

**APPENDIX A – OPINION OF THE UNITED
STATES COURT OF APPEAL FOR THE
SECOND CIRCUIT DATED OCTOBER 27, 2017**

874 F.3d 356

United States Court of Appeals,
Second Circuit.

In the MATTER OF the Complaint of BUCHANAN
MARINE, L.P., as Bareboat Charterer of The Barge
B-252, In the Matter of the Complaint of A.P. Franz,
Jr., Trustee, As Owner, Petitioners-Counter-
Defendants-Appellees,
Tilcon New York, Inc., Claimant-Counter-Claimant-
Appellee,

v.

Wayne Volk, Karen Volk, Claimants-Appellants.

Docket No. 16-1092-cv

August Term 2016

Argued: May 22, 2017

Decided: October 27, 2017

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE NORTHERN
DISTRICT OF NEW YORK.

Opinion

CHIN, Circuit Judge:

In this case, claimant-appellant Wayne Volk
worked at a quarried rock processing facility on the
Hudson River, inspecting and maintaining barges

used to transport rock down the river. In the accident that led to these proceedings, Volk was inspecting a moored barge when he slipped on some loose stone and fell, injuring himself. He asserted claims against the barge company as his employer, the owner of the barge, and the operator of the rock processing facility, under the Jones Act, 46 U.S.C. §§ 30101-30106, the Longshore and Harbor Workers' Compensation Act (the "LHWCA"), 33 U.S.C. §§ 901-950, general maritime law, and New York state law.

The principal question presented is whether Volk was a "seaman" within the meaning of the Jones Act. The district court (Sharpe, *J.*) held that Volk was not a seaman and dismissed his claims under the Jones Act. It also dismissed Volk's remaining claims.

We affirm the dismissal of Volk's Jones Act claims because we agree with the district court that Volk does not qualify as a "seaman" within the

meaning of the Jones Act. We hold, however, that the district court erred in dismissing certain of Volk's remaining claims against the owner of the barge and the operator of the rock processing facility. We therefore affirm in part and vacate in part and remand for the district court to conduct further proceedings consistent with our rulings below.

BACKGROUND

I. The Facts

The facts are largely undisputed and are summarized in the light most favorable to Volk, against whom summary judgment was granted.

Volk worked for petitioner-counter-defendant-appellee Buchanan Marine, L.P. (“Buchanan”) at the Clinton Point quarried rock processing facility on the Hudson River, in Dutchess County, New York, as a “barge maintainer” from 1999 until his accident on May 19, 2011.¹ At the Clinton Point facility, claimant-

counter-claimant-appellee Tilcon New York, Inc. (“Tilcon”) processes quarried rock for use in, *e.g.*, construction work, and loads the rock onto barges supplied by Buchanan. Buchanan then transports the loaded barges, using its tugboats, down the Hudson River to Tilcon's customers.²

The loading process has three steps. First, before an empty barge is loaded, and while it is tied to the dock, it is inspected by a Buchanan barge maintainer. The barge maintainer checks the barge for damage and excess water and repairs any damage so that the barge is in acceptable condition for loading. Second, the barge is moved to the loading facility by Tilcon, where it is loaded with quarried rock. Third, after the barge is loaded, it is moved back to the dock by Tilcon, where a Buchanan barge maintainer conducts a final inspection. During the first and third steps of the loading process, the barge is in the water

and secured to the dock, either tied directly to the dock or to barges already tied to the dock. Moored barges may be three or four barges deep, with the closest barge tied to the dock and the outward barges tied to one another. When a barge was tied to other barges—rather than tied directly to the dock—barge maintainers would climb over the barges to get to the one they needed to inspect.

When Volk was inspecting a barge, he would walk along the perimeter of the barge on the “margin decks,” which ran the length of the barge. App'x at 185. The margin decks were “so narrow [that] they were difficult to walk on or stand on,” *id.*, lacked guard or hand rails, and were often wet and soiled with excess gravel that spilt over from the loading process. When a barge required repairs, Volk would sometimes stand on a pontoon work boat—a flat floatable device

powered by a motor—on the barge's water side to do the work.

Volk was not assigned to any specific barge; rather, he worked on all Buchanan barges that arrived for loading at the Tilcon facility. Volk was not a crewmember of any of Buchanan's tugboats that transported the barges down the Hudson River. He 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.

On May 19, 2011, Volk was walking along the margin decks of Barge B-252 (the “Barge”), which had been loaded with stone, when he slipped on excess wet stone and injured his right arm and shoulder on the side of the Barge. He filled out an incident report with

his dock supervisor, Timothy Conn, the same day. The next day, Conn drove Volk to the local medical clinic, where Volk was diagnosed with a sprained arm and prescribed pain medication. Later that day, Volk saw a chiropractor, who advised him that he could not work. Volk has not worked since the accident and has been receiving workers' compensation benefits under the LHWCA.

II. The Proceedings Below

On October 16, 2012, Volk and his wife Karen Volk commenced a personal injury action against Buchanan and Tilcon in New York State Supreme Court, Ulster County. On April 15, 2013, A.P. Franz, Jr., the owner of the Barge, and Buchanan, as bareboat charterer of the Barge,³ commenced this action in the district court pursuant to the Limitation of Liability Act of 1851, 46 U.S.C. §§ 30501-30512, seeking exoneration from or limitation of liability.⁴ In

accordance with Rule F of the Supplemental Rules for Admiralty or Maritime Claims and Asset Forfeiture Actions of the Federal Rules of Civil Procedure, the court approved a \$47,420.77 security bond, representing Franz and Buchanan's interest in the Barge, directed issuance of notice to all persons asserting claims affected by the limitation proceeding, ordered that any claim related to the incident be filed with the court within a specified time period, and enjoined the filing or prosecution of any suits related to the incident.⁵

Tilcon and the Volks answered the complaint and asserted counterclaims. Tilcon asserted claims against Franz and Buchanan for indemnification or contribution. The Volks asserted claims against Franz, Buchanan, and Tilcon under the Jones Act, the LHWCA, general maritime law, and New York state law.

The Volks filed a motion to dismiss on August 16, 2013. The district court denied the motion on March 28, 2014. The parties thereafter cross-moved for summary judgment. On March 10, 2016, the district court granted the motions of Franz, Buchanan, and Tilcon, denied the Volks' cross-motion, and granted Franz and Buchanan's complaint for exoneration from liability. The court exonerated Franz, Buchanan, and Tilcon from liability for Volk's injury, except for Buchanan's liability for workers' compensation. The court concluded that Volk's Jones Act claims fail because he is not a “seaman” under the Jones Act. The court also concluded that all of Volks' remaining claims under the LHWCA, general maritime law, and state law fail.

This appeal followed.

DISCUSSION

“We review *de novo* a district court's grant of summary judgment to determine whether the district court properly concluded that there was no genuine dispute as to any material fact, such that the moving party was entitled to judgment as a matter of law.” *Myers v. Patterson*, 819 F.3d 625, 632 (2d Cir. 2016).

I. Overview

Maritime workers injured in the course of their employment may proceed, depending on their status and the status of the responsible party, on four possible theories or sets of theories: the Jones Act, the LHWCA, general maritime law, and state law. *See generally O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55, 61-62 (2d Cir. 2002).

The Jones Act confers a cause of action in negligence to any “seaman injured in the course of employment.” 46 U.S.C. § 30104. Prior to the passage of the Jones Act, general maritime law entitled

seamen only to “maintenance and cure” from their employer, and to damages “from the vessel's owner for [any] injuries received ... in consequence of the unseaworthiness of the ship.” *Chandris, Inc. v. Latsis*, 515 U.S. 347, 354, 115 S.Ct. 2172, 132 L.Ed.2d 314 (1995) (internal quotation marks omitted). Suits to recover for injuries caused by their employers' negligence, however, were barred. *Id.* The Jones Act changed this by creating “an express right of action in tort.” *O'Hara*, 294 F.3d at 61-62.

The LHWCA is a workers' compensation system, which provides scheduled compensation for injury to a broad range of land-based maritime workers. *Chandris*, 515 U.S. at 355, 115 S.Ct. 2172. It covers “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,” 33 U.S.C. § 902(3), but does not include “a master or member of a crew of any vessel,” *id.* § 902(3)(G).⁶ The scheduled no-fault compensation structure is the *exclusive* remedy for injured workers against their employers. *Id.* § 905(a).

The LHWCA does not, however, affect an employee's right to sue the owner or charterer of the vessel on which he or she was injured for negligence. *Id.* § 933(a); *see also Gravatt v. City of N.Y.*, 226 F.3d 108, 115 (2d Cir. 2000)(noting that, under LHWCA, employee “may sue negligent third parties in tort, notwithstanding his entitlement to no-fault compensation provided by the employer”). Pursuant to § 905(b), a claimant retains the right to bring an action for damages “caused by the negligence of a vessel, ... against such vessel as a third party.” 33 U.S.C. § 905(b). A claimant is not required to elect between statutory compensation from the employer

and an action for damages against another, as he “can both accept compensation and file a civil action against a third party tortfeasor.” Thomas J. Schoenbaum, 1 Adm. & Mar. Law § 7-10 (5th ed. 2016). A cause of action under § 905(b) against the vessel owner is for negligence in maritime tort, *id.*, and “[t]he remedy provided in this subsection shall be exclusive of all other remedies against the vessel except remedies available under this chapter,” 33 U.S.C. § 905(b).

In some cases, the vessel owner is also the employer, and a different analysis will be required. *Gravatt*, 226 F.3d at 118-20; 33 U.S.C. § 905(b). In these dual-capacity situations, “[i]nsofar as the employer-vessel is negligent in its stevedore-employer capacity, it is immune from suit under section 905(a), [but,] insofar as it is negligent in its vessel capacity, it will be liable under section 905(b) in the same manner

as a third party.” *Gravatt*, 226 F.3d at 120.⁷ See generally Schoenbaum § 7-10.

In short, “[t]he Jones Act allows seamen to recover for negligence against their employers; the LHWCA authorizes maritime workers *other than* seamen to recover for negligence, but only against parties *other than* their employers.” *O’Hara*, 294 F.3d at 62. The two remedies are mutually exclusive. *Chandris*, 515 U.S. at 355-56, 115 S.Ct. 2172 (“[T]he Jones Act and the LHWCA are mutually exclusive compensation regimes.”).

The Jones Act does not define “seaman,” but, as noted above, the LHWCA excludes from coverage “a master or member of a crew of any vessel.” 33 U.S.C. § 902(3)(G). Thus, courts have recognized that a worker is a seaman if he or she is “a master or member of a crew of any vessel.” *Id.*; see *O’Hara*, 294 F.3d at 62 (“It is ... ‘odd but true that the key requirement for

Jones Act coverage now appears in another statute.’”
 (quoting *Chandris*, 515 U.S. at 356, 115 S.Ct. 2172)).
 We discuss the elements of “seaman” status more fully
 below.

