Seaman Status: The Supreme Court Recharts Its Course: Wilander and Gizoni

Eileen R. Madrid
Seaman Status: The Supreme Court Recharts Its Course: Wilander and Gizoni

Eileen R. Madrid*

"Ode to Seaman's Status"

“When I grow up I’ll go to sea
And when I’m hurt I’ll sue in admiralty
If I win I know I’ll be
A rich ole salt, don’t you see.”

But now they’ve changed the question
It all began with Robison
And when it’s all done
They gave seaman's status to anyone.

For there’s Higginbotham v. Mobil Oil
Now, I’ll never have to leave the soil
A seaman’s not known for his toil
Because there’s retained status from Pfeifer Oil.

I’ve got a raft and I’ve got a scow
And though I’ve never swabbed a bow,
Higginbotham's fleet rule shows me how
I can get seaman’s status right now.¹

INTRODUCTION

The recent unanimous decision of the United States Supreme Court in McDermott International, Inc. v. Wilander² resolved the longstanding


conflict between the Fifth Circuit, on the one hand, and the Third, Seventh, and Ninth Circuits, on the other hand, with respect to the legal standard for determining Jones Act seaman status. The Supreme

3. The Fifth Circuit first synthesized its seaman status test in Offshore Company v. Robison, 266 F.2d 769, 779 (5th Cir. 1959). Twenty-six years later, a divided Fifth Circuit sat en banc and reaffirmed its Robison test with some modifications in Barrett v. Chevron, U.S.A., Inc., 781 F.2d 1067, 1074 (5th Cir. 1986) (en banc). The Fifth Circuit's Robison seaman status test states:

there is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.

266 F.2d at 779. The First and Eighth Circuits have also relied on the Robison test. See, e.g., Bennett v. Perini Corp., 510 F.2d 114, 115 (1st Cir. 1975); Slatton v. Martin K. Eby Constr. Co., 506 F.2d 505, 510 (8th Cir. 1974), cert. denied, 421 U.S. 931, 95 S. Ct. 1659 (1975); Stafford v. Perini Corp., 475 F.2d 507, 510 (1st Cir. 1973).

4. The Third Circuit had followed the more traditional tripartite seaman status test originally enunciated by the First Circuit in Carumbo v. Cape Cod S.S. Co., 123 F.2d 991, 995 (1st Cir. 1941). That test requires "that the ship be in navigation; that there be a more or less permanent connection with the ship; and that the worker be aboard primarily to aid in navigation." Id. at 995. E.g., Simko v. C&C Marine Maintenance Co., 594 F.2d 960, 964 (3d Cir.), cert. denied, 444 U.S. 833, 100 S. Ct. 64 (1979); Griffith v. Wheeling Pittsburgh Steel Corp., 521 F.2d 31, 36 (3d Cir. 1975), cert. denied, 423 U.S. 1054, 96 S. Ct. 785 (1976). Before Robison, the Fifth Circuit had originally adopted this test in McKie v. Diamond Marine Co., 204 F.2d 132, 136 (5th Cir. 1953), and continued to use it sporadically after Robison. See Bertrand v. International Mooring & Marine, Inc., 700 F.2d 240, 244 (5th Cir. 1983), cert. denied, 464 U.S. 1069, 104 S. Ct. 974 (1984); McDermott, Inc. v. Boudreaux, 679 F.2d 452, 455 (5th Cir. 1982).


6. The Ninth Circuit had also retained the traditional tripartite "aid in navigation" test set out supra note 4. Gizoni v. Southwest Marine, Inc., 909 F.2d 385, 387 (9th Cir. 1990), cert. granted, 111 S. Ct. 1071 (1991); Estate of Wenzel v. Seaward Marine Services, Inc., 709 F.2d 1326, 1327 (9th Cir. 1983); Bullis v. Twentieth Century-Fox Film Corp., 474 F.2d 392, 393 (9th Cir. 1973).


Section 688. Recovery for injury to or death of seaman
(a) Application of railway employee statutes; jurisdiction.

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain
Court expressly approved the second prong of the Fifth Circuit’s seaman status test formulated in Offshore Company v. Robison, which confers seaman status on all workers: (1) who are more or less permanently assigned to a vessel or who perform a substantial portion of their work aboard a vessel and (2) whose duties contribute to the function or mission of the vessel.

In Wilander, the Supreme Court flatly rejected the notion that a maritime worker must “aid in the navigation of the vessel” in order to attain Jones Act seaman status and affirmed the Fifth Circuit’s ruling which upheld a jury finding of Jones Act seaman status in respect of a paint foreman employed by McDermott in the Persian Gulf.

In this ruling, the Supreme Court turns away from distinctions based on the employee’s particular job or the nature of his duties and focuses instead on the employee’s connection to a vessel in navigation. Although the Jones Act grants “any seaman” an action for damages at law for personal injuries sustained in the course of his employment, the Jones Act does not define the term “seaman.” In Wilander, the Court stated, “[w]e believe the better rule is to define ‘master or member of a crew’ under the LHWCA, and therefore ‘seaman’ under the Jones Act, solely in terms of the employee’s connection to a vessel in navigation.”

