suggest heavy

13. Likewise, see § 903(a), which describes the coverage of the Act using the same terminology. (Pet. Appdx. D. at 42a).

construction being performed from work barges floating or attached to the open navigable waters must be included in the definition of a harbor worker. Without doubt, some maritime construction workers whose employment primarily involves working on a pier in a safe harbor could be included as a covered worker, see *Dir., Office of Workers' Comp. Programs v. Perini N. River Assocs.* 459 U.S. 297, 299 (1983) but that still does not prohibit construction workers from claiming seaman status. *Perini*, of course, does not mandate that maritime construction workers cannot be seamen under the Jones Act. It only holds that a maritime construction worker injured on the navigable waters, under the right circumstances, can be considered a covered employee under LHWCA. But, as the Second Circuit found in *Uzdavines v Weeks Marine, Inc.,* 418 F.3d 138 (2d Cir. 2005) (discussed *infra.*) simply claiming LHWCA covered status does not necessarily mean that a worker's decision to seek coverage under the Act takes him automatically removes him from being found to be a seaman. In such case, as in *Uzdavines*, the employer may assert that it is not subject to the Act's provisions due to the seaman's exclusion in § 902(3)(G). (Pet. Appdx. D at 36a).

II

THE SECOND CIRCUIT'S DECISION NOT ONLY CONFLICTS WITH SUPREME COURT DECISIONS BUT THOSE OF SIX OTHER CIRCUITS AND, INDEED OTHER SECOND CIRCUIT AUTHORITY

A. Supreme Court Authority

Directly on point, but not even cited by the Second Circuit, is *Southwest Marine, Inc. v Gizoni*, 502 U.S. 81 (1991) where a ship repair facility employee who worked on numerous non-self propelled barges used to repair other vessels was accorded the right to a jury trial on his Jones Act status. There the Court held that he could proceed to prove it "[b]ecause a ship repairman may spend all of his working hours aboard a vessel in furtherance of its mission—even one used exclusively in ship repair work—[thus] that worker may qualify as a Jones Act seaman." 502 U.S. at 92.

Significant, but also ignored, is *Stewart v Dutra Const. Co.*, 543 U.S. 481 (2005) where another engineer repairman was injured in a construction project. Like here, the barge in *Stewart* was immobile at the time of the incident, and when it did move, it traveled 30-50 feet about every two hours. Affixed to it was a large excavator used to dig out sediment for a tunnel being built. Two dependent questions were posed in *Stewart*. Although moored, the court held it was a vessel in navigation and the injured worker was sufficiently connected to that vessel because his duties contributed to the accomplishment of the mission and function of the vessel. On remand

from the Supreme Court, the First Circuit in *Stewart v Dutra Const. Co., Inc.*, 418 F.3d 32 (1st Cir 2005) found the marine engineer/ maintenance worker involved in digging the trench for a tunnel across Boston Harbor to be a seaman as a matter of law.

The Second Circuit's decision defies the instructions in the seminal Supreme Court's cases as to who is entitled to claim seaman status. As such, the petition should be granted to rectify the Second Circuit's error.

B. Conflicts with Six Other Circuit Courts Decisions

The panel's decision also conflicts with decisions of six other Circuits analyzing similarly situated maritime construction workers, thus, the Second Circuit decision is an outlier needing to be reined in.

1st Circuit

As mentioned above, the First Circuit in *Stewart v Dutra Const. Co., Inc.*, 418 F.3d 32 (1st Cir 2005), on remand from the Supreme Court, found the marine engineer/ maintenance worker involved in digging the trench for a tunnel across Boston Harbor to be a seaman as a matter of law. It held:

> The question is whether, in light of the Court's decision in *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005) (Stewart III), we should rule, as a matter of law, that the plaintiff was a seaman for Jones Act purposes. After studying the Court's decision and the parties' supplemental briefs, we answer this question in the affirmative ...

Id at 33.

This construction/mining activity was performed in a near-stationary location on a daily basis. Stewart, as a marine engineer, contributed to its function even though the construction vessel was always affixed to the river bottom, on-site and virtually not traveling from point to point.

3rd Circuit

In *Foulk v. Donjon Marine Co., Inc.*, 144 F.3d 252 (3d Cir.1998) a commercial diver working with a crane barge on jetty construction was found to be entitled to show seaman status. The Third Circuit noted that:

> here is no question that Foulk met the first requirement—he contributed to the functioning of the vessel and to the accomplishment of its mission. As the district court found, the mission of the vessel in question, the Farrell 256, was the installation of an artificial reef... Foulk was employed as a diver whose duty it was to aid in the installation of the reef. See *Wilander*, 498 U.S. at 355 ("It is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work."). There is also no question that Foulk met the first part of the second requirement—his connection to the vessel was substantial in nature. As the district court found, Foulk and the dive crew were necessary for the successful completion of the Farrell 256's project — the construction

> of the artificial reef. Foulk, 961 F.Supp. at 697. Furthermore, the profession of commercial diving is maritime in nature as it cannot be done on land. *Wallace v. Oceaneering Int'l,* 727 F.2d 427–36 (5th Cir.1984). Commercial divers are regularly exposed to the perils of the sea, the protection from which was the purpose of the Jones Act seaman requirement. *Chandris*, 515 U.S. at 368–70, 115 S.Ct. at 2190.

Foulk v Donjon Mar. Co., Inc., 144 F3d 252, 258-59 (3d Cir 1998).

This construction activity was performed in a stationary location on a daily basis. Foulk, as a marine diver, contributed to its function even though the construction vessel was on-site and was not traveling from point to point.

4th Circuit

In *Saylor v. Taylor*, 77 F. 476 (C.A.4 1896), a dredge worker, in the pre-Jones Act era, was found to be able to show seaman status. In *Stewart*, the Court noted that these type of construction related workers can be seamen, noting: "[d]espite the seeming incongruity of grouping dredges alongside more traditional seafaring vessels under the maritime statutes, Congress and the courts have long done precisely that." 543 U.S at 497.

Like in *Stewart*, this material mining activity was performed in a near-stationary location on a daily basis. There, the dredge worker contributed to the vessel's function even though the construction activity of a dredge

was done virtually on-site and not traveling from point to point.

5th Circuit

In *In Re Endeavor Marine, Inc.*, 234 F.3d 287 (5th Cir 2000), like here, the plaintiff was a crane operator assigned to work aboard a derrick barge on the Mississippi River that was usually moored to a dock where he loaded and unloaded cargo and helped to maintain the crane. Sometimes, the barge was moved from its base wharf to other wharfs for loading and unloading ships. On at least one occasion during the 18 months he worked on the barge, the plaintiff rode the barge from one location to another to operate and perform maintenance on the crane. On other occasions, he drove his automobile to the new location where the barge was moved. There, the court found the plaintiff to be a seaman, based on the fact that (1) plaintiff was permanently assigned to and worked on the same barge during his entire employment, (2) the barge was moved on occasion to different wharfs on the Mississippi River and the plaintiff moved to whatever new location the vessel was moved to, and finally he was exposed to the perils of the sea, in that case the Mississippi River. In a decision issued on May 11, 2021, the Fifth Circuit in *Sanchez v. Smart Fabricators of Texas, LLC*, 2021 WL1882565 (5th Cir. May 11, 2021) reiterated that these facts were sufficient to determine that a maritime crane operator could meet the seaman status test.