Maritime workers may also have common law remedies available to them, including, as noted, general maritime remedies for “maintenance and cure” and “unseaworthiness.” *Chandris*, 515 U.S. at 354, 115 S.Ct. 2172 (internal quotation marks omitted). The Jones Act—unlike the LHWCA—does not eliminate pre-existing common law causes of action. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 29, 111 S.Ct. 317, 112 L.Ed.2d 275 (1990) (“The Jones Act evinces no general hostility to recovery under maritime law.”); *see also Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 429, 129 S.Ct. 2561, 174 L.Ed.2d 382 (2009) (Alito, J., dissenting). And while the LHWCA eliminates common law claims against

the employer, it permits harbor workers to sue third-party vessel owners for negligence under federal common law standards that establish certain duties of care. *See O'Hara*, 294 F.3d at 64-65.

In *Scindia Steam Navigation Company v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981), the Supreme Court set forth standards to guide judicial determinations of liability under the LHWCA and general maritime law. It identified three duties of care. First, as we have noted, the “turnover duty” imposes on the vessel owner a duty to “exercise ordinary care under the circumstances to have the ship ... in such condition that an ... experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety” and “a duty to warn stevedores ... of hazards of which the [owner] know[s] or should know and which are unknown or would not be obvious to the

stevedore.” *O’Hara*, 294 F.3d at 65 (citing *Scindia*, 451 U.S. at 167, 101 S.Ct. 1614). Second, the active control duty imposes liability on an owner “if it actively involves itself in [the vessel’s] operations and negligently injures” the employee. *Id.* (internal quotation marks omitted). Third, the duty to intervene requires the vessel owner to “intervene if it acquires actual knowledge that (1) a condition of the vessel or its equipment poses an unreasonable risk of harm and (2) the stevedore ... is not exercising reasonable care to protect its employees from that risk.” *Id.* (internal quotation marks omitted).

Finally, in some circumstances, maritime workers may assert claims under state law. *Id.* at 68 (discussing claims under New York Labor Law §§ 200 and 241(6)).

II. *Jones Act Claims*

The district court dismissed Volk's Jones Act claims because it concluded that Volk did not qualify as a “seaman” within the meaning of the Jones Act. We agree.

A. Applicable Law

Congress enacted the Jones Act in 1920 to provide “heightened legal protections to seamen because of their exposure to the perils of the sea.” *O'Hara*, 294 F.3d at 61 (internal quotation marks and alterations omitted). It “gives seamen an express right of action in tort because of their status as ‘wards of the admiralty’ who ‘are by the peculiarity of their lives liable to sudden sickness from change of climate, exposure to perils, and exhausting labour.’” *Id.* at 61-62 (quoting *Chandris*, 515 U.S. at 354-55, 115 S.Ct. 2172). “[T]o qualify as a seaman under the Jones Act, a maritime employee must have a substantial employment-related connection to a vessel in

navigation,” *Chandris*, 515 U.S. at 373, 115 S.Ct. 2172 (emphasis omitted), or “to an identifiable group of such vessels,” *id.* at 368, 115 S.Ct. 2172.

To have an “employment-related connection” to a vessel, “the worker's duties must contribute to the function of the vessel or to the accomplishment of its mission.” *O'Hara*, 294 F.3d at 63 (internal quotation marks omitted). This standard is liberal: “[t]he putative seaman need not aid in the navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship's work.” *Id.* (internal quotation marks omitted); *see also Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 554, 117 S.Ct. 1535, 137 L.Ed.2d 800 (1997) (noting this prong focuses on whether the worker “contributed to the function of the vessel or the accomplishment of its mission”). Moreover, “the worker's connection to the vessel must be ‘substantial in both its duration and its nature.’ ”

O'Hara, 294 F.3d at 63 (quoting *Tonnesen v. Yonkers Contracting Co.*, 82 F.3d 30, 32 n.2 (2d Cir. 1996)). This inquiry “focuses on whether the [worker] derives his livelihood from sea-based activities.” *Id.* (internal quotation marks omitted). “Land-based maritime workers do not become seamen because they happen to be working on board a vessel when they are injured, and seamen do not lose Jones Act protection when the course of their service to a vessel takes them ashore.” *Chandris*, 515 U.S. at 361, 115 S.Ct. 2172.

Nevertheless, the “recognized [] distinction between land-based and sea-based maritime workers” does not mean “that a maritime employee must work *only* on board a vessel to qualify as a seaman under the Jones Act.” *Id.* at 363, 115 S.Ct. 2172. Rather, “the ultimate inquiry” is whether, in light of the totality of the circumstances, “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.” *Id.* at 370, 115 S.Ct. 2172; *see also Harbor Tug & Barge Co.*, 520 U.S. at 555, 117 S.Ct. 1535 (“For the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea.”). “Whether [a worker] qualifies as a seaman ‘is a mixed question of law and fact.’ ” *O'Hara*, 294 F.3d at 63-64 (quoting *Harbor Tug & Barge Co.*, 520 U.S. at 554, 117 S.Ct. 1535).

The Supreme Court has emphasized that it is important “to focus upon the essence of what it means to be a seaman and to eschew the temptation to create detailed tests to effectuate the congressional purpose.” *Chandris*, 515 U.S. at 369, 115 S.Ct. 2172. “The Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to ‘the

special hazards and disadvantages to which they who go down to sea in ships are subjected.’ ” *Id.* at 370, 115 S.Ct. 2172 (quoting *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104, 66 S.Ct. 872, 90 L.Ed. 1099 (1946) (Stone, C.J., dissenting)). The key is whether the individual “ ‘had a sufficient relation to the navigation of vessels and the perils attendant thereon.’ ” *Id.* (quoting *Wallace v. Oceaneering Int’l*, 727 F.2d 427, 435 (5th Cir. 1984)).

B. Application

In weighing “the total circumstances” of Volk's employment, we conclude as a matter of law that Volk does not qualify as a seaman under the Jones Act. *See id.* As a reasonable factfinder could only conclude, his work on the barges did not regularly expose him to the special hazards and disadvantages of the sea. *See id.* at 369-70, 115 S.Ct. 2172.

Volk did not “derive[] his livelihood from sea-based activities.” *O'Hara*, 294 F.3d at 64 (internal quotation marks omitted). Volk never operated a barge and only worked aboard the barges when they were secured to the dock. *See Harbor Tug & Barge Co.*, 520 U.S. at 555, 117 S.Ct. 1535 (“For the substantial connection requirement to serve its purpose, the inquiry into the nature of the employee's connection to the vessel must concentrate on whether the employee's duties take him to sea.”). The barges Volk

worked on were moved to the loading dock by Tilcon workboats and Tilcon employees, and transported down the Hudson River by Buchanan tugboats.⁸ Volk was not a crew member of and did not serve on the Buchanan tugboats.⁹ Indeed, Volk reported to the dock foreman, not a ship's officer, and it was the dock foreman who brought him to the medical clinic after his accident. Volk belonged to a union that represents equipment operators. He did not belong to a maritime union and did not hold a maritime license or other "seaman's papers." *O'Hara*, 294 F.3d at 64. Finally, Volk never spent the night aboard a barge; he worked an hourly shift and went home every night after his shift ended. In contrast, a traditional Jones Act seaman normally serves for voyages or tours of duty. *See, e.g., Aguilar v. Standard Oil Co.*, 318 U.S. 724, 731-32, 63 S.Ct. 930, 87 L.Ed. 1107 (1943) (voyages);

Sellers v. Dixilyn Corp., 433 F.2d 446, 447-48 (5th Cir. 1970) (tours of duty).

In *O'Hara*, we concluded that a dock worker who was injured while repairing the Staten Island pier aboard a barge was not a “seaman” as a matter of law because he had, at most, “a transitory or sporadic connection” to the barges “in their capacity as vessels in navigation.” 294 F.3d at 64 (emphasis omitted). Key to our holding was that the dock worker (1) belonged to a dock workers union rather than a maritime union, (2) lacked a maritime license, (3) never spent the night aboard a barge, and (4) never operated a barge or assisted in its navigation and only worked aboard the barges when they were fully secured to the pier that the dock worker was employed to repair. *Id.* We emphasized that, although the worker “spent more than half his working hours ... aboard the barges, ... he spent all of that time performing tasks related to

the repair of the Staten Island pier while the barges were secured to the pier.” *Id.* This case is not substantially different from *O’Hara*.

Volk seeks to rely on the Fifth Circuit's decision in *Naquin v. Elevating Boats, LLC*, 744 F.3d 927 (5th Cir. 2014), *cert. denied* — U.S. —, 135 S.Ct. 1397, 191 L.Ed.2d 359 (2015). There, 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.” *Id.* at 930. His duties included “inspecting [the lift-boats] for repairs, cleaning them, painting them, replacing defective or damaged parts, performing engine repairs, going on test runs, securing equipment, and operating the vessels' marine cranes and jack-up legs.” *Id.* The worker was occasionally “dispatched ... to repair a vessel or fill in as a vessel crane operator while the vessel was operating in open

water.” *Id.* at 931. The Fifth Circuit affirmed the jury verdict in favor of the shipyard worker awarding Jones Act damages, finding that the shipyard worker was exposed to the perils of a maritime work environment such that he was a seaman. *Id.* at 935.

The Fifth Circuit's decision is not controlling on us, and it is in any event distinguishable. The shipyard worker there clearly had a more substantial connection to seafaring vessels than Volk does. For example, the shipyard worker operated “the vessels' marine cranes and jack-up legs” and worked aboard the vessels in open water, even if only “occasionally.” *Id.* at 930. Volk did none of these things; Volk worked on barges that were moored, directly or indirectly, to the Tilcon dock and did not operate the Tilcon workboats or Buchanan tugboats that transported the barges. *See Schultz v. Louisiana Dock Co.*, 94 F.Supp.2d 746, 750 (E.D. La. 2000) (“Plaintiff's duties

were limited to inspecting and repairing barges moored at the facility. He did not go to sea or face the perils of the sea in the manner associated with seaman status. Plaintiff ate meals ashore and went home every night. He admitted that with respect to the vessels used to transport him around the facility he did not serve as a deckhand.”).

In sum, none of Volk's work was of a seagoing nature. Volk's duties were limited to inspecting and repairing barges that were secured to the dock at the Clinton Point facility. Volk did not go to sea and he was not exposed to the “perils of the sea” in the manner associated with seaman status. *See Denson v. Ingram Barge Co.*, 5:07-cv-00084-R, 2009 WL 1033817, at *3 (W.D. Ky. Apr. 16, 2009) (“The hazards Denson states he faced do not rise to the level of the special hazards and disadvantages faced by seamen; they are hazards that longshoremen commonly

encounter. Therefore, Denson was an intended beneficiary of the LHWCA.”). Accordingly, considering the total circumstances of Volk's employment, we conclude as a matter of law that Volk does not qualify as a “seaman” within the meaning of the Jones Act, and we affirm the dismissal of his Jones Act claims.

III. *Other Claims*

Volk also asserted claims under the LHWCA, general maritime law, and New York law against all three appellees: Buchanan, Franz, and Tilcon. The district court dismissed all these claims. We conclude that the district court should have permitted certain of these claims to proceed.