Wilander further stated that:

The key to seaman status is employment-related connection to a vessel in navigation. We are not called upon here to define this connection in all details, but we hold that a necessary element of the connection is that a seaman perform the work of a vessel. (citation omitted). In this regard, we believe the requirement that an employee’s duties must “contribut[e] to the function of the vessel or to the accomplishment of its mission” captures well an important requirement of seaman status. It is

---

8. 266 F.2d 769, 779 (5th Cir. 1959).
9. Id. at 779. See supra note 3.
11. Id. (quoting Maryland Casualty Co. v. Lawson, 94 F.2d 190, 192 (5th Cir. 1938) for the statement “There is implied a definite and permanent connection with the vessel, an obligation to forward her enterprise.”). It is interesting to note that in describing the type of vessel connection characteristic of seaman status, the Court relies on a pre-Robison decision.
12. (quoting Offshore Co. v. Robison, 266 F.2d 769, 777 (5th Cir. 1959)).
not necessary that a seaman aid in navigation or contribute to the transportation of the vessel, but a seaman must be doing the ship’s work.\textsuperscript{13}

The \textit{Wilander} decision rests on the legislative chronology of the Jones Act, passed in 1920, and the Longshore and Harbor Workers' Compensation Act,\textsuperscript{14} a compensation scheme for harbor workers passed in 1927, which eliminated Jones Act benefits for land-based maritime workers and harbor workers\textsuperscript{15} and substituted a compensation remedy for those workers. In that respect, this decision represents a different analytical approach to seaman status than the oft-cited maxim that the Jones Act is remedial legislation which should be liberally construed so as to achieve maximum coverage in order to accomplish beneficent purposes.\textsuperscript{16} The decision in \textit{Wilander} may appear to give lip-service to this maxim in the statement: “All who work at sea in the service of a

\begin{itemize}
\item[(13)] \textit{Wilander}, 111 S. Ct. at 817.
\item[(14)] 33 U.S.C. §§ 901-950 (1988) [hereinafter LHWCA].
\item[(15)] The LHWCA covers maritime workers, and, at Section 902(3), defines maritime “employee” as:
\begin{itemize}
\item[(3)] The term “employee” means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include—
\begin{itemize}
\item[(A)] individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;
\item[(B)] individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
\item[(C)] individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);
\item[(D)] individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;
\item[(E)] aquaculture workers;
\item[(F)] individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;
\item[(G)] a master or member of a crew of any vessel; or
\item[(H)] any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;
\end{itemize}
\end{itemize}
\end{itemize}

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


ship face those particular perils to which the protection of maritime law, statutory as well as decisional, is directed.' 17 However, the ruling rests entirely on statutory construction and legislative intent rather than on jurisprudential policy considerations. The Court clearly declared that the definition of seaman status, and hence Jones Act coverage, is "found in the plain language 'master or member of a crew of any vessel'" in the LHWCA. Indeed, when reviewing its earlier decisions, the Court expressly noted that the holding in Warner v. Goltra 19 that the master of a vessel is a "seaman" under the Jones Act need not have relied on the salutary principle that the Jones Act is remedial legislation, and that the Court's policy analysis in that case "was unnecessary," because Jones Act coverage is defined "in the plain language of" the LHWCA. 20

The Court's focus, therefore, has shifted to defining Jones Act seaman status in terms of the express LHWCA provisions and in accordance with the underlying congressional policy of treating land-based maritime workers, who may face some maritime perils, similarly to other land-based workers by providing a compensation remedy like that provided under state statutes. In fact, the LHWCA itself is remedial legislation coverage which is to be broadly construed in accordance with the express statutory provisions. 21

Not only does this decision resolve the longstanding conflict between the circuits, but the Wilander decision also establishes an important guideline for determining the proper legal standard for seaman status under the Jones Act—whether the maritime worker is land-based or sea-based. This pivotal factor is derived from an analysis of the historical interaction of the Jones Act and the LHWCA, from which seaman status evolved. 22 Having given this guideline to seaman status under the Jones Act, the Supreme Court again leaves the precise legal definition to be refined in future cases. 23

17. Wilander, 111 S. Ct. at 817.
20. Wilander, 111 S. Ct. at 814.
(a) That the claim comes within the provisions of this chapter."
CASE BACKGROUND IN WILANDER

The plaintiff, Jon Wilander, was employed by McDermott International, Inc. (McDermott) as a paint foreman supervising the sandblasting and painting of fixed drilling platforms located in the Persian Gulf. Although assigned to the M/V Gates Tide, a “paint boat” chartered to McDermott, at the time of his accident, Wilander was not on the paint boat but was inspecting a pipe on a fixed drilling platform when a plug on a pressurized pipe exploded and struck him in the head.

Wilander filed suit against McDermott alleging he was a seaman within the coverage of the Jones Act. Prior to trial, McDermott filed a motion for summary judgment on the issue of Wilander’s status as a seaman, and in opposition to McDermott’s motion, Wilander filed an affidavit stating that during his employment with McDermott he spent approximately 70% of his work time “aboard some vessel.”

The trial court denied McDermott’s motion for summary judgment on seaman status, ruling that there was sufficient evidence to present the seaman status question to the jury. The court elected to sever the seaman status issue from liability and damages and bifurcated the trial so that the seaman status issue would be tried to the jury first, followed by a later trial on liability and damages under the Jones Act.

Although the Supreme Court decision simply stated that Wilander was assigned to the M/V Gates Tide, an American flag paint boat chartered to McDermott and outfitted with equipment used in sandblasting and painting the fixed platforms, a review of the Fifth Circuit opinion reveals that the issues and factual findings concerning Wilander’s vessel connection were not so simple. Whereas the Supreme Court opinion stated only that “[b]y special interrogatory, the jury found that Wilander was either permanently assigned to, or performed a substantial amount of work aboard, the GATES TIDE . . . ,” the Fifth Circuit described the jury’s findings on vessel-connection in the following language:

Following the first part of the trial the jury found that the plaintiff had status as a seaman because he was substantially connected to 1) the DB-9, a Panamanian vessel owned by the defendant; 2) the GATES TIDE, an American vessel chartered to the defendant; 3) the fixed platform upon which he was injured, and 4) a group of vessels called the “TIDEX” fleet. The jury further found that the plaintiff contributed to the function of the DB-9 and the GATES TIDE.

26. Wilander, 887 F.2d at 89.
In fact, the trial jury answered seven special interrogatories on the Jones Act seaman status issues. For the purposes of this discussion, it is sufficient to state that the jury found that Wilander was either permanently assigned to, or performed a substantial amount of work aboard the vessel, GATES TIDE, and that the duties which Mr. Wilander performed contributed to the function of the GATES TIDE's regular operation or to the accomplishment of its mission.