Doty's facts are even stronger. His work was never performed at a safe cove or pier, but was performed in the dangerous waters of the wide Hudson River. Like the operator in *Endeavor Marine*, he was permanently

assigned to the fleet of vessels operated by his employer, and was not sporadically employed by an independent contractor who assigned him to that fleet on a transitory or sporadic basis performing a discreet project and then being reassigned to some other shore based project.

Moreover, the Second Circuit's decision also conflicts with the Fifth Circuit's line of cases finding drilling crews permanently assigned to drill vessels essentially permanently stationed on a well head in the navigable waters to have seaman status. There is nothing particularly different about sitting on a well-head, not traveling back and forth between ports, and performing construction work creating a five-mile long bridge structure, yard by yard. Fifth Circuit decisions on this point conflicting with the Second Circuit's *Doty* decision include *Rogers v. Gracey-Hellums Corp.,* 331 F. Supp. 1287, 1288 (E.D. La. 1970), aff'd, 442 F.2d 1196 (finding that a roughneck permanently attached to a barge was a member of the crew), *Producers Drilling Co. v. Gray,* 361 F.2d 432, 436–37 (5th Cir. 1966) (finding that a roustabout who maintained a barge and its equipment as well as helped drill a well was a seaman) and *Offshore Co. v Robison*, 266 F.2d 769 (5th Cir 1959) (roustabout working on the main deck of a mobile drilling platform or barge at a well-head resting on the bottom of the Gulf of Mexico was a seaman).[14] Like those 'roughnecks' found to be seamen, Mr. Doty, too, in his permanent assignment to the fleet

14. These three cases are specifically analyzed and approved by the Fifth Circuit in the most recent pronouncement on seaman status in *Sanchez v. Smart Fabrication of Texas, L.L.C.* 2021 WL1882565. (5th Cir. May 11, 2021). Further, it is to be noted that the *Robison* decision was the primary underpinning to this Court's ground breaking decision in *Wilander, supra.*.

did repairs and at times operated the equipment that did the maritime construction on-site and often stationary with only short movements along the developing bridge.

8th Circuit

Under *Bunch v. Canton Marine Towing Co.,* 419 F.3d 868 (8th Cir. 2005) the Eighth Circuit also would permit a jury to find Mr. Doty a seaman. There a barge maintainer who worked almost exclusively on a fleet of vessels, although moored, was entitled to show seaman status.

9th Circuit

The 9th Circuit also would permit a jury to find a similarly situated crane operator/repairman as Mr. Doty to present a jury question on seaman status. *Scheuring v. Traylor Bros.,* 476 F.3d 781, 786-87 (9th Cir. 2007). There, a crane operator like Mr. Doty, who worked on a crane barge constructing a pier was entitled to show Jones Act status because the barge was subject to wind and wave action, it moved to various sites on the project, and the worker performed repairs and at times did deck hand work. *Id* at 786-87. Mr. Doty did all of the same things, but the Second Circuit denied his right to a jury determination of his status.

C. Second Circuit Authority Conflicting With Decision Below

A critical decision ignored by the Second Circuit was its own *Uzdavines v Weeks Marine, Inc.*, 418 F.3d 138 (2d Cir. 2005), which analyzed Jones Act versus Longshore

coverage for a maintenance engineer employed aboard a barge with a bucket excavator used to dredge a portion of New York Harbor as part of the aborted Navy Home Port project. Aboard the barge he performed mechanical repairs. After his death due to disease, his widow sought LHWCA death benefits. The employer claimed that despite his long history of shore-side work, Mr. Uzdavines was not a covered employee under LHWCA, rather, he was a Jones Act seaman, as a member of the crew of the dredge and that his employment met each of the *Chandris* tests and as applied in *Stewart*. The facts of *Uzdavines*, like *Stewart*, are indistinguishable from Mr. Doty's situation, yet the Second Circuit ignored both.

The determination that Uzdavines's connection to the barge was both substantial in duration and nature, was based on a finding that "[f]or a period of approximately three to four consecutive weeks ... the decedent served as an oiler aboard the dredge, working on "the brake drums and friction drums which suspend the cable to lift up the bucket while dredging." 418 F.3d at 141. He also maintained its engines. *Id.* at 145. Based on the above the Second Circuit found as a matter of law that Mr. Uzdavines was a seaman. *Uzdavines* 418 F.3d at 146.

Like in *Stewart*, Mr. Uzdavines's work supported the material mining activity of the vessel which was performed in a near-stationary location on a daily basis. As a marine engineer, he contributed to the vessel's function even though the construction vessel was virtually on-site and not traveling from point to point.

The court here should have found that Mr. Doty met all of the tests for seaman status because his duties

contributed to the function of the vessel in navigation or to the accomplishment of its mission; and second, that he had a connection here to a *fleet of vessels* in navigation that was substantial in terms of both its duration and its nature. *Chandris*, 515 U.S. at 376. These requirements are meant to emphasize that "the Jones Act was intended to protect sea-based maritime workers, who owe their allegiance to a vessel and not land-based employees who do not."

The Second Circuit below misplaced singular reliance on *Matter of Buchanan Marine*, 874 F.3d 356 (2d Cir. 2017), which denied Jones Act status to that claimant because, unlike Mr. Doty, he could not show compliance with the basic factors postulated by the Supreme Court. Indeed, there is nothing within the *Buchanan Marine* decision even indicating if he met the required showing of at least 30% of his time on vessels, compared to his shoreside loading duties making him an "other person engaged in longshoring operations." 33 USC § 902(3).

The court's decision also improperly consider relevant the jettisoned concept that the worker had to aid in navigation to be a seaman. See, *Wilander*, supra. It also incorrectly relied on the fact that Mr. Doty did not sleep on any vessel, a factor rejected in numerous cases, including *Matter of Weiss v. Central R.R. Co. of N.J.*, 235 F.2d 309 (2nd Cir. 1956).[15]

---

15. Notable is that the plaintiff in *Stewart*, who ultimately was found to be a seaman in the final "*Stewart"* decision, *Stewart v Dutra Const. Co., Inc.*, 418 F.3d 32 (1st Cir 2005), like Mr. Doty, was hired by a the local mechanic's union to work as a mechanical engineer. He was assigned to the construction project to maintain the dredge in question's functioning The plaintiff there lived ashore and commuted to work each day. He never resided on

Similarly the court's characterization that the Strong Island was floating but 'moored' like the boats the plaintiff in *Buchanan Marine* boarded is unsupported but, in any event irrelevant, as the Supreme Court has stated:

> Also, a watercraft need not be in motion to qualify as a vessel under § 3. Looking to whether a watercraft is motionless or moving is the sort of "snapshot" test [for seaman status] that we rejected in *Chandris*. Just as a worker does not "oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the worker was engaged while injured," *Chandris*, 515 U.S. at 363, neither does a watercraft pass in and out of Jones Act coverage depending on whether it was moving at the time of the accident.

Stewart, 543 U.S. 495-96.