A. Buchanan

The district court correctly dismissed all the remaining claims against Buchanan. Buchanan is Volk's employer and ordinarily would be immune from suit under 33 U.S.C. § 905(a). As bareboat charterer of the Barge, however, Buchanan is a dual capacity employer-vessel owner. *See Reed v. S.S. Yaka*, 373 U.S. 410, 412, 83 S.Ct. 1349, 10 L.Ed.2d 448 (1963) (“It has long been recognized in the law of admiralty that for many, if not most, purposes the bareboat charterer is to be treated as the owner.”). Therefore, if Buchanan were negligent in its vessel capacity in relation to Volk's injury, Buchanan would be liable under 33 U.S.C. § 905(b) in the same manner as a third party. *Gravatt*, 226 F.3d at 119. The district court ruled that Buchanan was not acting in a capacity as vessel owner in relation to Volk's injury, and therefore is liable exclusively for Volk's workers'

compensation payments under the LHWCA. *See* 33 U.S.C. § 905(a) (stating that employer is liable exclusively for scheduled no-fault compensation). Volk does not challenge that ruling on appeal. Because the statutory, no-fault compensation payments under the LHWCA are Volk's exclusive remedy as to Buchanan, his general maritime law and state law claims against Buchanan were properly dismissed. *See id.*

B. Franz

As vessel owner, Franz was subject to suit for negligence under the LHWCA. 33 U.S.C. § 905(b). Although the district court correctly noted that Franz was not an employer or bareboat charterer of the Barge and therefore was only responsible for his “turnover duty,” *see O'Hara*, 294 F.3d at 65, the district court did not properly analyze the LHWCA claims. While he could not be responsible for the

presence of excess stone, Franz arguably had a duty, as owner, to address the condition of the Barge before turning it over to Buchanan.

As the district court itself recognized, Volk's negligence claim could have been based on the condition of the vessel, not just the presence of excess stone on the margin deck. *See* Special App'x at 27 (“The alleged negligence which caused W. Volk's injury could plausibly originate from one of two sources. *The first is where the stones reached the margin deck of the B-252 from a barge weeper, which is a drainage hole on the side of a barge.* The second is where the stones could have been overloaded by Tilcon and spilled onto the margin deck.” (citation omitted and emphasis added)). On remand, the district court shall consider whether there is a viable claim under § 905(b) of the LHWCA against Franz as owner based on the condition of the vessel. *See Gravatt*, 226 F.3d at

115(“[T]he employee may sue negligent third parties in tort.”); *see also Pellegrino v. A.H. Bull S.S. Co.*, 309 F.Supp. 839, 842 (S.D.N.Y. 1969) (“The shipowner owes an absolute and non-delegable duty to ... longshoremen properly aboard its vessel to provide a seaworthy ship.”). As that statute is the sole basis under which Volk can recover against Franz, 33 U.S.C. § 905(b), the general maritime and state law claims otherwise must be dismissed. *See Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818, 121 S.Ct. 1927, 150 L.Ed.2d 34 (2001) (noting that the LHWCA preempts all other claims against a vessel owner).

C. Tilcon

The district court correctly held that Tilcon, the operator of the rock processing facility, has no LHWCA liability because it did not employ Volk or own the Barge. *See* 33 U.S.C. § 905. The district court

also correctly held that the general maritime claims asserted against Tilcon fail because Tilcon is not an owner of the Barge and because Volk is not a seaman. Tilcon had no duty to provide a seaworthy vessel or to provide maintenance and cure because it did not own the Barge. *See Oxley v. City of New York*, 923 F.2d 22, 24-25 (2d Cir. 1991) (noting that a vessel owner has a duty to supply a seaworthy vessel); *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 441, 121 S.Ct. 993, 148 L.Ed.2d 931 (2001) (“A claim for maintenance and cure concerns the vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while serving the ship.”). Further, Volk is not entitled to maintenance and cure because he is not a seaman. *See* 1B-IV Benedict on Admiralty § 44 (2015) (“Longshoremen, of course, have never been entitled to maintenance and cure.”).

The district court erred, however, in dismissing Volk's New York state law claims against Tilcon for negligence, gross negligence, and violations of N.Y. Labor Law § 200. The district court determined that these claims failed because the alleged hazard—the presence of excess stone on the margin deck of the Barge—was open and obvious. The district court's holding in this regard was based on an error of law. New York law utilizes a comparative negligence scheme, meaning the doctrines of contributory negligence and assumption of risk are not complete defenses as a matter of law. *See Integrated Waste Servs., Inc. v. Akzo Nobel Salt, Inc.*, 113 F.3d 296, 300 (2d Cir. 1997) (“[W]hen New York, by statute, adopted comparative negligence, it abolished not only contributory negligence as a complete defense, but also assumption of risk. Under the statute, liability is split between plaintiffs and defendants based on the

relative culpability and causal significance of their conduct.” (citing N.Y. C.P.L.R. § 1411)); *see also Payne v. United States*, 359 F.3d 132, 138 (2d Cir. 2004) (“[U]nder New York law the open and obvious nature of a dangerous condition ... does not absolve *370 the landowner of its general duty of care.”). Even assuming the condition was open and obvious, a factual question exists as to the relative fault of the parties.

Accordingly, the district court's grant of summary judgment to Tilcon on these state law claims was error.

CONCLUSION

To summarize, we conclude as follows:

1. The district court correctly dismissed: (a) the Jones Act claims against all three appellees; (b) the LHWCA, general maritime law, and state law claims against Buchanan; and (c) the LHWCA and general maritime claims against Tilcon; and

2. The district court erred in dismissing: (a) the LHWCA claim against Franz to the extent it is based on the alleged breach of Franz's duty, as owner, to turn over a reasonably safe vessel; and (b) the state law claims against Tilcon for negligence, gross negligence, and violation of N.Y. Labor Law § 200.

Accordingly, the case is **AFFIRMED IN PART, VACATED IN PART**, and **REMANDED** for such further proceedings as may be appropriate.

¹ Volk also used other phrases throughout the proceedings to describe his position, such as “[w]elder, pumper, [and] boat checker.” App'x 982.

² Buchanan's barges are “dumb” barges, meaning they have no independent means of propulsion and, therefore, a tugboat is required to transport them.

³ A “bareboat charter” is a “charter under which the shipowner surrenders possession and control of the vessel to the charterer, who then succeeds to many of the shipowner's rights and obligations,” typically including the provision of “personnel, insurance, and other materials necessary to operate the vessel.” Black's Law Dictionary 284 (10th ed. 2009). Thus, the “bareboat charterer” is the non-owner operator of a vessel. Here, Franz had bareboat chartered the Barge along with his fleet of other barges and tugboats to Buchanan. Pursuant to the bareboat charter, Franz transferred exclusive control to Buchanan to use, operate, command, and navigate his fleet of barges and tugboats.

⁴ The Limitation of Liability Act limits the owner of a vessel's liability for maritime accidents to “the value of the vessel and pending freight.” 46 U.S.C. § 30505(b). The statute thus alters the usual rules of vicarious liability. *See In re City of N.Y.*, 522 F.3d 279, 283 (2d Cir. 2008).

⁵ “Typically, ‘once the [vessel] owner files a petition for limitation, all other claims and proceedings against the owner related to the matter in question shall cease.’ ” *In re Petition of Germain*, 824 F.3d 258, 264 (2d Cir. 2016) (quoting *Tandon v. Captain's Cove Marina of Bridgeport, Inc.*, 752 F.3d 239, 244 (2d Cir. 2014)) (alterations omitted).

⁶ A longshoreman is “[a] maritime laborer who works on the wharves in a port; esp., a person who loads and unloads ships.” Black's Law Dictionary 1085 (10th ed. 2009).

⁷ A “stevedore” is a “person or company that hires longshore and harbor workers to load and unload ships.” Black's Law Dictionary 1640 (10th ed. 2009).

⁸ Volk would occasionally ride on the Tilcon workboats from the pier, where he performed his work on the barges, to the loading dock. The distance was “[p]robably” a “couple hundred yards,” App'x 1012, and Volk did not perform any inspection or repair work while on the Tilcon workboats. *See Casser v. McAllister Towing & Transp. Co.*, 10 Civ. 1554 (JSR), 2010 WL 5065424, at *3 (S.D.N.Y. Dec. 7, 2010)(rejecting argument that once a person steps onto a vessel he is a seaman because “if this argument were accepted, then there would be no distinction between a longshoreman and a seaman”).

⁹ Volk argues for the first time on appeal that he was a crew member of the small pontoon work boat that he used to approach a moored barge from the water side to make repairs to the barge. Even if this argument were not waived, *see Greene v. United States*, 13 F.3d 577, 586 (2d Cir. 1994) (“[I]t is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal.”), it does not change our analysis as the pontoon work boat, like the Buchanan barges, was unmanned, had no crew members, and was only used, on occasion, as a work platform by Volk and his fellow workers.

**APPENDIX B – OPINION OF THE DISTRICT
COURT DATED MARCH 10, 2016**

2016 WL 922793 (Only the Westlaw citation is
currently available).

United States District Court,
N.D. New York.

In the Matter of the Complaint of A.P. Franz, Jr.,
Trustee, as owner, and Buchanan Marine, L.P., as
bareboat charterer of the Barge B-252 For
Exoneration From or Limitation of Liability.

1:13-cv-411 (GLS/DJS)

Signed 03/10/2016

MEMORANDUM-DECISION AND ORDER

Gary L. Sharpe, Senior District Judge

I. Introduction

Petitioners A.P. Franz, Jr., Trustee, as owner,
and Buchanan Marine, L.P., as bareboat charterer, of
the barge B-252 commenced this action pursuant to
the Limitation of Liability Act of 1851¹ (hereinafter
“Limitation Act”) seeking exoneration from or
limitation of liability. (Compl., Dkt. No. 1.) Pending

are Franz and Buchanan's motion for summary judgment, (Dkt. Nos. 45-50), and the summary judgment motion of claimant Tilcon New York, Inc., (Dkt. No. 51). Claimants Wayne and Karen Volk cross-moved for summary judgment, seeking dismissal of the limitation proceeding. (Dkt. No. 53.) For the reasons that follow, the court grants the motions of Franz, Buchanan, and Tilcon, denies the Volks' cross-motion, and grants Franz and Buchanan's complaint for exoneration from liability.

II. Background

A. Facts²

Claimant Wayne Volk (hereinafter “W. Volk”) worked as a barge checker for Buchanan at the Clinton Point quarried rock processing facility operated by Tilcon on the Hudson River. (Pets.' Statement of Material Facts (SMF) ¶¶ 1, 7, Dkt. No. 49.) At the facility, Tilcon processes quarried rock and

loads the rock onto barges supplied by Buchanan. (Tilcon's SMF ¶ 8, Dkt. No. 51, Attach. 1.) Using its tug boats, Buchanan then transports the barges down river to Tilcon's customers. (*Id.* ¶¶ 8, 35.)

On May 19, 2011, W. Volk fell and injured his right arm and shoulder while inspecting a barge after it was loaded with wet stone. (Pets.' SMF ¶ 13; Tilcon's SMF ¶¶ 42-45; Dkt. No. 53, Attach. 3 at 110; Dkt. No. 53, Attach. 12.) W. Volk slipped on loose, excess stones on the side or margin deck on the northern, port end of the barge's stern. (Dkt. No. 12 ¶ 5; Dkt. No. 53, Attach. 3 at 90-91.) Nobody witnessed his fall. (Pets.' SMF ¶ 13.) Before the barge was loaded, W. Volk inspected it and noted that its deck was clear of all stones. (*Id.* ¶ 14.) The stones that he tripped over came onto the deck during Tilcon's loading process. (*Id.*) W. Volk notified Timothy Conn, his supervisor and foreman, who was also employed by Buchanan,

about his injury, and, the following day, Conn drove W. Volk to a clinic to receive medical treatment for the injury. (*Id.* ¶ 15; Tilcon's SMF ¶ 2.)