Having determined Jones Act coverage on this basis, the case then proceeded to trial on liability and damages, and the jury rendered a net award of $337,500.00.

On appeal to the Fifth Circuit, in addition to asking the Fifth Circuit to reject its Robison test and adopt the more stringent standard

27. The actual jury interrogatories and answers were as follows:

Special Interrogatories to the Jury
1. Do you find from a preponderance of the evidence that Mr. Wilander was either permanently assigned to, or performed a substantial amount of work aboard the vessel, GATES TIDE?
   Answer Yes or No
   Yes

2. If your answer to question number 1 is “No” please proceed to question number 3. If you answered “Yes” to question 1, please answer the following question: Do you find from a preponderance of the evidence that the duties which Mr. Wilander performed contributed to the function of the GATES TIDE's regular operation or to the accomplishment of its mission?
   Answer Yes or No
   Yes

3. Do you find from a preponderance of the evidence that Mr. Wilander was either permanently assigned to, or performed a substantial amount of work aboard vessels belonging to the TIDEX fleet other than the GATES TIDE?
   Answer Yes or No
   Yes

4. If your answer to question number 3 is “No” please proceed to question number 5. If you answered “Yes” to question number 3 please answer the following question: Do you find from a preponderance of the evidence that the duties which Mr. Wilander performed contributed to the function of the vessels in the TIDEX fleet or to the accomplishment of their mission?
   Answer Yes or No
   No

5. Do you find from a preponderance of the evidence that Mr. Wilander was either permanently assigned to, or performed a substantial amount of work aboard, the barge DB-9?
   Answer Yes or No
   Yes

6. If your answer to question number 5 is “No” please proceed to question number 7. If you answered “Yes” to question 5, please answer the following question: Do you find from a preponderance of the evidence that the duties which Mr. Wilander performed contributed to the function of the barge DB-9's regular operation or to the accomplishment of its mission?
   Answer Yes or No
   Yes

7. Do you find from a preponderance of the evidence that Mr. Wilander was either permanently assigned to, or performed a substantial amount of work aboard, the fixed platform?
   Answer Yes or No

Yes
used by the Seventh Circuit in *Johnson v. John F. Beasley Construction Co.*,\(^{28}\) McDermott contended that the trial court should have denied seaman status as a matter of law, and alternatively, that there was insufficient evidence to support the jury’s finding on seaman status. Under the Seventh Circuit’s *Johnson* test, seaman status is conferred only on employees who “perform significant navigational functions or further the transportation function of the vessel,” and as a matter of law, Wilander would not there have qualified for seaman status.

Adhering to its decision in *Barrett v. Chevron U.S.A., Inc.*,\(^{29}\) which reaffirmed the validity of the *Robison* test, the Fifth Circuit panel affirmed, finding “sufficient evidence [under the *Robison* test] to support the jury’s finding that the plaintiff had status as a seaman.”\(^{30}\)

McDermott then petitioned the United States Supreme Court for a writ of certiorari, which was granted limited to the narrow question of whether one must aid in the navigation or transportation-function of a vessel in order to qualify as a “seaman” under the Jones Act.\(^{31}\) Simply stated, the Supreme Court limited its review of the case to the question of whether, as a matter of law, a worker must satisfy the transportation/navigation function test. The petition for writ of certiorari presented more complicated formulations of the issue.\(^{32}\)

\(^{28}\) 742 F.2d 1054, 1062-63 (7th Cir. 1984), cert. denied, 469 U.S. 1211, 105 S. Ct. 1180 (1985).

\(^{29}\) 781 F.2d 1067, 1074 (5th Cir. 1986) (en banc).

\(^{30}\) *Wilander*, 887 F.2d at 91. (The panel deciding *Wilander* consisted of Judges Gee, Garza and Jones; interestingly, two of the judges on the *Wilander* panel, Judges Gee and Jones, had filed a special concurring opinion in *Barrett*, in which they expressed their own preference for the *Johnson* rule, and said that if they had been free to, they would have adopted the *Johnson* test in the Fifth Circuit. Judge Garza, as a senior judge, was not in active service and hence did not sit on the en banc court in *Barrett*).

\(^{31}\) *McDermott’s petition for writ of certiorari had presented two questions for review, but the Supreme Court granted review limited to question I presented by the petition.*

**Questions Presented for Review**

I. When a worker is injured on a fixed platform in the Persian Gulf, but claims status as a seaman under the Jones Act, 46 U.S.C. 688, by alleging connection to an American-flagged vessel, how is the United States District Court to determine which of the conflicting definitions of status constitutes American law, specifically, whether transportation-related employment functions are a prerequisite to status under the Act?

II. Did the United States Court of Appeal, Fifth Circuit, err as a matter of law, in concluding Respondent, who had only a transitory connection with the only American vessel in an operating group of vessels, had established sufficient connexity with that vessel to impose American law on a cause of action arising from Respondent’s work as a painter foreman on an offshore platform in the Persian Gulf?
THE SUPREME COURT DECISION IN WILANDER

In briefs and argument before the United States Supreme Court, McDermott advocated the adoption of a transportation/navigation function test which would have precluded Wilander’s coverage under the Jones Act as a matter of law. A transportation/navigation test confers Jones Act seaman status only on employees who “perform significant navigational functions or further the ‘transportation function’ of the vessel.”

The Supreme Court opinion stated that certiorari was granted “to resolve the conflict between the Robison and Johnson tests on the issue of the transportation/navigation function requirement.” The Supreme Court’s statement of the issue indicates that the decision in Wilander is ostensibly limited to a consideration of the last element of these tests, as can be seen by a comparison of the two tests set out below.