Indeed, the vessel in *Offhsore Co. v. Robison,* supra. which decision was the underpinning for the *Wildander* decision in this court, was sunk and sitting on the bottom of the Gulf of Mexico, much more stationary than any of the vessels on which Mr. Doty worked. The panel

---

the barge which had no living quarters or full kitchen. This information is stated in the brief to the First Circuit by Dutra Construction Co., the employer of Mr. Stewart, which opposed his seaman status, citing to the Appellate Record. "The Petitioner lived ashore in East Boston and commuted to work each day. (C.A. App. 90-91) He never resided on the Super Scoop, which had no living quarters or full kitchen. (C.A. App. 240-241, 247)." *Stewart v. Dutra Construction Co.*, 2004 WL 1743936 (U.S.), 5 (U.S.,2004) (Respondent Dutra's Brief).

wrongly equated Mr. Doty to a 'land-based worker' who just happened to be on a vessel at the time of injury. In so doing, the Second Circuit misread the "connection" test enunciated in *Chandris* to distinguish between land-based workers and seafarers. That test reads:

> The fundamental purpose of this substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea.

Chandris, 515 U.S. 368.

The elements of that distinction are whether there is a "transitory" or "sporadic" connection to a vessel (or fleet) of vessels in navigation. Websters defines "sporadic" to mean "occurring occasionally, singly, or in irregular or random instances." It defines "transitory" to mean "of brief duration : temporary." Nothing about Mr. Doty's work fits either definition, rather, he was purposefully on the fleet of vessels all the time, not randomly, performing necessary work to allow the vessels to complete their mission.

CONCLUSION

The Second Circuit erred by not applying to the question of whether Mr. Doty could be found to be a seaman the applicable standards for the determination stated in the Supreme Court cases of *Gizoni*, *Chandris*, *Wilander*, *Papai* and *Stewart.* Its decision conflicts with six other Circuit Court decisions and even other Second Circuit authority. The uncontroverted evidence is that Brian Doty met all of the tests enunciated in those decisions to meet the seaman status requirement. Accordingly, certiorari should be granted to rectify the serious omissions of the Second Circuit.

Respectfully submitted,

PAUL T. HOFMANN
Counsel of Record
HOFMANN & SCHWEITZER
212 West 35th Street, 12th Floor
New York, NY 10001
(212) 465-8840
paulhofmann@hofmannlawfirm.com

Counsel for Petitioner

APPENDIX

APPENDIX A — SUMMARY ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED OCTOBER 22, 2020

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

20-36-cv

BRIAN DOTY,

Plaintiff-Appellant,

v.

TAPPAN ZEE CONSTRUCTORS, LLC,

Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York (Karas, *J.*).

October 22, 2020, Decided

Present: ROSEMARY S. POOLER, RAYMOND J. LOHIER, JR., WILLIAM J. NARDINI, *Circuit Judges.*

SUMMARY ORDER

ON CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is **AFFIRMED**.

Appendix A

Brian Doty appeals from the December 18, 2019 judgment of the United States District Court for the Southern District of New York (Karas, *J.*) granting summary judgment to Tappan Zee Constructors, LLC ("TZC") on his claims brought under the Jones Act and Longshore and Harbor Workers' Compensation Act. We assume the parties' familiarity with the underlying facts, procedural history, and specification of issues for review.

TZC was hired by the New York State Thruway Authority to design and construct the Governor Mario M. Cuomo Bridge to replace the Tappan Zee Bridge. TZC hired Doty in May 2014 to work as a night-shift mechanic. In that role, he maintained and repaired both vessels and equipment appurtenant to materials barges, tug boats, work boats and crane barges. The bridge construction site had four ringer crane barges—barges with cranes attached to the barge decks, with a ring of steel beams that allowed the cranes to rotate 360 degrees while lifting equipment and materials. As relevant here, one crane was affixed to a 214-foot long crane barge named "The Strong Island," which was held in place by a 40-foot steel ring. The barges at the bridge construction site were stationary and moored. Aside from taking a boat between moored barges, Doty did not work aboard a vessel while it was traveling over water.

On November 19, 2014, Doty was injured while repairing a crane attached to the Strong Island. He was transported by work boat to the barge. Once there, he entered the engine compartment cab and performed diagnostic testing before exiting the cab to go the source

of the problem. To do so, he had to walk on top of 8-to-10-inch-wide steel beams, without the benefit of hand rails. He slipped and fell five feet to the crane's deck, injuring several vertebrae. Doty sued, alleging TZC was negligent in failing to provide a safe place to work and that the vessel was unseaworthy due to dangerous walking surfaces providing a dangerous condition. He sued for damages under the Jones Act, 46 U.S.C. § 30104, and, alternatively, under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 905(b) and 933 ("LHWCA").

On appeal, Doty first challenges the district court's holding that he was not a seaman within the meaning of the Jones Act. In *Chandris, Inc. v. Latsis*, the Supreme Court set out a two-part test for who is a seaman within the meaning of the Jones Act: "First . . . an employee's duties must contribute to the function of a vessel or to the accomplishment of its mission" and "[s]econd . . . 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." 515 U.S. 347, 368-69, 115 S. Ct. 2172, 132 L. Ed. 2d 314 (1995).

The district court relied on our decision in the *Matter of Buchanan Marine, L.P.*, where this Court considered whether a barge maintainer working at a riverside facility was a seaman. 874 F.3d 356, 365 (2d. Cir. 2017). There, the plaintiff was not assigned to any vessel and never operated a barge. *Id.* at 366. When the plaintiff worked aboard barges, the barges were secured to the dock in order to inspect them for cargo loading and cargo transport. *Id.* The plaintiff reported directly to the dock foreman,

belonged to a union for equipment operators, and did not have a maritime license. *Id.* at 367. Moreover, the plaintiff "never spent the night aboard a barge" but rather "worked an hourly shift and went home every night after his shift ended." *Id.* Weighing the total circumstances of the plaintiff's employment, the court found that "none of [his] work was of a seagoing nature [and] he was not exposed to the perils of the sea in the manner associated with seaman status." *Id.* at 368 (citations and internal quotation marks omitted). Based on these facts, the Court found that the plaintiff was not a seaman within the meaning of the Jones Act. *Id.*

We agree with the district court that Doty is not a seaman. Like the plaintiff in *Buchanan*, Doty (1) performed maintenance work exclusively on stationary vessels rather than vessels navigating over water; (2) did not operate or otherwise assist in the navigation of any vessel; (3) held no maritime license; and (4) went home at the end of an hourly shift and never slept aboard a vessel. *See id.* at 366-67; *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002) (finding lack of seaman status for dock worker who (1) worked only on vessels secured to a pier; (2) did not "operate a barge or otherwise assist in its navigation"; (3) "held no Coast Guard license or other seaman's papers"; and (4) "never spent the night aboard a barge." (internal quotation marks omitted)). Doty argues that his employment circumstances differ from those of the plaintiff in *Buchanan* in that Doty worked on vessels that were floating (though secured) in the middle of open water rather than moored to a riverside dock; accordingly, he claims that he had a greater exposure to certain

maritime perils, such as choppy waters or heavy boat traffic. Even assuming that to be correct, however, that one factor would not tip the scales in his favor under the totality of the circumstances analysis. Considering all the circumstances, we conclude that Doty was not a seaman.

Doty also challenges the district court's dismissal of his negligence claim brought under the LHWCA. The LHWCA provides no-fault workers' compensation benefits for land-based, non-seaman maritime workers injured "in the course of employment." 33 U.S.C. § 902(2-4). "The LHWCA's no-fault compensation structure is the exclusive remedy for injured [maritime employees] against their employers." *Buchanan Marine*, 874 F.3d at 363 (citing 33 U.S.C. § 905(a)). Thus, the LHWCA generally bars negligence claims brought by maritime workers against their employers. *See O'Hara*, 294 F.3d at 62 ("As with most other workers' compensation schemes, th[e] entitlement [to no-fault compensation payments under the LHWCA] displaces the employee's common-law right to bring an action in tort against his or her employer.").