W. Volk has not worked since the accident and has been receiving workers' compensation under the Longshore and Harbor Workers' Compensation Act³ (LHWCA). (Pets.' SMF ¶¶ 17, 21; Dkt. No. 47 ¶¶ 7, 9.) He also applied for New York State workers' compensation benefits, however, the board denied his claim because he was already receiving LHWCA benefits. (Pets.' SMF ¶ 17; Dkt. No. 47 ¶ 8.)

W. Volk's injury occurred aboard the barge B-252. (Pets.' SMF ¶ 13.) The B-252 was a “ 'dumb' barge” that required a tugboat to ferry it from place to place. (*Id.* ¶ 6; Dkt. No. 53, Attach. 3 at 22-24.) Franz owned the B-252 as a trustee, and, in July 1993, Franz bareboat chartered that barge along with his fleet of other barges and tug boats to Buchanan for a period

set to expire in December 2018.⁴ (Pets.' SMF ¶¶ 2-4; Dkt. No. 47, Attach. 1.) Pursuant to the bareboat charter, Franz transferred exclusive control to Buchanan to use, operate, command, and navigate his fleet of barges and tug boats. (Pets.' SMF ¶ 4; Dkt. No. 47, Attach. 1 § 8(b).)

Buchanan used the B-252 and the other barges to transport suppliers', like Tilcon's, products down the Hudson River to their customers. (Tilcon's SMF ¶¶ 7-13, 35, 38-41.) Although Buchanan docked its barges at Tilcon's Clinton Point facility, Buchanan retained responsibility for their inspection and maintenance. (*Id.* ¶¶ 15-16.) After the barges arrived at the facility, Buchanan employees would inspect them and report their findings to Conn, their supervisor, who then discussed with Alex Perlman, his supervisor, whether or not the barge was "loadable." (*Id.* ¶¶ 19, 21.) If the barges required

maintenance, Conn would direct Buchanan employees to repair them before they were deemed suitable to be loaded and transported. (*Id.* ¶ 25.)

Once a barge was declared loadable, Tilcon's employees would load the quarried rock onto it. (*Id.* ¶ 28.) After the rock was loaded, the barge would be moved to another dock for Buchanan employees to conduct a final inspection before the barge would be transported by a tug boat down river to Tilcon's customers. (*Id.* ¶¶ 35-36, 38.)

As a barge checker, W. Volk was paid hourly. (Pets.'s SMF ¶ 11.) His employment duties involved inspecting Buchanan's barges that came into the Clinton Point facility both before and after loading along with performing necessary repairs and maintenance to the barges. (*Id.* ¶¶ 7, 9, 11.) When W. Volk boarded the barges to perform inspections and maintenance they were berthed to the dock, but could

be as many as three or four barges deep from the dock at one time. (*Id.* ¶ 8.) He was not assigned to work on a particular barge, did not eat meals on any barge, and never slept overnight on the barges. (*Id.* ¶¶ 10-11.) Additionally, W. Volk is a member of the International Union of Operating Engineers, which is a union for equipment operators. (*Id.* ¶ 20.) W. Volk does not belong to a maritime union and does not have maritime licences such as a seaman's work card, also known as a "ZCard." (*Id.* ¶ 19.) Accordingly, he never worked on one of Buchanan's tug boats. (*Id.* ¶ 18.)

B. Procedural History

On October 16, 2012, the Volks filed a complaint to recover for personal injury against Buchanan and Tilcon in New York State Supreme Court in Ulster County. (Compl., Attach. 2.) In response, on April 15, 2013, Franz and Buchanan commenced this federal court action pursuant to the

Limitation Act seeking exoneration from or limitation of liability. (Compl.) Pursuant to Supplemental Rule F(1) of the Federal Rules of Civil Procedure, Franz and Buchanan offered a security bond of \$47,420.77, representing the value of their interest in the B-252. (Compl. ¶ 11; Dkt. No. 1, Attach. 4.) The court thereafter granted Franz and Buchanan's motion to approve security, enjoin suits, and direct the issuance of notice. (Dkt. No. 4.)

Both the Volks and Tilcon answered and asserted counterclaims. (Dkt. Nos. 6, 12, 15.) Specifically, the Volks alleged both direct and derivative claims under the Jones Act,⁵ LHWCA, general maritime law, and New York state law. (Dkt. No. 15.) The Volks then filed a motion to dismiss, (Dkt. No. 16), which the court subsequently denied, (Dkt. No. 21). The court directed Franz and Buchanan to increase their security by \$10,000. (*Id.*) The parties

completed discovery, and the motions referenced above were filed. For the reasons that follow, the court grants the motions of Franz, Buchanan, and Tilcon, denies the Volks' cross-motion, and grants Franz and Buchanan's complaint for exoneration from liability.

III. Standard of Review

The standard of review pursuant to Fed. R. Civ. P. 56 is well established and will not be repeated here. For a full discussion of the standard, the court refers the parties to its decision in *Wagner v. Swarts*, 827 F. Supp. 2d 85, 92 (N.D.N.Y. 2011), *aff'd sub nom. Wagner v. Sprague*, 489 F. App'x 500 (2d Cir. 2012).

IV. Discussion

A. Limitation Act

In the court's earlier decision, it held that Franz and Buchanan's allegation that negligence occurred without their privity or knowledge sufficiently stated their entitlement to limit their liability under the Limitation Act on a motion to dismiss. (Dkt. No. 21 at 8-9.) The Volks now renew their argument on summary judgment. (Dkt. No. 53 at 19.) Specifically, the Volks contend that Franz or Buchanan cannot show that they did not have privity or knowledge of negligence because: (1) photos reveal unsafe conditions around the B-252; (2) there were stones on the deck of the port, stern side of the B-252 at the time of W. Volk's accident that Franz or Buchanan should have known about; (3) the Volks' expert confirmed that the presence of such stones violates Occupation Safety and Health

Administration (OSHA) regulations; and (4) affidavits from former Buchanan employees state that stones regularly covered the barge decks. (*Id.*; Dkt. No. 16, Attach. 1 at 8-12.) In reply, Franz and Buchanan maintain that there is a factual dispute about the condition of the barge because its expert opined that the B-252 was “fit for its intended purpose and seaworthy” on the day of the accident. (Dkt. No. 54 at 8 (quoting Dkt. No. 55, Attach. 3 at 8).)

A proceeding commenced pursuant to the Limitation Act “protects the right of vessel owners [and bareboat charterers] to limit their liability to the value of the vessel [and its freight].” *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 453 (2001); *see* 46 U.S.C. §§ 30501, 30505(a). In fact, “[i]t is well established that a vessel owner may seek both limitation of liability and a total exoneration from liability in the same limitation action.” *In re Bridge*

Constr. Servs. of Florida, Inc., 39 F. Supp. 3d 373, 381 (S.D.N.Y. 2014). The test of whether a vessel owner may be absolved from or can limit his liability requires two inquiries. *See Otal Invs. Ltd. v. M/V Clary*, 673 F.3d 108, 115 (2d Cir. 2012). First, a claimant bears the initial burden to show what, if any, negligence caused the accident. *See id.* If a claimant does not demonstrate that actionable conduct occurred, “there is no liability to be limited and the owner would then be entitled to exoneration.” *Messina v. Murray* (In re *Messina*), 574 F.3d 119, 126 (2d Cir. 2009) (internal quotation marks and citation omitted). Only after a claimant demonstrates negligence, a vessel owner bears the burden to prove that he lacked knowledge or privity of such conduct. *See id.* at 127; *see also* 46 U.S.C. § 30505(b).

Franz and Buchanan move for summary judgment granting their complaint, arguing that they

were not negligent or otherwise committed actionable conduct and, therefore, are entitled to exoneration. (Dkt. No. 50.) The Volks contend that Franz, Buchanan, and their co-claimant Tilcon are liable on a number of theories.⁶ (Dkt. No. 15.) Specifically, the Volks allege claims under the Jones Act and the LHWCA as well as common law maritime claims including unseaworthiness, maintenance and cure, and general maritime claims. (*Id.* ¶¶ 26-42.) Additionally, the Volks allege violations of New York Labor Law § 200 along with ordinary negligence, nuisance, and gross negligence. (*Id.* ¶¶ 11-25, 43-52.) Tilcon asserts claims against Franz and Buchanan for indemnification or contribution. (Dkt. No. 6 ¶¶ 16-19.)

1. Jones Act

The Volks contend that they are entitled to relief under the Jones Act because W. Volk was a seaman who suffered a personal injury. (Dkt. No. 53 at 13-17.) Franz and Buchanan oppose and assert that W. Volk does not meet the standard to be a Jones Act seaman. (Dkt. No. 50 at 4-11.) Tilcon argues that it is not liable under the Jones Act because it was not W. Volk's employer. (Dkt. No. 51, Attach. 3 at 10-11.)

Under the Jones Act, a seaman may recover from personal injury in the course of his employment against his or her employer. *See* 46 U.S.C. § 30104. To achieve seaman status the claimant must demonstrate an “employment-related connection to a vessel in navigation.” *McDermott Int’l, Inc. v. Wilander*, 498 U.S. 337, 355 (1991); *accord Tonnesen v. Yonkers Contracting Co., Inc.*, 82 F.3d 30, 32 (2d Cir. 1996), *abrogated on other grounds by Stewart v.*

Dutra Constr. Co., 543 U.S. 481 (2005). A putative seaman has an employment-related connection if (1) his duties contribute to the function of the vessel, and (2) the connection is substantial in duration and nature. *See Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995); *accord O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55, 63 (2d Cir. 2002). This status-based inquiry is a mixed question of law and fact, and summary judgment will be awarded “where the facts and the law ... reasonably support only one conclusion.” *O'Hara*, 294 F.3d at 63-64 (internal quotation marks and citations omitted).

The Second Circuit, in *O'Hara*, held that the claimant was not a Jones Act seaman because he had at most “a transitory or sporadic connection” to the barges “in their capacity as vessels in navigation.” *Id.* at 64 (internal quotation marks omitted). Specifically, the claimant lacked maritime licenses, spent no

nights aboard the barges, and did not operate the vessels. *Id.* Rather, the claimant belonged to a dockbuilders union and only worked aboard the barges when they were fully secured to the pier that he was employed to repair. *Id.*

Assuming without deciding that W. Volk meets the first criteria, *see id.* at 63 (“This standard is liberal. ... All who work at sea in the service of a ship are *eligible* for seaman status.” (internal quotation marks and citation omitted)), his connection to the B-252 is far from substantial in either duration or nature. On the contrary, W. Volk is square on all fours with the claimant in *O'Hara*. He never slept on the vessel, held no maritime licenses, and never worked on a Buchanan tug boat. (Pets.' SMF ¶¶ 10-11, 18-19.) Instead, W. Volk was a member of Local 825, a union for equipment operators, and only performed inspection and repair work when the barges were

secure to the docks at the Clinton Point facility. (*Id.* ¶¶ 7-8, 20.) Finally, W. Volk was not assigned to a particular vessel, but instead serviced all barges that came through the facility. (*Id.* ¶ 9.) As a result, he does not qualify for seaman status, and petitioners and Tilcon⁷ are awarded summary judgment on the Volks' Jones Act claims.