<table>
<thead>
<tr>
<th>Robison test</th>
<th>Johnson test</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. More or less permanent assignment or performed substantial portion of work,</td>
<td>1. A vessel in navigation,</td>
</tr>
<tr>
<td>AND</td>
<td>2. More or less permanent connection with the vessel,</td>
</tr>
<tr>
<td>2. Contributed to the function of the vessel or to the accomplishment of its</td>
<td>AND</td>
</tr>
<tr>
<td>mission.</td>
<td>3. Contributed to the operation and welfare of the vessel as a means of</td>
</tr>
<tr>
<td></td>
<td>transport on water.</td>
</tr>
</tbody>
</table>

In other words, as expressed by the Supreme Court, the scope of the Wilander decision is limited to the last part of the respective status tests.

Having so limited the scope of its review, the Court then began a recitation of the historical development of the law of seamen, focusing on the jurisprudential and statutory developments, especially in the context of the longstanding competing forces between the congressional enactments of the Jones Act and the Longshore and Harbor Workers’ Compensation Act and the court decisions interpreting that legislation.

Historical Perspective

The opinion began with a discussion of the state of general maritime law as it stood at the beginning of the twentieth century with regard to seamen’s remedies. The United States Supreme Court, in The Os-

33. See Barrett, 781 F.2d at 1073.
34. Wilander, 111 S. Ct. at 810.
ceola," had reviewed both English and American general maritime law authorities and affirmed seamen's entitlement to maintenance and cure benefits and to the warranty of seaworthiness, but had held that the vessel was not responsible to seamen for negligence of its master or crew. The Jones Act, passed by Congress in 1920, was the second congressional attempt to create a negligence remedy for seamen. Reasoning that the only purpose for the Jones Act was to remove the jurisprudential bar to a negligence remedy articulated in The Osceola, the Supreme Court "assume[d] that the Jones Act uses 'seaman' in the same way." The Court declared that this synonymy is also supported by its earlier decision in Warner v. Goltra. The Court then stated that the Jones Act "adopts without further elaboration the term used in The Osceola."

Justice O'Connor then went on to determine who was a seaman under the general maritime law at the time the Jones Act was passed in 1920. There follows a discussion of the jurisprudential development of seaman status under the general maritime law from the middle of the nineteenth century through the early twentieth century recognizing that the narrow rule was to limit seaman's status to maritime workers who "actually navigate." Nevertheless, as noted by Justice O'Connor,

Notwithstanding the aid in navigation doctrine, federal courts throughout the last century consistently awarded seamen's benefits to those whose work on board ship did not direct the vessel. Firemen, engineers, carpenters, and cooks all were considered seamen.

By the late 19th and early 20th centuries, federal courts abandoned the navigation test altogether, including in the class of seamen those who worked on board and maintained allegiance to the ship, but who performed more specialized functions having no relation to navigation.

Following this review of jurisprudence and of leading maritime treatises, the Supreme Court concluded that at the time of The Osceola

35. 189 U.S. 158, 23 S. Ct. 483 (1903).
36. See Wilander, 111 S. Ct. at 810.
38. Wilander, 111 S. Ct. at 811.
40. Wilander, 111 S. Ct. at 811.
41. Id.
42. Id. at 812.
and the enactment of the Jones Act, general maritime law did not require seamen to aid in navigation, and that the Jones Act itself created no such navigation requirement for seaman status. The worker need only be employed on board a vessel "in furtherance of its purpose."\(^4\)

The Supreme Court then noted that it continued to construe "seaman" broadly after passage of the Jones Act, holding that a stevedore was a "seaman" covered under the Act when injured while engaged in maritime employment.\(^4\) The Court then reiterated its mistaken supposition in *Haverty* that it could not "believe that Congress willingly would have allowed the protection to men engaged upon the same maritime duties to vary with the accident of their being employed by a stevedore rather than by a ship."\(^4\)

But Justice O'Connor then declared that:

Congress would, and did, however. Within six months of the decision in *Haverty*, Congress passed the Longshore and Harbor Workers' Compensation Act (LHWCA), 44 Stat. (part 2) 1424, as amended, 33 U.S.C. §§ 901-950. The Act provides recovery for injury to a broad range of land-based maritime workers, but explicitly excludes from its coverage "a master or member of a crew of any vessel." 33 U.S.C. § 902(3)(G). This Court recognized the distinction, albeit belatedly, in *Swanson v. Marra Brothers, Inc.*, 328 U.S. 1, 66 S.Ct. 869, 90 L.Ed. 1045 (1946), concluding that the Jones Act and the LHWCA are mutually exclusive. The LHWCA provides relief for land-based maritime workers, and the Jones Act is restricted to "a master or member of a crew of any vessel": "We must take it that the effect of these provisions of the [LHWCA] is to confine the benefits of the Jones Act to the members of the crew of a vessel plying in navigable waters and to substitute for the right of recovery recognized by the *Haverty* case only such rights to compensation as are given by the [LHWCA]." *Id.*, at 7, 66 S.Ct., at 872. "[M]aster or member of a crew" is a refinement of the term "seaman" in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. Thus, it is odd but true that the key requirement for Jones Act coverage now appears in another statute.

With the passage of the LHWCA, Congress established a clear distinction between land-based and sea-based maritime

---

43. *Id.* at 813.
45. *Haverty*, 272 U.S. at 52, 47 S. Ct. at 19.
workers. The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seamen.46

Thus, the statutory interplay prescribed a distinguishing factor for the determination of Jones Act seaman status: whether the maritime worker is a land-based worker or is a sea-based worker. This dichotomy is derived from a consideration of the statutory development, the statutory language and the congressional intent implicit in the LHWCA of granting land-based maritime workers remedies similar to those granted other land-based workers and of excluding land-based workers from Jones Act coverage. Acknowledging that the Court had nevertheless continued to treat longshoremen as "seamen" when doing seamen's work and incurring maritime hazards when it extended the warranty of seaworthiness to longshoremen in *Seas Shipping Co. v. Sieracki*, Justice O'Connor noted that *Sieracki* was congressionally overruled by the 1972 amendments to the LHWCA which barred shore-based workers from an unseaworthiness remedy.48 Justice O'Connor then stated the Court's next proposition:

Whether under the Jones Act or general maritime law, seamen do not include land-based workers.