However, an injured maritime employee covered by the LHWCA may sue negligent third parties in tort, including the owner or charter of the vessel on which the employee was injured. *Id.* at 363-64; *see* 33 U.S.C. § 905(b). Here, TZC is both the employer and the vessel owner, requiring analysis under the "dual capacity" standard set forth *Gravatt v. City of New York*, 226 F.3d 108, 125 (2d Cir. 2000). This analysis focuses on "the allegedly negligent conduct to determine whether that conduct was performed in the course of the operation of the owner's

vessel as a vessel or whether the conduct was performed in furtherance of the employer's harbor-working operations." *Id.* "The negligence of the employer's agents, acting in tasks constituting harbor-work employment, may not be imputed to their employer in its capacity as vessel owner." *Id.*

In *Gravatt*, a journeyman dock builder, who was employed by a construction contractor retained by the City of New York to repair one of its bridges, was injured while working on a barge chartered by the contractor at a construction site. *Id.* at 111. Normally, his duties did not include handling materials on the barges, but, on the day of his injury, he was instructed by the site foreman to go onto a materials barge to help move old piles so as to clear access to new materials. *Id.* at 113. He was subsequently hit by a pile that was being moved in an allegedly unsafe and negligent manner by personnel working on the crane barge and knocked into the water, causing serious injuries. *Id.* The Court assessed whether the employees' negligent conduct was undertaken in pursuance of the contractor's role as vessel owner or as employer. The Court noted that "the task of the materials barge, as a vessel, was to transport building materials from Newark to the work site and to transport debris from the work site to Newark," while the work assigned to the foreman and to the injured dock builder was to make repairs to the bridge, "which included the unloading of construction materials brought by the barges and the reloading of the barges with debris." *Id.* at 125. Moreover, all of the personnel working on the crane barge were engaged in bridge repair; none was engaged in seafaring work. *Id.* at 125-26. Simply put,

"[n]either the materials barge, nor the crane barge, nor anybody present at the bridge repair site was engaged in vessel duties at the time of the accident." *Id.* at 125. Accordingly, this Court held that the contractor was negligent in its capacity as employer, but not as a vessel owner. *Id.* at 125. Thus, there was no claim under Section 905(b) because the defendants were responsible only as employers, not as the vessel owners.

We agree with the district court that Doty cannot bring a negligence action against TZC. Doty was engaged in inspection and repair work at the time of his injury. Assuming Doty's injury was caused by TZC's negligence, the negligent act was committed while TZC acted as a construction company building a bridge. The Strong Island barge was moored and being used as a work platform for the crane, and the crane was being used to build the bridge. The allegedly dangerous condition was related to TZC's work as a construction company, not as a vessel owner.

We have considered the remainder of Doty's arguments and find them to be without merit. Accordingly, the order of the district court hereby is AFFIRMED.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

APPENDIX B — EXCERPT OF TRANSCRIPT OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK, DATED DECEMBER 17, 2019

[1]UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

17 Civ. 7947(KMK)

BRIAN DOTY,

Plaintiff,

v.

TAPPAN ZEE CONSTRUCTORS LLC,

Defendant.

United States Courthouse
White Plains, New York

December 17, 2019

HONORABLE KENNETH M. KARAS, District Court Judge

* * *

[26]was stationary with respect to the bottom of the river at the time, the river was moving quite fast underneath the vessel, so relative to the water, it was moving. But I think that is critical. If that's his argument and if the Court was

thinking that he had to be on a vessel that was moving for him to have an injury, that is just simply not correct.

THE COURT: Go ahead.

MR. DENGLER: That's not my argument, and I don't think that's what the Court was getting at. I agree that where the location of the injury occurs is not relevant, or it does not need to occur while on the vessel.

My argument is the job duties of Mr. Doty never were carried out while he was on a vessel that was moving, and that's the key point.

Thanks.

THE COURT: Okay.

So as I said, we're here for argument on the defense summary judgment motion. It is true that the defense did not -- I'm just going to go through the some of the relevant facts -- it's true, Mr. Hofmann is right, that the defense did not respond to the plaintiff's counterstatement, 561 statement, but to the extent the defense did dispute some of the facts in the counterstatement in their own statement, then I don't see how the facts aren't disputed. I don't think it really matters, honestly, because I think the key facts are not in [27]dispute.

But in terms of some of the background. TZC was hired by the New York State Thruway Authority to design and construct a new bridge, and the bridge, we're talking about what used to be called the Tappan Zee,

now that Governor Mario M. Cuomo Bridge. The bridge spans the Hudson from Westchester to Rockland County. Construction began back in 2013. Before working with TZC, plaintiff's work included work he did at an automobile repair garage, sales for construction equipment, driving a truck as a "teamster" and being a backhoe operator. He possessed a Class A CDL driver's license, and a Transportation Worker Identification Credential, which he obtained in connection with hauling propane in prior employment. Plaintiff does not possess a Merchant Mariner credential or any seaman's papers, but he is a member of the Operating Engineers Union Local 137.

Plaintiff was hired by TZC as a Group 2B mechanic in May of 2014, and his role was that of "night shift mechanic." Plaintiff himself avers that "when repairs were needed to service and fix equipment and vessels, [he] and other maintenance workers would be called to fix it." That's from paragraph 13 of the plaintiff's affirmation.

As we've been reminded here by Mr. Hofmann, plaintiff worked 12-hour shifts, typically five-to-six days a week. His work largely consisted on working on equipment attached to or [28] "laying upon moored barges at the bridge construction site." That's actually from plaintiff's counterstatement, paragraph 14. Plaintiff himself asserts that during his employment he spent "90 percent of shifts on vessels on the navigable water of the Hudson River, servicing the vessels, the barges, work boats, and the tugboats." That's his affirmation at paragraph 21.

Plaintiff also testified that he and other mechanics "weren't working on the barges themselves" but rather

were working on equipment on the barges or other vessels, like "the tugboats and things of nature." That's from his deposition at page 57.

Plaintiff also noted that some mechanics were occasionally asked to conduct repairs to the barges themselves, and they would do it, but that that's not something plaintiff himself ever did. That's what he said in his deposition.

In his affirmation what plaintiff said is that he "like a ship's engineer, did maintenance and repair work to the vessel's appurtenances when necessary" such as repair and maintenance work where "the water pumps, light towers, generators and cranes aboard the fleet of vessels." He also said that at times he pumped out barges to help keep them afloat, something that Mr. Hofmann echoed here today, and he also claimed that he spent "90 percent of his shifts on vessels on a navigable water of the Hudson River," and "derived his [29]livelihood from...working for TZC, maintaining the function of its vessels and repairing them." Paragraph 21.

Now it's also not disputed that the barges at the bridge construction site were largely stationary and "moored in place-using spuds (vertical steel shafts or pilings)." That's from the counterstatement at paragraph 16. But then plaintiff qualifies this by citing to a March 2, 2018, press release by the US Coast Guard which reports that; "several construction barges...were reported drifting south of the Tappan Zee Bridge on Friday afternoon." So I guess, while the stationary nature of the barges is apparently not dispositive, plaintiffs sure as heck is trying

to make it seem like they weren't moored or otherwise stationary. Indeed, goes on to say that the Hudson River is a highly dynamic and unstable system, citing plaintiff's affirmation which states, "the water was often choppy with several high foot waves which caused significant vessel motion." But during his deposition Mr. Doty was asked point blank:

"Question: The mechanic barge, that was moored; right?