2. Longshore and Harbor Worker's Compensation Act (LHWCA)

The LHWCA is a no-fault workers' compensation scheme that supplies benefits to longshoremen and harbor-workers who are injured in the course of their employment. *See generally* 33 U.S.C. §§ 901-950. "Like most state workers' compensation schemes, the LHWCA 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."

Gravatt v. City of New York, 226 F.3d 108, 115 (2d Cir. 2000). Consequently, employers are insulated from injured employees' tort claims. *See id.*; 33 U.S.C. § 905(a).

At the same time, injured employees may pursue tort claims against third parties and still receive LHWCA workers' compensation payments. *See* 33 U.S.C. § 933(a). In particular and unique to the LHWCA, the statute explicitly allows injured employees to recover against the vessel for its negligence. *See id.* § 905(b); *Gravatt*, 226 F.3d at 115. However, to guarantee the exclusivity of the statute's no-fault remedy against employers, the LHWCA bars third parties from impleading employers for contribution or indemnification. *See* 33 U.S.C. § 905(b) (“[T]he 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.”).

A vessel's negligence is governed by uniform federal law and “the contours of the action for vessel negligence under 905(b) [is] to be worked out by federal courts.” *Gravatt*, 226 F.3d at 117-18 (citing H.R. Rep. No. 92-1441 (1972), *reprinted in* 1972 U.S.C.C.A.N. at 4704-05). The Supreme Court in its seminal opinion *Scindia Steam Navigation Co., Ltd v. De Los Santos*, 451 U.S. 156, 165 (1981), acknowledged that Congress “did not specify the acts or omissions of the vessel that would constitute negligence” and defined a vessel's three duties of care. A vessel's three actionable obligations would later become known as the *Scindia* duties. *See, e.g., Gravatt*, 226 F.3d at 120-21.

First, a vessel has a turnover duty. *See Scindia*, 451 U.S. at 167; *Howlett v. Birkdale Shipping Co.*

S.A., 512 U.S. 92, 98 (1994). This duty requires a vessel owner to 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 carry on its cargo operations with reasonable safety.” *Scindia*, 451 U.S. at 167. Additionally, a vessel owner must notify the stevedore⁸ of “hidden danger which would have been known to him in the exercise of reasonable care.” *Id.*

Second, a vessel has an active control duty. *See id.*; *see also Howlett*, 512 U.S. at 98. Accordingly, “once stevedoring operations have begun, the vessel will be liable ‘if it actively involves itself in the cargo operations and negligently injures a longshoreman.’” *Gravatt*, 226 F.3d at 121 (quoting *Scindia*, 451 U.S. at 167). Moreover, “the vessel must take care to prevent

unreasonable hazards in areas of the vessel under its direct control.” *Id.*

Finally, a vessel has a duty to intervene. *See Scindia*, 451 U.S. at 175-76. This duty requires a vessel owner to intervene if he actually knows that a condition on the vessel or its equipment poses an unreasonable risk of harm and the stevedore is not exercising reasonable care to protect his employees. *See id.*; *see also Gravatt*, 226 F.3d at 121.

a. Tilcon

Tilcon asserts that it has no LHWCA liability because it did not employ W. Volk nor did it own the B-252. (Dkt. No. 51, Attach. 3 at 13.) Because LHWCA liability only attaches to employers or vessels, *see* 33 U.S.C. § 905, Tilcon's motion on this ground is granted. However, the Volks are not precluded from pursuing other third party tort claims against Tilcon.

See 33 U.S.C. § 933(a); *see also Gravatt*, 226 F.3d at 115.

b. Franz

Franz maintains that it is not liable because it was not the owner of the B-252 as it bareboat chartered the B-252 to Buchanan. (Dkt. No. 50 at 14-17.) A bareboat charter, or demise, is “tantamount to, though just short of, an outright transfer of ownership.” *Guzman v. Pichirilo*, 369 U.S. 698, 700 (1962); *accord Am. Petroleum & Transp., Inc. v. City of New York*, 737 F.3d 185, 187 n.1 (2d Cir. 2013). To have an effective bareboat charter, “the owner of the vessel must completely and exclusively relinquish [its] possession, command, and navigation” over the vessel. *Guzman*, 369 U.S. at 699 (internal quotation marks and citations omitted). The charterer then becomes owner *pro hac vice* “of the vessel for the period of the charter and is responsible for the vessel's

operation.” *Agrico Chem. Co. v. M/V Ben W. Martin*, 664 F.2d 85, 91 (5th Cir. 1981). To that end, the charterer is liable for all damages arising from the vessel's operation. *See id.* “The charter may describe the duties of [the vessel owner and the charterer] and provide for the shifting of risks between them, but, in general, control entails responsibility for fault.” *Id.* Thus, because the charterer ordinarily retains full control, it is ultimately liable for damages arising from the vessel's operations. *See id.*

Regarding LHWCA liability under a bareboat charter, the original vessel owner is only responsible for its “turnover duty.” *Gravatt*, 226 F.3d at 120-21; *see Miller v. AGS Chartering Co.*, 1993 WL 232063, at *3 (E.D. La. June 21, 1993) (citing *Scindia*, 451 U.S. at 167). As noted above, this duty requires a vessel owner to warn a stevedore about:

the condition of the [vessel's] gear,

equipment, tools, and work space to be used in the stevedoring operations; and if [it] fails at least to warn the stevedore of hidden danger which would have been known to [it] in the exercise of reasonable care, [the vessel owner] has breached [its] duty and is liable if [its] negligence causes injury to the longshoreman.

Scindia, 451 U.S. at 167. This same duty to warn of latent defects applies between vessel owners and bareboat charterers. *See Miller*, 1993 WL 232063 at *3.

Here, Franz bareboat chartered the B-252 along with its fleet of other barges and tug boats to Buchanan. In July 1993, Franz and Buchanan executed a charter, which was in effect at the time of W. Volk's injury on May 19, 2012. (Pets.' SMF ¶¶ 3-4; Dkt. No. 47 ¶¶ 5-6; Dkt. No. 47, Attach. 1.) Pursuant to the charter, "the possession, use, operation and maintenance of the [v]essels [was] at the sole risk, cost and expense of [Buchanan]." (Dkt. No. 47, Attach. 1 §

8(b), at 5.) Notably, the charter explained that Buchanan would “defend, indemnify and save harmless [Franz] from and against ... any claim, cause of action, damage, liability or expense.”⁹ (*Id.*) Because Franz relinquished control of its barges including the B-252, it duly bareboat chartered the B-252 to Buchanan. *See Guzman*, 369 U.S. at 699.

Equally important, the negligence that the Volks complain of does not relate to Franz's turnover duties to warn Buchanan of hidden dangers. *See Scindia*, 451 U.S. at 167. To be sure, W. Volk testified that he slipped on loose rocks on the B-252, but those loose rocks were not present on the barge before it was loaded. (Dkt. No. 53, Attach. 3 at 90-91.) Accordingly, the loose rocks were not a hidden danger that Franz could have informed Buchanan about. The Volks also allege that Franz breached its turnover duty because it failed to warn Buchanan about the absence of hand

grips and hand rails and that the margin decks were narrow. (Dkt. No. 53 at 17-18.) Franz, however, only has a duty to warn of defects “that are not known by the [bareboat charterer] and would not be obvious to or anticipated by him if reasonably competent in the performance of his work.” *Scindia*, 451 U.S. at 167. Narrow margin decks and lacking hand grips and hand rails are examples of obvious features that are exempt from notice. *See, e.g., Toups v. Marine Transp. Servs., Inc.*, No. CIV. A. 99-2481, 2000 WL 1159392, at *3 (E.D. La. Aug. 15, 2000) (holding that potential hazards posed from the absence of a ladder or gangway was noticeable to a reasonably competent stevedore). Accordingly, the Volks do not have a LHWCA claim against Franz, and petitioners' motion on this ground is granted.

c. Buchanan

Buchanan acknowledges it is liable under the LHWCA, however, asserts that W. Volk's remedy is limited to LHWCA workers' compensation payments under the statute's no-fault insurance scheme. (Dkt. No. 50 at 17-22.) The court agrees.

As noted above, workers' compensation payments are the exclusive remedy for an injured employee against his employer. *See* 33 U.S.C. § 905(a). However, a unique problem arises when the employer is also the vessel owner, *see Gravatt*, 226 F.3d at 118-20, or in this case, the owner *pro hac vice*. In this situation, courts refer to the employer as a dual-capacity employer-owner. *See, e.g., id.* at 115-16; *Daza v. Pile Found. Const. Co., Inc.*, 983 F. Supp. 2d 399, 411 (S.D.N.Y. 2013). Reasoning that an injured employee has a third party claim against a negligent vessel, the Supreme Court held that an injured

employee may also allege tort claims against a dual-capacity employer-owner. *See Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523, 528-32 (1983); *Gravatt*, 226 F.3d at 119. To be sure, “Congress intended a general principle that the rights and liabilities of employee and employer should not turn on whether the employer acted in a dual-capacity as vessel owner.” *Gravatt*, 226 F.3d at 119. That said, “it [is] clear that a vessel owner acting as its own stevedore is liable only for negligence in its 'owner' capacity, not for negligence in its 'stevedore' capacity.” *Pfeifer*, 465 U.S. at 531 n.6 (citing 33 U.S.C. § 905(b) (1972), *amended by* 33 U.S.C. § 905(b) (1984)).

The Second Circuit in *Gravatt* analyzed how a vessel's *Scindia* duties apply to a dual-capacity employer-owner. *See Gravatt*, 226 F.3d at 120-25. With respect to the turnover duty, *Gravatt* held that this duty clearly aligned with a dual-capacity owner-

employer's capacity in vessel operations. *See id.* at 122. As a result, a dual-capacity employer-owner is liable as a vessel if it violates its turnover duties. *See id.* By contrast, the court explained that determining whether a vessel acted in its capacity as a vessel or employer under the second and third duties presented courts with a greater challenge. *See id.* at 122-23. Relying on precedent from the First and Fifth Circuits, the court held that “[l]iability in vessel negligence under section 905(b) will only lie where the dual-capacity defendant breached its duties of care while acting in its capacity as vessel owner.” *Id.* at 124. Accordingly, “the court's task is to analyze ... whether [the allegedly 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.” *Id.* at 125.

Applying this rule, *Gravatt* held that the dual-capacity vessel-employer was negligent in its role as employer and not in its capacity as a vessel. *See id.* The dockbuilder in that case was injured by debris that slipped from a crane's teeth, which knocked him into the Harlem River. *See id.* at 113. The undisputed negligence was attributed to the dockbuilder's supervisor for failing to properly oversee materials handling and to the crane's hoisting procedure and use of timber tongs, which violated industry standards and state and federal regulations. *See id.* at 113-14 nn.3-4. The court determined that the negligence of the supervisor and the construction procedure related to the dual-capacity vessel-employer's role as an employer because the vessel was acting in its "capacity as contractor performing bridge repairs not in its capacity as vessel owner." *See id.* at 126. Consequently, the dockbuilder's exclusive

remedy was LHWCA workers' compensation. *See id.* (citing 33 U.S.C. § 905(a)).