The LHWCA does not change the rule that a seaman need not aid in navigation . . . . There is nothing in these cases, or the LHWCA, to indicate that members of a crew are required to navigate. The "member of a crew" exception in the LHWCA overrules *Haverty*; "master or member of a crew" restates who a "seaman" under the Jones Act is supposed to be: a sea-based maritime employee.49

Having declared an equivalency among the three terms "seaman," "member of a crew," and "sea-based maritime employee," Justice O'Connor then went on to explore the source of the confusion surrounding the navigation requirement.

Recognizing that the source of the circuit conflict resolved in *Wilander* is the Supreme Court's inconsistent use of a navigation requirement in its Jones Act decisions throughout the first half of this century, the Court stated that the inconsistency arose in the period from 1927, when Congress passed the LHWCA, up until the Supreme Court's decision in *Swanson v. Marra Bros.*,50 when the Supreme Court first recognized "the mutual exclusivity of the LHWCA and the Jones Act."51 The Court

47. 328 U.S. 85, 66 S. Ct. 872 (1946).
49. Id. at 814.
50. 328 U.S. 1, 66 S. Ct. 869 (1946).
then discussed its ruling in *Warner v. Goltra*,\(^{52}\) which reasoned that the master of a vessel must be a "seaman" under the Jones Act. Justice O'Connor stated that this reasoning "was unnecessary" because "the answer was to be found in the plain statutory language: 'master or member of a crew of any vessel.'"\(^{53}\)

However, Justice O'Connor stated that "*Warner* is important for our purposes because it is the Court's first look at the term 'seaman' in the Jones Act as it applies to sea-based employees . . . . There is no reference to navigation . . . . *Warner* plainly rejected an aid in navigation requirement under the Jones Act."\(^{54}\)

The *Wilander* decision ascribed the roots of the navigation confusion to its decision in *South Chicago Coal & Dock Co. v. Bassett*,\(^{55}\) but commented that the Court in *Bassett* was not defining the term "seaman" under the Jones Act, but was defining "member of a crew" under the LHWCA at a time when the Court viewed "seaman" as a broader term than "member of a crew." The *Bassett* Court stated explicitly that it did not equate "member of a crew" under the LHWCA with "seaman" under the Jones Act . . . . *Bassett* did not impose an aid in navigation requirement for seaman status under the Jones Act.\(^{56}\)

Again in *Norton v. Warner Co.*, another "member of a crew" exception LHWCA case decided before the Court recognized the mutual exclusivity between the LHWCA and the Jones Act, the Court returned to the expansive concept of "seamen" as indicating all workers who labor about the vessel. Nevertheless, *Wilander* has now clarified that only crew members are seamen.

The Supreme Court spent little time discussing its Jones Act cases decided in the late 1950s except to note that they confer seaman status to a wide variety of workers "whose jobs had not even an indirect connection to the movement of the vessel."\(^{58}\) Still, Justice O'Connor noted that these Jones Act cases are "befuddling . . . because they tie 'seaman' under the Jones Act to 'member of a crew' under the LHWCA, while ostensibly retaining the *Bassett* aid in navigation requirement."\(^{59}\)

---

52. 293 U.S. 155, 55 S. Ct. 46 (1934).
54. Id.
55. 309 U.S. 251, 60 S. Ct. 544 (1940).
59. Id.
After *Butler v. Whiteman*, the Supreme Court accepted no more seaman status cases, "relegating to the lower courts the task of making some sense of the confusion left in our wake." "One of the problems that this Court's Jones Act cases presents is that the sundry jobs performed by the seamen in the cases of the late 1950s will not lie with any rational conception of aid in navigation." 

Her examination having discerned no aid in navigation requirement for seaman status either under the Jones Act or under the general maritime law, Justice O'Connor firmly rejected the navigation/trans- portation requirement with the following comment:

"The time has come to jettison the aid in navigation language. That language, which had long been rejected by admiralty courts under general maritime law, and by this Court in *Warner*, a Jones Act case, slipped back in through an interpretation of the LHWCA at a time when the LHWCA had nothing to do with the Jones Act." 

What she meant to say, however, is that the navigation language slipped back in the case law "at a time when the Supreme Court believed that the LHWCA had nothing to do with the Jones Act." Nevertheless, this decision makes it clear that:

We now recognize that the LHWCA is one of a pair of mutually exclusive remedial statutes that distinguish between land-based and sea-based maritime employees. The LHWCA restricted the definition of "seaman" in the Jones Act only to the extent that "seaman" had been taken to include land-based employees. There is no indication in the Jones Act, the LHWCA, or else- where, that Congress has excluded from Jones Act remedies those traditional seamen who owe allegiance to a vessel at sea, but who do not aid in navigation.