"Answer: Yes." That's page 62.

At page 63. "Question: Other than the work boat, did you ever work aboard a vessel that was traveling over water?

"Answer: No."

[30]Page 68. "Question: But the tug was always moored you were working on it?

"Answer: Yes.

"Question: The work boats that you worked on, when there was an issue with a work boat, they were moored as well?

"Answer: Yes. Sometimes they were in dry dock, too."

Plaintiff acknowledges he never slept aboard the barges, his tools stayed close to him and remained with him during the workday. These are all from the counterstatement.

Appendix B

Paragraph 19 where plaintiff acknowledges he never assisted in the movement of the mechanic's barge, and while he traveled over the water by vessel to get to the mechanic's barge, that was something that was part of his commute. And at his deposition at pages 70, 71, plaintiff acknowledged that he didn't assist in the movement of any vessels.

Now in terms of the accident itself, plaintiff alleges that on November 19 of 2014 he suffered an injury to his back while attempting to fix a "hoist control problem" on a "ringer crane" mounted upon Strong Island barge, which is one of TZC chartered barges.

Plaintiff had previously worked on the ringer crane on the Strong Island barge "on several occasions, each time having to access the ringer crane's engine compartment." That's paragraph 30 of the counterstatement.

[31]He was aware of some safety concerns about the ringer crane. Paragraph 31.

Plaintiff also knew that when the ringer crane experienced hoist control problems, it was frequently due to a problem with "frozen air lines," which had to be fixed from within the ringer's barge engine compartment. Paragraph 32.

The engine compartment was accessed by walking across "steel beams that were only 8-to-10 inches wide," which "had no handrails on either side and was about five feet above the crane's timber mats." Paragraph 35.

Upon crossing the steel beam, the mechanic would then typically step onto the "crane track," walk up to an about 18-to-20 inch wide catwalk outside the doors alongside the engine compartment," and then enter the compartment.

On November 19, plaintiff was advised "that the Strong Island crane had a hoist control problem because the air lines were frozen." Paragraph 40.

He was able to reach the engine compartment and perform diagnostics on the air lines. After this initial inquiry, plaintiff realized that the problem was likely coming from electrical components which were on the other side of the engine compartment. Paragraph 41. To access that other side, he had to exit the compartment, step onto the catwalk, step down onto the crane track and walk across a steel beam that was different between the ringer's crane tracks to access the other [32]side of the ringer crane. Paragraphs 36 and 41.

Now plaintiff says that the steel beam "went under the boom of the crane," so he had to crouch to get under the boom while walking across the steel beam. That's paragraph 42. As he was walking, plaintiff asserts that he "slipped on the oily residue on top of the narrow beam and fell five feet onto the crane's timber mats." Although he landed on his "two feet," he experienced "immediate pain between his shoulder blades as a result of this fall."

Plaintiff was able to finish working on the crane, but as a result of the fall, he alleges he suffered injuries to

several of his vertebrae. That's paragraphs 44 to 45 of the counterstatement.

We all know what the summary judgment standard is, that is, summary judgment is only appropriate when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Of course it's the movant's burden to show that there's no fact dispute. All the facts have to be construed in light of the non-movant and all ambiguities and all reasonable inferences are to be drawn against the movant. Only admissible evidence can be considered, and of course the Court does not resolve any credibility disputes or any other factual disputes and otherwise doesn't weigh the evidence.

All right, so the first issue here is whether [33]plaintiff is a seaman under the Jones Act, and this is what's alleged in Counts One, Two and Three. Because all of them seek relief under the Jones Act.

The act itself does not provide a definition of what a seaman is. The Supreme Court, however, has promulgated two basic requirements to be considered a seaman:

First, the worker's duties must contribute to the function of the vessel in navigation or to the accomplishment of its mission; and

Second, the worker must have a connection to a vessel in navigation that is substantial in terms of both its duration and its nature. That's from the *Chandris* case 515 U.S. 347, 376.

Now according to the Supreme Court, these requirements are meant to emphasize that "the Jones Act was intended to protect sea-based maritime workers, who owe their allegiance to a vessel and not land-based employees who do not." That's page 376.

The ultimate inquiry is whether "the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time." Page 370.

Chandris most recently was applied in a case that's relevant here in *Matter of Buchanan Maritime L.P.*, 874 F.3d. 356. In *Buchanan*, the employee there was a "barge maintainer" [34]who inspected barges used for loading and transporting quarried rock walking along their perimeters while they were moored to the either the dock or other barges. In describing the case, the Second Circuit noted that the plaintiff employee there "worked an hourly shift, went home at the end of each work day, and did not take meals or sleep on any barge. He was a member of the International Union of Operating Engineers, which represents equipment operators. He did not belong to a maritime union or hold a maritime license." Nor was the plaintiff there a "crew member" on any of the tugboats that transported the barges down the Hudson River.

Given this factual landscape, the circuit concluded that the employee there was not covered by the Jones Act and gave several reasons for that conclusion.

So among other things, the circuit noted that the plaintiff there never operated a barge, and "only worked

on board the barges when they were secured to the dock." Page 366.

Also that the plaintiff there never served as a crew member on the barges of the tugboats, that the plaintiff belonged to a union that represented equipment operators and did not belong to a maritime union or hold a maritime license, and also that the plaintiff "never spent the night aboard a barge...in contrast, a traditional Jones Act seaman normally serves for voyages or tours of duty." That's 367.

[35]In reaching the result it did in *Buchanan*, the Second Circuit specifically rejected the Fifth Circuit case in – is it *Naquin*? I don't know how to pronounce it. *Naquin*?

MR. DENGLER: *Naquin*.

MR. HOFMANN: Yes, sir.

THE COURT: *Naquin*, N-A-Q-U-I-N. So regardless of how I butcher the pronunciation, the spelling is the same, *versus Elevating Boats*, 744 F.3d 927, where a shipyard worker spent approximately 70 percent of his total time working aboard so-called lift boats that were moored, jacked up or docked in the shipyard canal. The circuit noted, of course, that the Fifth Circuit decision wasn't controlling but also distinguished the facts in *Buchanan* from *Naquin*, saying that in *Naquin* the employee operated "the vessel's marine cranes and jack-up legs and worked aboard the vessels in open water,

even if only occasionally." Whereas in *Buchanan*, the employee "worked on barges that were moored, directly or indirectly, to the dock, and did not operate the work boats or tugboats that transported the barges."

Here it's undisputed that plaintiff, in fact, spent most of him time on moored barges performing mechanical work for the bridge project. To the extent that he worked on tugboats or work boats, they were moored at the time of his work. That's right from his deposition at page 68. While plaintiff certainly rode on boats, he rode the work boats as a [36]passenger but not as a crew member to be transported to the barges for his work.

Even to the extent that his travel time could be counted as sea-based work, that was, at best, maybe 30 minutes a day out of 12-hour shifts, which is far below the 30 percent that was discussed in *Chandris*.

So based on the undisputed facts here, and when they're lined up with the Second Circuit's decision in Buchanan, which though there may be people in this room that think it was wrongly decided, I have to follow. And I'm not saying I do think it was wrongly decided, I'm not smart enough to figure that out.