Here, the Volks allege that Buchanan was negligent because it committed “multiple OSHA violations as to the configuration of the margin decks, ... the lack of hand grips or hand rails,” and that the B-252 was “covered with stones when [W. Volk] slipped and fell.” (Dkt. No. 53 at 17-18.) Buchanan has not violated its turnover duties for the same reasons as Franz. *See supra* Part IV.A.2.b. Namely, the alleged dangers were apparent and would be anticipated by longshoreman inspecting the barge. *Id.* Nor was Buchanan engaged in vessel duties at the time of the accident. When functioning as a vessel, Buchanan would send its empty barges to the Clinton Point facility, and then, after Tilcon loaded its quarried rock, Buchanan would send its barges down the Hudson River to deliver the quarried rock to

Tilcon's customers. (Tilcon's SMF ¶¶ 7-8, 35, 38-39.) When functioning as a stevedore, Buchanan employees inspected and repaired the barges at the Clinton Point facility while Tilcon loaded its product. (*Id.* ¶¶ 10-15, 19-29, 35-38.) In short, “[t]he performance of [inspection and repair] work was separate and apart from the vessel's work.” *Gravatt*, 226 F.3d at 125. W. Volk's injury occurred because of alleged negligence that happened during the time that Buchanan was operating as a stevedore. *See Daza*, 983 F. Supp. 2d at 411 (finding no vessel negligence when “the injury was [the vessel's] responsibility as employer and not vessel owner”). As W. Volk's injury is attributable to conduct related to Buchanan's capacity as his employer, LHWCA workers' compensation benefits are his exclusive remedy.

B. General Maritime & State Law Claims

The Volks also assert numerous general maritime and state law claims against Franz, Buchanan, and Tilcon. (Dkt. No. 15 ¶¶ 11-25, 30-39, 43-49.) As an initial matter, the claims against Franz and Buchanan must fail because the LHWCA preempts all other claims against a claimant's employer and vessel. *See Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811, 818 (2001) (citing 33 U.S.C. §§ 904(b), 905(b)).¹⁰

The Volks may still pursue claims against Tilcon as an alleged third party tortfeasor. *See* 33 U.S.C. § 933(a). Specifically, the Volks allege maritime claims of unseaworthiness and maintenance and cure as well as other general maritime claims. (Dkt. No. 15 ¶¶ 30-39.) The Volks also allege claims of ordinary negligence, N.Y. Labor Law § 200, nuisance, and gross negligence. (*Id.* ¶¶ 11-25, 43-49.) Tilcon opposes and maintains that it does not owe a duty to

the Volks. (Dkt. No. 51, Attach. 3 at 5-9, 11-12, 14-15.)

The court agrees with Tilcon.

1. Maritime Claims Against Tilcon

The Volks assert three maritime claims arising under federal common law against Tilcon. For the reasons that follow, all claims are meritless.

First, the Volks allege that Tilcon breached its duty to provide a seaworthy vessel. (Dkt. No. 15 ¶¶ 30-32.) Tilcon, however, was not the owner of B-252 and, as a result, bore no such duty. *See Oxley v. City of New York*, 923 F.2d 22, 24-25 (2d Cir. 1991); *Lisowski v. Reinauer Transp. Co, Inc.*, No. 03-CV-5396, 2009 WL 763602, at *13 (E.D.N.Y. Mar. 23, 2009). What is more is that W. Volk does not have a cognizable unseaworthiness claim against any alleged tortfeasor because, as discussed above, he is not a seaman. *See Scindia*, 451 U.S. at 165 (explaining that the 1972 amendments to the LHWCA abolished “the

longshoreman's right to recover for unseaworthiness"); *accord Gravatt*, 226 F.3d at 116.

Second, the Volks allege that Tilcon breached its duty to provide maintenance and cure to W. Volk. (Dkt. No. 15 ¶¶ 33-35.) This claim fails on similar grounds because Tilcon is not the owner of B-252. *See Lewis*, 531 U.S. at 441 (“A claim for maintenance and cure concerns the vessel owner's obligation to provide food, lodging, and medical services to a seaman injured while serving the ship.”). Again, this action is only available to seaman, and W. Volk does not qualify. *See Mahramas v. Am. Export Isbrandtsen Lines, Inc.*, 475 F.2d 165, 170 (2d Cir. 1973); *see also* 1B-IV Benedict on Admiralty § 44 (2015) (“Longshoremen, of course, have never been entitled to maintenance and cure.”).

Finally, the Volks assert general maritime claims against Tilcon. (Dkt. No. 15 ¶¶ 36-39.) Such

claims are based on a vessel owner's duty to those aboard his ship, and, thus, are inapplicable to Tilcon. *See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959); *see also Rainey v. Paquet Cruises, Inc.*, 709 F.2d 169, 171-72 (2d Cir. 1983); *In re Treanor*, No. 13-CV-5489, 2015 WL 7016954, at *6 (E.D.N.Y. Nov. 6, 2015).

2. State Law Claims Against Tilcon

The Volks also allege state law claims against Tilcon including negligence, gross negligence, and violations of N.Y. Labor Law § 200. (Dkt. No. 15 ¶¶ 11-25, 46-49.) N.Y. Labor Law § 200(1) codifies the common law duty requiring landowners, general contractors, and employers to maintain a safe workplace.¹¹ *See* N.Y. Labor Law § 200(1); *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 505 (1993). Such parties may be liable if the employee's injury is caused by the negligent means or manner

that the work is performed. *See Ross*, 81 N.Y.2d at 505. Landowners, like Tilcon, violate this duty if they have supervisory control over the operation which leads to the injury. *See Barreto v. Metro. Transp. Auth.*, 25 N.Y.3d 426, 434-35 (2015); *Ross*, 81 N.Y.2d at 505.

W. Volk was injured after he tripped over loose stones on the margin deck of the B-252. (Pets.' SMF ¶ 13.) The alleged negligence which caused W. Volk's injury could plausibly originate from one of two sources. The first is where the stones reached the margin deck of the B-252 from a barge weeper, which is a drainage hole on the side of a barge. (Tilcon's SMF ¶¶ 30-34; Dkt. No. 53, Attach. 3 at 91-93.) The second is where the stones could have been overloaded by Tilcon and spilled onto the margin deck. (Pets.' SMF ¶ 14; Dkt. No. 53, Attach. 3 at 93.)

Because the weepers are a component of the barges, they are within the control of Buchanan — not Tilcon. (Pets.' SMF ¶¶ 2-4.) Even assuming the weepers were defective, W. Volk may only recover against Buchanan under the LHWCA because it is his exclusive remedy as Buchanan is his employer or vessel owner. *See* 33 U.S.C. § 905(a)-(b).

Nevertheless, the Volks may still recover against Tilcon as a third party. *See* 33 U.S.C. § 933(a). Despite Tilcon's disagreement, the record reveals that it supervised and controlled loading the wet stone onto the B-252. (Tilcon's SMF ¶¶ 28-29.) Therefore, a reasonable jury could infer that Tilcon's alleged negligent overloading was a substantial factor in W. Volk's injury. *See Dos Santos v. Terrace Place Realty, Inc.*, 433 F. Supp. 2d 326, 334 (S.D.N.Y. 2006).

Tilcon, however, asserts that the alleged hazard was open and obvious obviating any liability. (Dkt. No. 51,

Attach. 3 at 7.) The court agrees. “The duty of an employer or owner to provide workers with a safe place to work does not extend to ... hazards that may be readily observed by reasonable use of the senses in light of the worker's age, intelligence and experience.” *Bodtman v. Living Manor Love, Inc.*, 105 A.D.3d 434, 434-35 (1st Dep't 2013) (internal quotations and citations omitted); *see also Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 506-07 (2012). W. Volk testified that, before he tripped, he saw “a large amount of ... stone” and chose not to walk around it because there was “[n]o way to get around it.” (Dkt. No. 53, Attach. 3 at 101.) W. Volk was an experienced barge checker who regularly inspected barges for defects. (Tilcon's SMF ¶ 19; Dkt. No. 53, Attach. 3 at 5.) To be sure, W. Volk suggested that the origin of the loose stone could be from the weeper or “probably bounced over the side [of the barge] being overloaded.” (Dkt. No. 53, Attach.

3 at 91-93.) As a result, Tilcon established that it is entitled to judgment, and the Volks failed to raise a question of fact regarding Tilcon's alleged negligence.¹² *See Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 26 N.Y.3d 40, 49 (2015).

Finally, the Volks allege that they were endangered by a public or private nuisance that Tilcon permitted on its property. (Dkt. No. 15 ¶¶ 43-45.) At the outset, the Volks do not have a cognizable action for public nuisance because they are not a state agency authorized to seek redress for a wrong committed against the public. *See Copart Indus., Inc. v. Consol. Edison Co. of N.Y., Inc.*, 41 N.Y.2d 564, 568 (1977) (“A public ... nuisance is an offense against the State and is subject to abatement or prosecution on application of the proper governmental agency.”) (internal citations omitted); *see also City of New York v.*

Smokes-Spirits.Com, Inc., 12 N.Y.3d 616, 626-27 (2009); *but see Wakeman v. Wilbur*, 147 N.Y. 657, 663-64 (1895) (holding an individual may recover in a public nuisance action if he suffered special damages resulting from a “private and peculiar injury”). Even if W. Volk had standing to bring an action on this ground, his injury is not the result of “conduct or omissions which offend ... the public in the exercise of rights common to all, in a manner such as to offend public morals.” *Copart Indus., Inc.*, 12 N.Y.3d at 568 (internal citation omitted).

The Volks are no more successful on their theory of private nuisance. A private nuisance is negligent or intentional conduct where the defendant substantially and unreasonably interferes with the plaintiff's right to use and enjoy his property. *See id.* at 570; *see also Berenger v. 261 W. LLC*, 93 A.D.3d 175, 182 (1st Dep't 2012). In short, “[n]uisance is

characterized by a pattern of continuity or recurrence of objectionable conduct.” *Berenger*, 93 A.D.3d at 182. Nothing in the record suggests that Tilcon could have interfered with the Volks' right to use and enjoyment, particularly, because the Volks did not own the Clinton Point facility where the injury occurred. (Pets.' SMF ¶¶ 1, 7); *see generally Domen Holding Co. v. Aranovich*, 1 N.Y.3d 117, 123-24 (2003).

In sum, because the Volks have not established negligence or other actionable conduct against Franz and Buchanan under any alleged theory, the complaint for exoneration from liability is granted. *See Messina*, 574 F.3d at 126; *see also The 84-H*, 296 F. 427, 432 (2d Cir. 1923). Consequently, Tilcon's claims for contribution or indemnification are dismissed. Furthermore, for the reasons stated above, the Volks' cross-claims against Tilcon are dismissed.

V. Conclusion

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that Franz and Buchanan's motion for summary judgment (Dkt. No. 45) is **GRANTED**; and it is further

ORDERED that the complaint for exoneration (Dkt. No. 1) is **GRANTED**; and it is further

ORDERED that Tilcon's motion for summary judgment (Dkt. No. 51) is **GRANTED**; and it is further

ORDERED that Tilcon's claims for contribution or indemnification (Dkt. No. 6 ¶¶ 16-19) are **DISMISSED**; and it is further

ORDERED that the Volks' cross-motion for summary judgment to dismiss the limitation proceeding (Dkt. No. 53) is **DENIED**; and it is further

ORDERED that the Volks' cross-claims against Tilcon are **DISMISSED**.