In case the reader had not yet recognized the death of *Sieracki* with the earlier statement to the effect that "seaman" under the general maritime law does not include land-based workers, Justice O'Connor made the demise of *Sieracki* abundantly clear by citing as authority Chief Justice Stone's dissenting opinion in *Sieracki*, which distinguished land-based and sea-based employment and stated that seaman's remedies arise "out of the status of the seaman and his peculiar relationship to the vessel." Again citing the dissent in *Sieracki*, *Wilander* declared that

62. Id.
63. Id.
64. Id. at 817.
65. Id. (quoting *Sieracki*, 328 U.S. at 104, 66 S. Ct. at 882) (Stone, J., dissenting).
it is this distinction [namely, the distinction between land-based and sea-based employment] that Congress recognized in the LHWCA and the Jones Act.66

Justice O'Connor then went on to state that "[this distinction] also explains why all those with that 'peculiar relationship to the vessel' are covered under the Jones Act, regardless of the particular job they perform."67 In this way, the Supreme Court turns away from distinctions based upon the nature of the worker's particular job duties and declares that seaman status turns on the maritime worker's peculiar relationship to the vessel, explaining that:

[w]e believe the better rule is to define "master or member of a crew" under the LHWCA, and therefore "seaman" under the Jones Act, solely in terms of the employee's connection to a vessel in navigation . . . . It is not the employee's particular job that is determinative, but the employee's connection to a vessel.68

Thus, "the key to seaman status is employment-related connection to a vessel in navigation."69 But, having given us the distinguishing factor of whether the maritime worker is a land-based worker or a sea-based worker, the Court specified that it was not called upon in Wilander, "to define this connection in all details, but [only] hold[s] that a necessary element of the connection is that a seaman perform the work of a vessel."70

*Status: Legal and Factual Issues*

As it had enunciated in its earlier Jones Act cases decided in the 1950s, the Supreme Court reiterated that the inquiry into seaman status is "of necessity fact-specific,"71 and that the determination [of seaman status] "will depend on the nature of the vessel and the employee's precise relation to it,"72 explaining that:

the question of who is a member of a crew and therefore who is a seaman is better characterized as a mixed question of law and fact. When the underlying facts are established, and the rule of law is undisputed, the issue is whether the facts meet the statutory standard.73

66. Id.
67. Id.
68. Id. (emphasis added).
69. Id.
70. Id.
71. Id. at 818.
72. Id.
73. Id.
Having provided the "sea-based" factor and perhaps the "nature of the vessel" as an additional clue, the Court offered no further guidelines for the phraseology of the proper legal standard, saying that

It is for the court to define the statutory standard. "Member of a crew" and "seaman" are statutory terms; their interpretation is a question of law. The jury finds the facts and, in these cases, applies the legal standard, but the court must not abdicate its duty to determine if there is a reasonable basis to support the jury's conclusion. If reasonable persons, applying the proper legal standard, could differ as to whether the employee was a "member of a crew," it is a question for the jury. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-251, 106 S. Ct. 2505, 2511-2512, 91 L.Ed.2d 202 (1986). In many cases, this will be true. The inquiry into seaman status is of necessity fact-specific; it will depend on the nature of the vessel, and the employee's precise relation to it. See Desper v. Starved Rock Ferry Co., 342 U.S. 187, 190, 72 S. Ct. 216, 218, 96 L.Ed. 205 (1952) ("The many cases turning upon the question whether an individual was a 'seaman' demonstrate that the matter depends largely on the facts of the particular case and the activity in which he was engaged at the time of injury"). Nonetheless, summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion. Anderson, supra, at 248, 250-251, 106 S. Ct., at 2510, 2511-2512.\(^7\)

\(^7\) The Supreme Court in Wilander did not address the factors determining what constitutes a "vessel in navigation" for purposes of determining crew member status under the Jones Act. The test for seaman status historically has evolved along with technological advancements which changed the purposes and functions of vessels. See Engerrand & Bale, Seaman Status Reconsidered, 24 S. Tex. L.J. 431, 433-35 and 472-77 (1983). As with the advancement from sailing vessels to steamers, the development of special-purpose vessels such as drilling ships, jack-up barges, submersible and semi-submersible drilling rigs created essentially a new class of vessels in commerce which operate and function differently than the traditional vessel plying navigable waters. Consequently, as with earlier technological advances in vessels, the character of the duties of the workers assigned to these vessels is distinct from the traditional seaman's duties. Partly because the operation of these drilling vessels is so different from the operation of traditional vessels, the drilling vessels give us a most dramatic example of how the navigation-function seaman status test had outlived the effectiveness it had when it was created in the era of sailing ships plying the seas. The most recent pronouncements of the Fifth Circuit on the vessel status question are found in Ellender v. Kiva Const. & Engineering Co., 909 F.2d 803, 806-08 (5th Cir. 1990); Gremillion v. Gulf Coast Catering Co., 904 F.2d 290, 292-94 (5th Cir. 1990); Daniel v. Ergon, Inc., 892 F.2d 403, 407-08 (5th Cir. 1990).

\(^7\) Wilander, 111 S. Ct. at 818.
Looking to its decision in *Senko v. LaCrosse Dredging Corp.*,76 which held that a handyman on a dredge anchored to shore was a Jones Act seaman, the Court quoted its statement in *Senko* that findings by the jury in Jones Act cases are conclusive if supported by the evidence. In the Court's own words, "a jury's decision is final if it has a reasonable basis."77 The *Wilander* Court stated that "[w]e are not asked here to reconsider this rule..."78 In this way, the Supreme Court in *Wilander* seemed to indicate that in some situations, where the seaman status jury findings would have legally insufficient evidentiary bases under the *Boeing Co. v. Shipman*79 standard, directed verdict and judgment notwithstanding the verdict may be appropriate.

In concluding, the Supreme Court restated the limited scope of its decision, even specifying that in *Wilander* the Supreme Court did not decide either of the following questions:

Whether there was a reasonable basis for the jury's determination that Wilander "had a sufficient connection to the GATES TIDE to be a 'seaman' under the Jones Act..."

and

whether there was a sufficient basis for the jury finding that Wilander "advanced the function or mission of the GATES TIDE."

Given the limited scope of the Supreme Court decision in *Wilander*, the Court has effectively managed to decide the "aid in navigation" question in a vacuum. The decision is almost a purely legal ruling. It may be that the Court intentionally limited its consideration to the abrogation of the navigation/transportation function requirement, intending that its decision could be neatly applied across the board in Jones Act litigation.