So again, just to reiterate, although plaintiff inspected equipment aboard a barge, he admits that the barges were stationary and moored when he inspected or fixed the equipment. That's from paragraph 16 of his counterstatement. You know, there's an argument that the barges would experience swells because of the currents

and the tide. They're still moored. And *Buchanan* doesn't suggest somehow that the result depends on how choppy the waters are. It's really about what work was being done, and that's what the focus is here.

Indeed, plaintiff never operated the barge or the boats that transported him and other mechanics from the dock to the barge or between the barges, and even to the extent he did some maintenance work on the tugboats, again the tug was always [37]moored when he was working on it. That's from his own deposition.

As I said, he rode the tugs mostly for transportation purposes. And at least at his deposition he said was never asked to do maintenance work on the barges themselves. You can't create a fact dispute by contradicting himself. We all know that that's clearly the law. Also, it's undisputed the plaintiff never slept on the boat or the barge or any of the vessels that he worked on. He doesn't possess any Mariner Credential or seaman's papers, and between his shifts he would return back to land, and certainly never stayed aboard the vessel for days at a time.

So while there may be some minor differences in terms of job description between the employee in *Buchanan* and here, the fundamental characteristics of the two jobs are the same, which is that the plaintiff here worked exclusively on stationary vessels, that he was never a member of the crew who did work while the vessels were transporting from one location to another. He never stayed overnight. He didn't stay on the vessels at all for days at a time. Again, I don't want to repeat it, it's all been said.

And so I think *Buchanan* is controlling here. It's also the facts here line up with the case called *Schultz versus Louisiana Dock Company*, 94 F.Supp. 2d 746, 730, which is an Eastern Louisiana decision. But any event, *Buchanan*, it seems [38]to me, really does control here.

Now just to acknowledge the fact that plaintiff does try to suggest that the question of seaman status is normally a fact-intensive question which is typically for the jury to decide. Indeed, of course that's true when there are fact disputes. Then it would be inappropriate to grant summary judgment.

But that being said, within the Second Circuit courts have granted summary judgment. In fact, that's exactly what happened to *Buchanan*. The circuit affirmed the granting of summary judgment in *O'Hara versus Weeks Marine*. The circuit affirmed granting of summary judgment because as a matter of law the plaintiff didn't qualify as a seaman. Indeed, in that case the plaintiff spent time, a significant amount of time working on a barge, but he spent all that time performing tasks related to the repair of the Staten Island pier while the barges were secured to the pier. That's, by the way, *Weeks Marine* 294 F.3d 55. That particular piece is from page 64. And the Second Circuit in that case noted "even assuming the stationary barges were vessels in navigation, the plaintiff produced no evidence from which a reasonably jury could conclude that he derives his livelihood from sea-based activities. And most of the evidence establishes that the plaintiff had a transitory or sporadic connection to the barges in their capacity as vessels in navigation. Such a

minimal [39]connection does not suffice to confer seaman status on him." And so I think that both *Buchanan* and *O'Hara*, as I said, I think they're controlling here.

Plaintiff cites some cases, so one of the cases plaintiff cites is *McDermott*, Supreme Court decision back in 1991, where the Supreme Court held it was not necessary for an employee to have aided in navigation to be considered a seaman under the Jones Act and that instead a seaman should be defined "in terms of the employee's connection to a vessel in navigation." That's page 354. "A necessary element of the connection is that a seaman perform the work of a vessel."

And so *Buchanan*, which obviously postdates this decision, applies the law and comes out the way it does. Now, again, Mr. Hofmann may have his issues with the judges of the Second Circuit, but he may have his day to confront them.

Plaintiff relies on *Naquin* in which the Second Circuit specifically distinguished and anyway said wasn't controlling, which, of course, it isn't.

Foulk versus Donjon Marine Company, a Third Circuit decision from 1998, 144 F.3d 252. The plaintiff there was part of a dive crew who assisted "in the placement of a reef underwater." The plaintiff there had been hired for a ten-day period. The district court granted summary judgment on the temporal factor alone, which the Third Circuit reversed, saying that it was inappropriate to attempt to determine the minimum

[40]durational element by an absolute number such as ten days. That's not really at issue here. Also, the plaintiff's duties here did not involve the same duties as the plaintiff in *Foulk* because Mr. Doty wasn't supposed to be in the water as part of his job. Now it may be, again, that the waters were choppy, but he was not doing underwater work in connection with the vessel.

Plaintiff cites *Collick versus Weeks Marine*, it's an unpublished decision from the Third Circuit which actually ruled upon the appeal from the grant of a summary judgment that the plaintiff had failed to show that he "likely would be successful in proving he was a seaman" where the plaintiff's work was substantially related to the construction of the pier unrelated to the mission of the barge. I'm not sure why that case is helpful to plaintiff. Another unpublished decision from the Fifth Circuit, which I'll just leave it at that.

There's a Fourth Circuit case cited from pre-Elvis Presly days, but there at least the plaintiffs were at least partially engaged in assisting in the moving of the barge along the shore. That case, by the way, is *Summerlin versus Massman Construction Company*, 199 F.2d 715, it's a Fourth Circuit case from 1952.

Ninth Circuit case, *Scheuring versus Traylor Brothers*, 476 F.3d 781. The plaintiff in that case was "most importantly on at least three occasions aboard the barge as it [41]was unmoored and moved by a tugboat," and on those occasions the plaintiff assisted with potentially "sea-based duties such as handling lines, weighing and dropping anchors, standing lookout, monitoring the

marine band radio and splicing wire and rope." Page 787. None of those claims exist here.

And of course, as was pointed out, I think Mr. Dengler said this, I think it was the last thing he said, the notion that somehow Mr. Doty is this Jones Act seaman because he "contributed to the function and mission of TZC's vessel," which is exactly what he says at page six of his brief, that's not the test. In fact, the same could have been said of the plaintiff in *Buchanan* because, for example, inspection duties, what could be important to the overall mission of a vessel. But in *Buchanan* and *O'Hara*, the Second Circuit clearly drew a line separating seaman from non-seaman employees in projects that happen to take place on or near some body of water. So I think the plaintiff's argument just goes beyond what was accepted in *Buchanan* and *O'Hara* and so because, as I said, I think that the material facts in here, the undisputed facts are really governed by *Buchanan*, the Court grants summary judgment and dismisses Counts One, Two and Three which are all predicated on plaintiff being a Jones Act seaman.

Now, non-seaman plaintiffs receive relief under the Longshore and Harbor Workers' Compensation Act.

Do you all have a word you use for it, like the [42] acronym?

MR. HOFMANN: LHWCA, Judge.

THE COURT: You don't have a word for it?

MR. DENGLER: Or Longshore.

MR. HOFMANN: Longshore.

MR. DENGLER: The Longshore Act.

THE COURT: Longshore? Because, I mean, LHWCA doesn't really work. All right, so Longshore, which is a comprehensive workers' compensation system under which the employers are required to compensate covered employees injured in the course of their employment regardless of fault. That's a quote from *Gravatt*, 226 F.3d 108, 115.

Now the defense concedes that plaintiff is covered by Longshore because he was injured on actual navigable waters and is not, defense's view is he's not covered by the Jones Act because he's not a seaman. In *Lockheed Martin Corp. versus Morganti*, 412 F.3d 407, 412, the Second Circuit said "when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies a status requirement in Section 2(3), unless he is excluded by any other provision of Longshore." And the circuit has said, on a number of occasions, including in *Uzdavines versus Weeks Marine*, 418 F.3d 138, 143, that Longshore and Jones Act are mutually exclusive remedies.