IT IS SO ORDERED.

¹ See 46 U.S.C. §§ 30501-30512.

² Unless otherwise noted, the facts are not in dispute. Also, the failure of the Volks to comply with Local Rule 7.1(a)(3) by admitting or denying each of the numbered paragraphs in Franz and Buchanan's and Tilcon's statements of material facts is not without consequences. The Volks' "Statement of Relevant and Material Facts" contained within their memorandum of law in opposition to the summary judgment motions is not properly responsive. (Dkt. No. 53 at 3-13); see N.D.N.Y. L.R. 7.1(a)(3). It is riddled with legal conclusions, cites scant record support, and contains lengthy paragraphs which fail to admit or deny the numerical paragraphs of Franz and Buchanan's and Tilcon's statements of material facts. (Dkt. No. 53 at 3-13.) Consequently, Franz and Buchanan's and Tilcon's properly supported and uncontroverted facts are deemed admitted.

³ See 33 U.S.C. §§ 901-950.

⁴ Prior to this litigation, the B-252 was scrapped "in the normal course of business." (Pets.' SMF ¶ 5.)

⁵ See 46 U.S.C. §§ 30101-30106.

⁶ The Volks may pursue claims against Tilcon because cross-claims are permissible in a limitation proceeding under the Limitation Act. See *British Transp. Comm'n v. United States*, 354 U.S. 129, 138 (1957); see also *Stissi v. Interstate & Ocean Transp. Co. of Philadelphia*, 765 F.2d 370, 377 (2d Cir. 1985).

⁷ Additionally, W. Volk does not qualify for relief under the Jones Act against Tilcon because Tilcon is not his employer. (Pets.' SMF ¶ 7); *see* 46 U.S.C. § 30104.

⁸ Generally, stevedores are contractors who perform services including moving waterborne freight or working on piers or vessels when the vessels are moored. *See, e.g.*, N.Y. Waterfront & Airport Comm'n Act § 9806.

⁹ The charter, however, carved out Buchanan's liability for gross negligence or willful misconduct on the part of Franz. (Dkt. No. 47, Attach. 1 § 8(b), at 5.)

¹⁰ For that reason, K. Volk's derivative claims for loss of consortium must also fail. *See Izaguirre v. Ugland Marine Mgmt. AS*, Civil Action No. H-11-04195, 2013 WL 820501, at *5 (S.D. Tx. Mar. 5, 2013); *see also Wright v. City of Ithaca*, No. 5:12-cv-378, 2012 WL 1717259, at *5 (N.D.N.Y. May 15, 2012).

¹¹ Courts consistently evaluate ordinary negligence and N.Y. Labor Law § 200 claims in tandem. *See, e.g., Barreto v. Metro. Transp. Auth.*, 25 N.Y.3d 426, 434-35 (2015).

¹² Because the Volks fail to establish claims for ordinary negligence, their claim for gross negligence necessarily fails. *See generally Colnaghi, U.S.A., LTD. v. Jewelers Prot. Servs., LTD.*, 81 N.Y.2d 821, 823-24 (1993); *see also Lubell v. Samson Moving & Storage, Inc.*, 307 A.D.2d 215, 217 (1st Dep't 2003).

APPENDIX C

**A CAREFUL RECITATION OF THE FACTS
TAKEN FROM THE RECORD ON APPEAL**

A. Introduction

Although, as stated, *supra*, the facts recited in the opinion of the Second Circuit are sufficient to establish seaman status as a matter of law, this factual recitation of facts is incomplete and led to incorrect legal conclusions. Following is a careful and accurate recitation of the facts, cited to the record on appeal.

B. Job Title: Barge Maintainer

Wayne Volk, for 12 years from 1999 through the date of the accident, May 19, 2011, during barge-loading season from March through December of each year, worked for Buchanan Marine, L.P. (“Buchanan”) as a “boat (barge) maintainer.”¹ Volk testified, “We

¹ Volk, A132-135; 983/8-10; Conn, A1243.

maintained the boats to float. We did everything to make them float and transport the material down the river safely . . . [we were the] welder, pumper, boat checker, boat maintainer . . . we did everything . . . what I said is [I am] a boat [barge] maintainer. [I do everything] to keep the boats afloat.”² In January and February of each year, the Hudson River freezes up and Buchanan’s deck barges (scows) cannot be used to transport crushed stone/gravel from Tilcon’s Clinton Point, Dutchess County, N.Y. quarry on the eastern shore of the Hudson River down river to New York City and beyond to customers. Volk, an hourly employee, was laid off without pay by Buchanan for that period of time as there were no barges afloat on the river for him to maintain.³

² Volk, A982/12-983/7.

³ Volk, A1002/13–1005/14.

C. Daily Duties

Volk worked for Buchanan as a barge maintainer spending nearly all of his work time, each and every workday, on the navigable waters, tidally influenced, of the Hudson River⁴ aboard Buchanan's barges and aboard a Buchanan-owned and controlled "little work barge/a little work boat with a motor on it,"⁵ maintaining the barges. Volk made initial and final inspections of every barge — the entire exterior, hull and sides of hull, decks and cargo boxes, for holes or cracks that would allow water into the hull that could cause the barge to list, capsize, and sink. This inspection included climbing down into each hull through a hatch in each end deck with a flashlight

⁴ Volk, A132-135; A1010/24-A1012/18; Cole, A813; Conn, A1248- A1249.

⁵ Conn, A1312/6-A1312/14.

(there was no electricity or light illuminating the insides of the hulls) to check for damage and to measure the water level to determine whether it needed pumping. The inspection process also entailed opening and looking through the inspection caps/nipples on each margin deck for water in the hull, permanently repairing the holes and cracks by welding or temporary repair by wedging small holes or cracks with wood wedges shaped for the hole and pounded into place, pumping of water from the hulls, hanging truck tires as bumpers all around the barges, and other necessary repairs, on a fleet of 150 to 200 barges (scows).⁶

D. Aboard Vessels on Open Water

⁶ Volk, A997/15-A1000/7; A1008/23-24; A132-A138; Cole, A/172-A177; Perlman, A1379/8-11; Burris, A184-A188.

For 12 years, Volk and the other barge maintainers worked for Buchanan all day long starting at 5:30 AM and finishing as late as 9:00 PM, making sure that all the barges were in seaworthy condition, as having been inspected, repaired and pumped, as needed, loaded with stone/gravel, and moved into the loaded rack after final inspection, waiting for the tow downriver by a large Buchanan river tug. They worked day in and day out, aboard Buchanan barges and exclusively so, operating, controlling, manning and navigating the Buchanan “little work barge” in the open waters of the Hudson River, to facilitate barge inspection, wedging with wood, welding, repairing, pumping water from hulls and otherwise maintaining the seaworthiness of the deck barges/scows, working from barge to barge and from the “little work barge” on both empty and full Buchanan barges in the empty and full racks and in

open water. Volk and the other barge maintainers never worked on land and never repaired or maintained the Tilcon dock. While working for Buchanan, Volk was paid for working aboard and maintaining Buchanan's fleet of barges/scows on the river.⁷ The 150 to 200 barges, all owned or chartered by Buchanan, constituted a fleet or flotilla⁸ controlled by Buchanan at all times.⁹

Each workday during those 12 years, the three barge maintainers (including Volk), after completing initial inspections of all empty barges (in the empty rack) which had been towed there earlier each morning by a large Buchanan river tug from New

⁷ Volk, A132-A135; A138; A1001-A1005; A1008-A1012; A1032-A1033.

⁸ Buchanan brief, page 21; Cole, A174, A177-A181.

⁹ Perlman, A1379/8-11; A1432/24-A1433/12; A1417/11-21.

York City, and after having reviewed their findings with Buchanan’s repair supervisor, Tim Conn, who had given the work orders for repair and pumping,¹⁰ would board, control, operate, man, and navigate in the open waters of the Hudson River—not tethered directly or indirectly to Tilcon’s dock—the “little work barge/little work boat with a motor on it.”¹¹ The “little work barge” which was sometimes referred to as “a Buchanan small boat or skiff”¹² or “pontoon boat”¹³ was powered by an outboard motor and equipped with a welder (the most essential and frequently utilized piece of equipment for repairs of steel barges/scows). The “little work barge” was used to access barges and

¹⁰ Volk, A132-135; 1033/18-18; Burris, A184-188.

¹¹Conn, A1312/6-17; Volk, A132-135; 993-994; A1000/23–1002/4; 1030/16-1032/11; Burris, A184-188.

¹² Volk, A134.

¹³ Volk, A1001/2.

to weld from or otherwise repair the barges in the empty and full racks and in open water. The “little work barge” also supplied and transported all tools and equipment necessary to conduct all barge inspections, make repairs and pump the barge hulls. It carried protective clothing and repair supplies (welding rods, steel, cutting torches with acetylene and oxygen tanks, 60-pound water pumps, etc.). All of this was too heavy and too bulky to carry as the barge maintainers jumped from barge to barge in the empty and loaded racks to access other barges that were tied side-by-side further out in the river (as there were no walkways or ramps). Those barges were connected only with lines and separated by truck tire bumpers affixed to their gunwales, with several feet of river water between. Inasmuch as Buchanan barges were not uniform in size, shape or capacity and thus floated at different levels in both racks, Volk and the other

barge maintainers, in order to access them, sometimes “had to climb up those tires and jump across, [as] every boat is not even.”¹⁴ The “little work barge” was also used as a self-propelled floating work platform for Volk and the other barge maintainers to stand on while welding holes and cracks in the steel plates of the barges’ hulls and to supply the welding machine in close proximity to the damaged areas of the barges floating on the river so Volk could carry the welding cables onboard the barge and weld the holes and cracks in the damaged decks and cargo boxes. This boat provided access to supply the pumps, hoses and priming pail to the all the barges so Volk could board and pump their hulls and access for Volk to perform

¹⁴ Volk, A1014/12-18; A1058; A1078; Perlman, A1379/5-20; Burris, A187.

other repairs while the barges were afloat, tied side-by-side 4-to-5 deep out into the Hudson River.¹⁵

E. Perils of the Hudson River

The barge maintainers (including Volk) knew they were constantly in peril while aboard the “little work barge” as they were manning, operating and navigating it in open water on the river, to and around all the unloaded and loaded barges and while working from it as it and they were subject to the weather (wind, fog, rain, freezing rain, accumulations of snow and ice on its deck), tidal influences, waves, and wakes from larger vessels plying the Hudson. They “watched up and down the river, watched around us so [they] we didn’t get crushed” by the big Buchanan barges/scows and the Buchanan river-going tugs and

¹⁵ Volk, A132-135; A137-138; A993- 994; A1000-1002; A1008-1012; A1030-1032; Burris, A187; Conn, A1311/22-1312/10; Cole, A173; A175;

other oceangoing vessels plying the river from New York City to the Port of Albany.¹⁶ At the end of the workday, the barge maintainers would come off the river, and go home. However, they would be on call “24 hours a day seven days a week for emergency barge repairs” (including pumping) to try and keep the loaded barges from capsizing and sinking.¹⁷

At Tilcon’s Clinton Point facility on the eastern shoreline of the Hudson River, the distances from the empty fleet floating at the south dock, north on the river to the loading dock and from the loading dock north on the river to the loaded rack at the end of the north walkway were each approximately 200 yards.¹⁸

¹⁶ Volk, A134; A1031; Cole, A813; Conn, A1275-76; A1344.