**IMPACT OF WILANDER**

The immediate practical effect of the *Wilander* decision is to render nationwide the Fifth Circuit's last prong of the *Robison* Jones Act seaman status test. While the Supreme Court in *Wilander* did not expressly adopt the Fifth Circuit's precise seaman status formulation, it did expressly embrace the last element of the *Robison* test (namely,

78. Id.
79. 411 F.2d 365, 374-75 (5th Cir. 1969) (en banc); See Wallace v. Oceaneering International, 727 F.2d 427, 431-32 (5th Cir. 1984).
"contribute to the function of the vessel or to the accomplishment of its mission") as an accurate formulation of an essential element of seaman status. It remains to be seen what effect this decision may have on the disjunctive first prong of the Robison test—"assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel. . . ."81 The Court’s reference to "a definite and permanent connection with the vessel . . ."82 seems to undercut the viability of Robison's "substantial part of his work" avenue to Jones Act coverage.83

Although the Supreme Court decision in Wilander emphasized that seaman status turns on the employee's connection to the vessel and not the particular job the worker performs, nothing in Wilander signals a rejection of the Fifth Circuit's refinement on Robison promulgated in Pizzitolo v. Electro-Coal Transfer Corp.84 Given the limited scope of review granted by the Supreme Court, it can be persuasively argued that the Supreme Court in Wilander simply did not get to this point because it limited its consideration to the determination of whether or not a navigational function requirement was legally necessary in the Jones Act seaman status test and did not then go on to define that test.

Moreover, a comparison of the Fifth Circuit opinion in Pizzitolo with the decision in Wilander reveals that Justice O'Connor followed the same mode of analysis used by Judge Davis in Pizzitolo. Wilander and Pizzitolo both discussed the historical developments and focused on the statutory language and legislative intent underlying the Jones Act and the LHWCA.

The Supreme Court opinion in Wilander mandates a Jones Act seaman status formulation consistent in both analysis and result with the existing Fifth Circuit test which denies seaman status to land-based workers who have no permanent assignment to a vessel or identifiable fleet of vessels. At the same time, this test includes within Jones Act coverage the entire ship's company belonging to a vessel, including those special purpose vessels engaged in oilfield operations whose crewmembers have specialized jobs with no navigational or transportational function.

FURTHER DEVELOPMENTS

Grant of Certiorari in Gizoni v. Southwest Marine, Inc.

The United States Supreme Court has now decided to review the principles enunciated in Pizzitolo. On February 25, 1991, six days after

81. Offshore Co. v. Robison, 266 F.2d 769, 779 (5th Cir. 1959).  
82. Wilander, 111 S. Ct. at 817, (quoting Maryland Casualty Co. v. Lawson, 94 F.2d 190, 192 (5th Cir. 1938)).  
83. A recent application of the "substantial portion of work" prong in Palmer v. Fayard Moving & Transportation Corp., 930 F.2d 437, 439 (5th Cir. 1991), does little to demonstrate its continued utility.  
its decision in Wilander, the Supreme Court granted certiorari in Southwest Marine, Inc. v. Gizoni,85 limited to consideration of the following question:

Are employees who are in occupations specifically covered by the Longshore Act nonetheless entitled to a jury trial to determine their status as Jones Act seamen?86

The question selected for review indicates that the Court will directly address the rule established in Pizzitolo. In Pizzitolo, the Fifth Circuit ruled that workmen engaged in any of the occupations expressly enumerated in the LHWCA87 are unqualifiedly covered by the LHWCA if they meet the LHWCA situs requirement of having been injured on navigable waters or an adjoining area.88 That is, if the plaintiff in a Jones Act suit is a harbor worker, longshore worker, shipbuilder or ship repairer, Pizzitolo declares that he is no longer entitled to have his Jones Act claim considered under the Robison seaman status test of "substantial part of his work on the vessel" and "duties . . . contribute[d] to the function of the vessel or to the accomplishment of its mission." Under Pizzitolo, the question of status is analyzed by determining first whether the worker is engaged in one of the statutorily enumerated occupations, and, second, whether he meets the situs requirement under 33 U.S.C. section 903(a). If both are present, the Jones Act claim will be dismissed as a matter of law without ever reaching the Robison seaman status test.

Case Background in Gizoni

Southwest Marine, Inc., the operator of a ship repair facility in San Diego, California, owns several floating platforms used in connection with its ship repair activities. The platforms support workers and equipment used in ship repair. These platforms themselves have no power, but are towed to various locations by tugboats which position the

87. 33 U.S.C. § 902(3) (1988) defines maritime employee as "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. . . ."
88. 33 U.S.C. § 903(a) (1988), provides in pertinent part that compensation shall be payable . . . only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).
platforms alongside vessels under repair, either at berths or in dry dock at Southwest Marine's shipyard or at the nearby Naval Station.

The plaintiff Byron Gizoni was a rigging foreman employed by Southwest Marine. As rigging foreman, he worked on floating platforms supervising other workers and riding the platforms as they were used to move equipment, materials, supplies and vessel components around the shipyard on and off the vessels being repaired. Mr. Gizoni was injured when his foot broke through a wooden sheet covering a hole in the deck of a platform being used to transport a rudder from the shipyard to a floating dry dock.

After the accident, Mr. Gizoni initially claimed benefits from Southwest Marine under the LHWCA, then filed suit against Southwest Marine under the Jones Act alleging that he was a seaman injured by the negligence of his employer. Southwest Marine filed a motion for summary judgment asserting: (1) that Gizoni was not a seaman under the Jones Act and (2) that his claim was barred by the exclusivity provision of the LHWCA in 33 U.S.C. section 905(a). The district court granted the motion for summary judgment, ruling as a matter of law that Mr. Gizoni was not a "seaman" under the Jones Act, but a harbor worker precluded from recovery under the Jones Act by the exclusive remedy provision of the LHWCA.