Now like a lot of state workers' compensation [43] schemes, what the circuit has said is that Longshore provides that the statutory no-fault compensation payments are the employer's exclusive liability to its

employees when they are injured in the course of their employment. The employee is therefore barred from suing his employer in tort. On the other hand, as with most state workers' compensation schemes, the employee may sue negligent third parties in tort notwithstanding its entitlement to no-fault compensation provided by the employer." *Gravatt* at page 117.

But in some cases where the employer is also "the owner or character of" the vessel where the injury occurred, the employee "may bring an action in negligence against the vessel as a third party." Page 115, quoting 905(b).

When an action is brought against a third-party vessel owner in general, there are three duties of care that vessel owners owe to plaintiffs covered by Longshore, as articulated in the *Scindia* case, and as described in *O'Hara* at page 65.

So first is the turnover duty:

"First, before turning over the ship or any portion of it to the stevedore [or other contractor employing non-longshoring harbor workers], the vessel owner must exercise ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to [44]carry on its cargo operations with reasonable safety."

This duty also "imposes on vessel owners...a duty to warn stevedores or other contractors of hazards of which

the vessels know or should know or which are unknown or would not be obvious to the stevedore."

The second duty is the active control duty.

"Second, once stevedoring operations have begun, the vessel will be liable if it actively involves itself in operations and negligently injures a longshoreman, or if the owner acts negligently with respect to hazards in areas, or from equipment, under the active control of the vessel during the stevedoring operation."

Finally is the duty to intervene.

"Third, with respect to obvious dangers in areas under principal control of the stevedore, the vessel owner must intervene if it acquires actual knowledge that, one, a condition of the vessel or its equipment poses an unreasonable risk of harm, and, two, the stevedore is not exercising reasonable care to protect its employees from that risk." And this is all quoted from *O'Hara* at page 65.

So that's the general rule. But in *Gravatt*, the Second Circuit, in fact, expressed some concern as to whether all these duties "apply to the dual-capacity case, where the LHWCA provides that the employer vessel owner is immune from suit for negligent conduct in its employer capacity but liable [45]for suit under Section 905(b) for negligence in its owner capacity." That's page 122.

The circuit went on to explain that although the application of the turnover duty was "clear" in the dual-

capacity situation, *Scindia*'s second and third prongs were "more problematic" in "the circumstance where the harbor-work contractor and the owner of the vessel are the same entity." Page 123. This is because "where the contracted service is performed by employees of the entity that owns the vessel, by definition the vessel owner would have actively involved itself in the operation and would have actual knowledge of the failure of the personnel undertaking the task to operate in a manner that protected their co-workers from danger." Ultimately this would provide certain harbor-working employees with "more expansive tort remedies if employed by a dual-capacity employer vessel owner than they would have if employed by an independent contractor. By the same token, the dual-capacity employer vessel owner would have greater liabilities than if the work arrangement involved a single capacity employer and a third-party vessel." Page 123.

The circuit noted that "this result would be contrary to the express intent of Congress which sought generally in drafting Section 905(b) to provide the same result regardless whether the covered work was performed by an independent contractor or by the ship through personnel it hired directly [46]to perform it."

So what *Gravatt* ultimately held was that "when the employer of an injured harbor worker is also the owner of the vessel and is sued by the harbor worker for negligence under 905(b) for vessel negligence, the Court's task is to analyze the allegedly negligent conduct to determine whether that conduct was performed in the course of the

operation of the owner's vessel as a vessel or whether the conduct was performed in furtherance of the employer's harbor-working operations." Page 125.

So here TZC entered into a bareboat charter with Sterling Equipment, chartering vessels "to transport construction materials and equipment," in connection with the bridge project. This included the Charter Order for the Strong Island barge where the injury in question occurred. TZC in a separate addendum in fact leased the "barge-mounted" crane. The crane was used in the bridge-replacement project. And what plaintiff claims is that the use of the steel gratings to provide a "secure, flat walking surface" would have provided him and other mechanics with easy ingress and egress to and from the crane's "engine cab." That's paragraph 7 and 8 of his affirmation. Instead, the crane had and always had a network of 8-to-10 inch steel beams that plaintiff had to navigate to access the engine compartment. Counterstatement paragraph 34 and 35.

[47]Plaintiff knew of the risks regarding the ringer crane on the Strong Island barge before his injury, which he acknowledged in paragraph 31, and one of the defendant's representatives, this person named Ronald Albers, who was the TZC equipment supervisor for TZC Management, also said that defendant knew that the fact that the beams were elevated with no handrail created a "falling hazard."

Under *Gravatt* I think the defense is right, the Second Circuit appears to have instructed that the true test for LHWCA liability for dual-capacity vessel owners is not

necessarily the three-part test, but rather whether the negligent conduct "was performed in the course of the operation of the owner's vessel as a vessel or whether the conduct was performed in furtherance of the employer's harbor-working operations." That is from *Daza versus Pile Foundation Construction Company*, 983 F.Supp.2d 399, 411.

Moreover, it is clear that the ringer crane on the Strong Island barge was used for construction purposes rather than for functions inherent to the vessel itself. In fact, when plaintiff was inspecting the engine compartment for frozen air lines, he was functioning within his role as a "Group 2B Mechanic" and was engaged in conduct related to TZC's capacity as his employer, meaning that the LHWCA workers' compensation benefits are his exclusive remedy. That's all lifted from *Matter of Franz*, 2016 WL 922793 at *8.

[48]So I think that the undisputed facts here line up with some of the same facts in cases that have applied *Gravatt* in the dual-capacity context. So for example, in *Daza*, summary judgment was granted to the defendant there where the plaintiff employee was engaged in work pertaining to a crane and not pertaining to vessel duties. And just as it was in *Daza*, plaintiff here, his employment was only for the purpose of construction and not related to TZC's capacity as the vessel owner.

And it can't really be said that TZC violated its turnover duty because plaintiff has already admitted that the danger of the steel beams was apparent to him,

it was not a hidden danger that he could not uncover with reasonable inspection, which was relevant also in *Daza* as discussed at page 412.

In *Franz*, because the barge was not functioning as a vessel at the time of the accident, the court found the dual-capacity owner defendant was not "engaged in vessel duties at the time of the accident."

At the time of the accident plaintiff was assigned to work on the ringer crane by his foreperson. He was engaged in "inspection and repair work," which is separate and apart from the vessel's work, which is exactly how *Franz* came out the way it did.

And so my view is that the cases that plaintiff [49] relies on really don't address the specific carve-out that's made in *Gravatt* with regard to dual capacity, and they're distinguishable because they mostly pertain to slip-and-falls related to gangways, providing ingress and egress to and from the vessels themselves, which is different materially from the walkway to and from the engine compartment of a crane on the vessel used for equipment-inspection purposes.

And the one case from the Second Circuit that plaintiff does cite is pre-*Gravatt*, and it's also distinguishable because the slip-and-fall was caused by obstructions from "lashing gear, including greased and oily turnbuckles, chains and wires," and an oily and greasy deck, all of which were hazards that were generated by the actions of the vessel's crew, but no such allegation is made here.