¹⁷ Volk, A138; Cole, A174.

¹⁸ Volk, A1012/19–1013/1.

In that area, the Hudson River from shoreline to shoreline is approximately a half-mile in width. When each empty barge was moved by the Tilcon push boat from the empty fleet, through open water, north on the river to the loading dock, every day, that barge was taken “halfway out in the river”¹⁹ and then back to the staging area and loading dock.

F. Barge Repair and Pumping

Throughout each workday, many, if not all, of the barges, needed repairs and pumping²⁰ as on the day of Volk’s accident aboard the B252. After Volk had pumped other barges in the empty rack in the morning of May 19, 2011, around 11 AM., he was aboard the B252 in the empty rack after having repaired (wedged with wood) small cracks in its cargo

¹⁹ Volk, A1037/17-18.

²⁰ Volk, A994–995; Cole, A174; Conn, A1257–1259.

box and pumped the hull. The B252 had a lot of water in it. Volk remained aboard, manning the pumps, as it was pushed north from the unloaded rack, in open water, out into the middle of the river, and pushed back in open water to the loading dock. Volk was aboard, set the pumps, and pumped water from the hull as it was loaded with wet ¾-inch stone. Once the B-252 was loaded, Volk was still aboard manning the pumps as it was pushed, again in open water, north to the loaded rack where Volk tied and secured the B252 into the loaded rack as third barge out in the river. Volk was aboard the B252 working and “worked through lunch that day.”²¹

For 12 years, during each workday, Volk repaired and pumped out barges in the empty rack,

²¹ Volk, A1034/2-1040/23; 1046/10-1053/23; Cole, A174-176.

then remained aboard each such barge as it made the three-fifths mile journey while being pushed by the Tilcon-operated push boat in open water—not tied to any other barge, dock or pier—to the middle of the river and back to the Tilcon loading dock, pumping while it was being loaded and then still manning the pumps while riding aboard to the loaded rack on the river where he tied and secured that barge.²² Volk would return to the empty rack some 400 yards south, to continue his repair work by riding back on the “little work barge” or the Tilcon-operated push boat/small boat.²³

²² Volk, A137; 1008/20–1012/18; A1013/22–1014/4; 1035/16-1040/20; 1051/21-1053/23.

²³ The barge maintainers (Volk and his coworkers, also barge maintainers) would wait or ride down on the Tilcon operated small tugboat/push boat, Conn, A1298/17-25.

G. More Navigation Duties

Part of Volk's job duties while aboard each barge, throughout each work day, was to assist in the navigation of the barges, empty or full, being moved by the Tilcon-crewed push boat/small tug, by tying lines on each barge that he was aboard to other barges or to the dock or pier.²⁴ "It was part of our (Volk's) job."²⁵

H. Dangerous Conditions

Boarding and inspecting the barges after they were fully loaded exposed Volk and other barge maintainers to new perils/hazards of overspill and wet gravel leaching out onto the margin decks from scuppers and weepers and through rusted holes or

²⁴ Volk, A997/4-12; A1053/2-23. Volk actually tied and secured the B252 into the loaded rack as the 3rd boat out from the north walkway on the day of the accident. Conn, A1296.

²⁵ Volk, A997/2-12.

gratings.²⁶ The margin decks had no handrails but instead “sharp and jagged steel edges” on rails that were the only things Volk could hold onto while walking and inspecting the margin decks. Dangerous conditions caused by wet gravel on the narrow margin decks were exacerbated by the wind, waves, and wakes from large oceangoing vessels navigating the Hudson River between Albany and New York City all year long together with weather conditions and accumulations of slippery snow and ice in winter months²⁷

²⁶ Burris, A184-188.

²⁷Portice, A1495/45-23–1496/46-6; Conn, A1275/6–1276/11, “And have you ever walked the margin decks yourself.. yes. Do you walk the same way every time . . . depends on conditions. could be ice, could be stone..when you do it you wear a life preserver..of course..to save your life in case you fall in the water” A.1343/22–1344/10.

I. Final Barge Inspection Procedure

Buchanan, for final inspection of the loaded barges in the loaded rack, required its repair supervisor, Conn, to be physically present to direct and supervise Volk and the other barge maintainers while they performed a mandatory complete walk-around and inspection of the entire “perimeter” of each loaded barge. This involved inspecting for any damage that may have been caused during the loading process, walking on every barge deck (margin decks and end decks) and inspecting for cracks and holes, inspecting the sides of each hull, opening and looking with a flashlight into each hull for water through the inspection caps/nipples on each margin deck, climbing into the hulls through each end deck hatch with a flashlight to look for leaks, measuring water levels to see whether pumping was needed, and inspecting all sides of the cargo box of each loaded

barge.²⁸ The requirement that Conn be personally present to supervise the final complete walk-around and inspection was a “new” procedure which began six to eight weeks prior to Volk’s accident of May 19, 2011, after “a scow rolled over on top of the other one and they sort of sunk and they flipped back over”²⁹ in the loaded rack. Volk, Conn and Perlman all described the perilous capsizing and sinking of the loaded barges that had been afloat in the loaded rack waiting for the tow down river.³⁰ If Volk had been aboard working on either of those barges when they capsized

²⁸ Volk, A1053/18-1056/3.

²⁹Volk, A168; A1199/10-17; Appendices D and E are dramatic photographs of the Buchanan barges capsizing and sinking in the river at the loaded rack, the location of Volk’s work accident on the B-252 Buchanan barge.

³⁰Volk, A137; A1199/10–1200/9; Conn, A1258-1259; photos: A168; Perlman, A1387/8–1389/19.

and partially sunk, he could have been thrown overboard and seriously injured or drowned, crushed by 2000 tons of gravel or, if in the hull, entombed and drowned. This is just one more example of the many perils to which Volk and the other maintainers were exposed daily over Volk's twelve years of employment as a barge repairer/maintainer.

The margin decks on the Buchanan barges were frequently covered with crushed stone and "with excessive material on them" they were "dangerous to walk on" such that Tilcon's dock foreman, Robert Portice "would not walk on them for fear of falling."³¹ It was understood that a barge maintainer falling overboard into the Hudson River from a margin deck of a loaded barge between two loaded barges in the

³¹ Portice, A1488/14-4–1488/14-9; A1494/38-17–1494/40-21.

loaded rack could be crushed or drowned when the two barges pinched together from tidal currents, waves or wakes from big oceangoing ships plying the Hudson from New York City to Albany. In the winter, they could suffer hypothermia and freeze to death.³² In fact, Tilcon's employees "were instructed not to walk the margin decks" of any Buchanan barge. This work rule was put in place before Portice was hired in 2006, and it continued to be Tilcon's custom and practice up to and after Volk's accident of May 19, 2011.³³ However, that was not the case for Buchanan's barge maintainers including Volk, who, as part of the final inspection, were required to walk and inspect the

³² Cole, A813-814; Conn, A1343/22-1344/10.

³³ Portice, A1495/44-18-1496/46-22.

margin decks, the entire “perimeter” of each and every loaded barge.³⁴

J. The Accident

Volk’s injuries occurred on May 19, 2011 about 1 to 1:30 PM. while he was performing the final inspection of the B-252 afloat in the loaded rack. He was carrying a flashlight and hammer in his left hand, walking forward and inspecting the port stern margin deck and side of the hull of the B-252 with his right arm over the rail on top of the cargo box when he slipped on wet stone, lost his footing, his feet slid off the margin deck and he caught himself by his right armpit on the rail of the cargo box, saving himself from falling overboard between the loaded barges and possibly being crushed to death or even drowned.³⁵ Volk

³⁴ Volk, A1054; A1198/17-1200/9.

³⁵ Volk, A135-138; 169-170; A1054/11-1055/7.

sustained injuries to his right arm, shoulder, neck, etc.

The B-252 was an older barge, 44 years old,³⁶ that had numerous dangerous conditions: narrow 18-inch-wide margin decks with a worn and rusted steel rib (reinforcing the cargo box) every few feet reducing the width to a few inches. There were rusted holes in the cargo box and rusted scuppers/weepers that allowed wet stone/gravel to leach out of the cargo box onto the margin decks, overspill from loading of wet gravel and stone on the margin decks, accumulations of stone and gravel on the margin decks for whatever reason (no duty on barge maintainers to clear and/or clean stone from the margin decks).³⁷ There were no handrails (an

³⁶ A18.

³⁷ Conn, A1315; Burris, A184-188; Thorpe, A189-191.

OSHA violation)³⁸ along the entire length of the margin decks so that Volk had to walk and inspect the margin decks and sides of the hull while walking with one arm over the top of the rail of the cargo box which was in disrepair from the repeated process of unloading with heavy equipment and which was “very jagged and sharp.”³⁹ After the accident, Volk examined underneath his right arm as he “was scared of getting ripped apart because there’s frayed metal on top” of the very rail that saved him from going overboard and possible drowning, or being crushed to

³⁸ The fleet of Buchanan barges was not inspected by the U.S. Coast Guard. Consequently, the barges fall within OHSA’s jurisdiction and regulations. Perlman, A1390/18–1393/7;_Cole, A177-179; A806-815; A838-A843.

³⁹Portice, A1495/45-23-1496/46-22; A18; Thorpe, A189-191; Volk, A135, 138-142; 1067/16-23; Burris, A185-187; Perlman, A1392/4-1392/9; A1393/4-1394/20.

death between the two barges.⁴⁰ In fact, the B-252 was scrapped some eight months after the accident.⁴¹

After Volk was injured on May 19, 2011, he reported the accident and injuries to his superior, Buchanan repair supervisor, Tim Conn, who, since 2005, was the supervisor in charge of “maintenance for barge loadings and checking the barges after they had been loaded.”⁴² Tim Conn took Volk to the Medicus walk-in clinic for medical treatment the next day.⁴³ Tim Conn was not the dock foreman. Bob Portice, employed by Tilcon, quarry and dock owner, was the one and only dock foreman.⁴⁴ Buchanan’s supervisor, Tim Conn,

⁴⁰ Volk, A1067/6-1068/9; A169-170.

⁴¹ Perlman, A1443/15–A1444/11; A1448/4–A1449/18.

⁴² Conn, A1233/5–A1247/25.

⁴³ Conn, A1240/41242/7.

⁴⁴ Portice, A1488/4-10.

was the **only** person at the Clinton Point loading facility and harbor to supervise and give any orders and/or direction to the 3 Buchanan barge maintainers, including Volk. The maintainers were not under the supervision, direction or control of Tilcon, its land-based employees, or its dock foreman, Portice.⁴⁵

⁴⁵ Volk, A133-134; Perlman, A1440/17-21; Portice, A1490/25-3-1491/26-17; Volk, A1185/2-1189/24; Burris, A184-188.

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**APPENDIX D –
CAPSIZED BARGES**



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**APPENDIX E –
CAPSIZED BARGES**