So in the Court's view, there are no disputed facts as to whether TZC's alleged negligent conduct occurred through its role as a vessel owner under the LHWCA and so therefore Count Four is dismissed.

Anything else?

MR. DENGLER: Nothing from me, your Honor.

THE COURT: Anything else, Mr. Hofmann?

MR. HOFMANN: No, your Honor.

THE COURT: Okay. Then we are adjourned. I'll enter an order noting the result here for reasons stated on the record.

[50]MR. DENGLER: Thank you. Your Honor.

(Proceedings concluded)

APPENDIX C — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED DECEMBER 23, 2020

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No: 20-36

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 23rd day of December, two thousand twenty.

BRIAN DOTY,

Plaintiff-Appellant,

v.

TAPPAN ZEE CONSTRUCTORS, LLC,

Defendant-Appellee.

ORDER

Appellant, Brian Doty, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

Appendix C

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

APPENDIX D — RELEVANT STATUTORY PROVISIONS

33 U.S.C.A. § 901

§ 901. Short title

This chapter may be cited as "Longshore and Harbor Workers' Compensation Act."

Appendix D

33 USCS § 902

§ 902. Definitions

When used in this Act—

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

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

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

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

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

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

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

(E) acquaculture workers;

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

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

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

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

(4) The term "employer" means an employer any of whose employees are employed in maritime

employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

(5) The term "carrier" means any person or fund authorized under section 32 [33 USCS § 932] to insure under this Act and includes self-insurers.

(6) The term "Secretary" means the Secretary of Labor.

(7) The term "deputy commissioner" means the deputy commissioner having jurisdiction in respect of an injury or death.

(8) The term "State" includes a Territory and the District of Columbia.

(9) The term "United States" when used in a geographical sense means the several States and Territories and the District of Columbia, including the territorial waters thereof.

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment

promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 10(d)(2) [33 USCS § 910(d)(2)] of this title;

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

(12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein.

(13) The term "wages" means the money rate at which the service rendered by an employee is compensated by an employer under the contract of hiring in force at the time of the injury, including the reasonable value of any advantage which is received from the employer and included for purposes of any withholding of tax under subtitle C of the Internal Revenue Code of 1954 [1986] [26 USCS §§ 3101 et seq.] (relating to employment taxes). The term wages does not include fringe benefits, including (but not limited to) employer payments for or contributions to a retirement, pension, health and welfare, life insurance, training, social security or other employee or dependent benefit plan for the employee's or dependent's benefit, or any other employee's dependent entitlement.

(14) "Child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, a child in relation to whom the deceased employee stood

in loco parentis for at least one year prior to the time of injury, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child", "grandchild", "brother", and "sister" include only a person who is under eighteen years of age, or who, though eighteen years of age or over, is (1) wholly dependent upon the employee and incapable of self-support by reason of mental or physical disability, or (2) a student as defined in paragraph (19) [(18)] of this section.

(15) The term "parent" includes step-parents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(16) The terms "widow or widower" includes only the decedent's wife or husband living with or dependent for support upon him or her at the time of his or her death; or living apart for justifiable cause or by reason of his or her desertion at such time.

(17) The terms "adoption" or "adopted" mean legal adoption prior to the time of the injury.

(18) The term "student" means a person regularly pursuing a full-time course of study or training at an institution which is—

(A) a school or college or university operated or directly supported by the United States, or by any State or local government or political subdivision thereof,

(B) a school or college or university which has been accredited by a State or by a State recognized or nationally recognized accrediting agency or body,

(C) a school or college or university not so accredited but whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited, or

(D) an additional type of educational or training institution as defined by the Secretary,

but not after he reaches the age of twenty-three or has completed four years of education beyond the high school level, except that, where his twenty-third birthday occurs during a semester or other enrollment period, he shall continue to be considered a student until the end of such semester or other enrollment period. A child shall not be deemed to have ceased to be a student during any interim between school years if the interim does not exceed five months and if he shows to the

satisfaction of the Secretary that he has a bona fide intention of continuing to pursue a full-time course of education or training during the semester or other enrollment period immediately following the interim or during periods of reasonable duration during which, in the judgment of the Secretary, he is prevented by factors beyond his control from pursuing his education. A child shall not be deemed to be a student under this Act during a period of service in the Armed Forces of the United States.

(19) The term "national average weekly wage" means the national average weekly earnings of production or nonsupervisory workers on private nonagricultural payrolls.

(20) The term "Board" shall mean the Benefits Review Board.

(21) Unless the context requires otherwise, the term "vessel" means any vessel upon which or in connection with which any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

(22) The singular includes the plural and the masculine includes the feminine and neuter.

Appendix D

33 USCS § 903

§ 903. Coverage

(a) Disability or death; injuries occurring upon navigable waters of United States. Except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

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

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

(d) Small vessels.

(1) No compensation shall be payable to an employee employed at a facility of an employer if, as certified by the Secretary, the facility is engaged in the business of building, repairing, or dismantling exclusively

small vessels (as defined in paragraph (3) of this subsection), unless the injury occurs while upon the navigable waters of the United States or while upon any adjoining pier, wharf, dock, facility over land for launching vessels, or facility over land for hauling, lifting, or drydocking vessels.

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

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

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

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

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

(B) a commercial tugboat, towboat, crew boat, supply boat, fishing vessel, or other work vessel which is under 1,600 tons gross as measured under section 14502 of title 46, United States Code, or an alternate tonnage measured under section 14302 of that title as prescribed by the Secretary under section 14104 of that title.

(e) Credit for benefits paid under other laws. Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act pursuant to any other workers' compensation law or section 20 of the Act of March 4, 1915 (38 Stat. 1185, chapter 153; 46 U.S.C. 688 [46 USCS §§ 30104, 30105]) (relating to recovery for injury to or death of seamen) shall be credited against any liability imposed by this Act.

Appendix D

33 USCS § 904

§ 904. Liability for compensation

(a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9 [33 USCS §§ 907, 908, and 909]. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

Appendix D

33 U.S.C.A. § 905

§ 905. Exclusiveness of liability

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

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

(b) Negligence of vessel

In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel as a third party in accordance with the provisions of section 933 of this title, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void. If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel. If such person was employed to provide shipbuilding, repairing, or breaking services and such person's employer was the owner, owner pro hac vice, agent, operator, or charterer of the vessel, no such action shall be permitted, in whole or in part or directly or indirectly, against the injured person's employer (in any capacity, including as the vessel's owner, owner pro hac vice, agent, operator, or charterer) or against the employees of the employer. The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred. The remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter.

(c) Outer Continental Shelf

In the event that the negligence of a vessel causes injury to a person entitled to receive benefits under this Act

by virtue of section 1333 of Title 43, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel in accordance with the provisions of subsection (b) of this section. Nothing contained in subsection (b) of this section shall preclude the enforcement according to its terms of any reciprocal indemnity provision whereby the employer of a person entitled to receive benefits under this Act by virtue of section 1333 of Title 43 and the vessel agree to defend and indemnify the other for cost of defense and loss or liability for damages arising out of or resulting from death or bodily injury to their employees.

Appendix D

46 U.S.C.A. § 30104

Formerly cited as 46 App. USCA § 688

§ 30104. Personal injury to or death of seamen [Statutory Text & Notes of Decisions subdivisions I to III]

<Notes of Decisions for 46 USCA § 30104 are displayed in multiple documents.>

A seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law, with the right of trial by jury, against the employer. Laws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section.