Gizoni appealed the summary judgment to the Ninth Circuit, which reversed and remanded for jury trial on the Jones Act claim. In its opinion, the Ninth Circuit applied the navigational function test for seaman status, the third part of which has been rejected in Wilander, namely, that (1) the vessel be in navigation, (2) the claimant have a permanent connection with the vessel, and (3) the claimant be onboard the vessel primarily to aid in navigation. Following its earlier decision in Wenzel v. Seaward Marine Services, Inc., the Ninth Circuit reversed and ruled that Gizoni's status as a Jones Act seaman was a question for the jury because there was a dispute between the parties as to whether he met the three elements of that seaman status test.

---

89. 709 F.2d 1326 (9th Cir. 1983).

90. The Ninth Circuit opinion appears also to have improperly construed the legal standard for summary judgment under Fed. R. Civ. P. 56, in finding an evidentiary basis sufficient to support a jury verdict that Gizoni was a member of a crew of a vessel in navigation. In so ruling, the Ninth Circuit stated that there is an evidentiary basis for a seaman status finding when the "parties dispute whether the ship was in navigation or whether the employee was actually a member of the ship's crew." Gizoni, 909 F.2d at 387. The principle that seaman status is a mixed question of law and fact does not mandate that the seaman status issue be submitted to a jury each time a disputed seaman status claim is asserted. Not all factual disputes preclude summary judgment; the factual dispute must be outcome determinative under applicable law. Holloway v. Pigman, 884 F.2d 365, 366 (8th Cir. 1989); Howland v. Kilquist, 833 F.2d 639, 642 (7th Cir. 1987). See also infra text accompanying notes 122-25.
On the second basis, the exclusivity provision of 33 U.S.C. section 905(a), the Ninth Circuit joined the Sixth Circuit in rejecting the notion that any person whose work involves ship repair is necessarily restricted to coverage under the LHWCA. In so ruling, the Ninth Circuit clearly contravened the express exclusivity provision of the LHWCA and thereby rejected the principles enunciated in Pizzitolo. The Ninth Circuit stated that “Gizoni is covered by the LHWCA only if he is not a seaman.”

Southwest Marine, Inc. filed a petition for writ of certiorari to the United States Supreme Court, which was granted limited to review of the question set out above.

Potential Implications of Gizoni

As outlined below, the grant of certiorari in Gizoni is explicitly designed to review the rule established in Pizzitolo. As can be seen from the following discussion, when viewed in the context of the jurisprudential and statutory development of the seaman status test under the Jones Act, the counterpoint created by the Pizzitolo and Gizoni cases reflects the longstanding competing forces between the Congressional enactments distinguishing land-based and sea-based maritime workers and the court decisions which had previously expanded Jones Act coverage.

Seaman Status in Counterpoint Created By Congress and the Courts

As discussed above, in connection with Wilander, the Jones Act grants “any seaman” an action for damages at law for personal injury sustained in the course of his employment. This legislation was expressly intended to overrule two United States Supreme Court decisions which held that the vessel was not responsible for negligence of its master or

---

91. The LHWCA, § 905(a) (1988), expressly provides that “the liability of an employer [for payment of compensation] shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death . . . .”

92. In Petersen v. Chesapeake and Ohio Railway Co., 784 F.2d 732 (6th Cir. 1986), a Jones Act suit brought by a machinist who repaired equipment and machinery on ferries and who performed most of his work in dry dock, the Sixth Circuit stated: “A plaintiff is not limited to the remedies available under the LHWCA unless he is unable to show that a genuine factual issue exists as to whether he was a seaman at the time of his injury.” Id. at 739.

93. Gizoni, 909 F.2d at 389.

The Jones Act does not define the term "seaman," and the term had been expanded in the court decisions to include any worker about a vessel.

Around the same time, Congress passed two statutes which were intended to grant land-based maritime workers remedies under state compensation statutes. In both instances, the Supreme Court struck down on constitutional grounds the attempts by Congress to extend coverage of state compensation statutes to land-based maritime workers injured on navigable waters. In so doing, the Court suggested that Congress had the power to enact a federal compensation statute covering these workers. In 1926 in *International Stevedoring Co. v. Haverty*, the Supreme Court held that the term "seaman" in the Jones Act included a longshoreman employed in maritime work on navigable waters who sued his stevedore employer for the negligence of a co-employee. Determined to grant land-based maritime workers remedies similar to those granted other land-based workers, within six months of the *Haverty* decision, Congress passed the LHWCA, which also excluded land-based workers from Jones Act coverage.

The LHWCA provided a compensation remedy for all maritime workers injured on navigable waters, but expressly excluded "a master or member of a crew of any vessel." Thus, passage of the LHWCA in 1927 legislatively amended the Jones Act and restricted the class of Jones Act seamen to masters or members of a crew of a vessel. This result was conclusively established by the Supreme Court in the *Wilander* decision, and had been stated by the Supreme Court in three earlier decisions.

Despite the passage of the LHWCA, both the Supreme Court and the lower courts continued to expansively define the term "seaman."

---

96. 272 U.S. 50, 47 S. Ct. 19 (1926).
Again, in *Seas Shipping Co. v. Sieracki*,\(^{101}\) the Supreme Court held that a longshoreman was a "seaman" and, as such, was entitled to the warranty of seaworthiness, stating that "for these purposes, he is, in short, a seaman because he is doing seaman's work and incurring a seaman's hazards."\(^{102}\) Still determined to treat harbor workers the same as other land-based workers, Congress amended the LHWCA in 1972 and eliminated the unseaworthiness action for longshoremen, substituting a negligence action similar to that available to other land-based workers.

The confusion was exacerbated by a series of Supreme Court decisions in the 1940s and 1950s which continued to expand the definition of "seaman" and which characterized the Jones Act seaman status question as a factual issue to be resolved by submission to the jury.\(^{103}\) One case contributing to this confusion which emanated from the Fifth Circuit was *Gianfala v. Texas Co.*\(^{104}\) In this case, a worker assigned to a submersible drilling barge who was killed while unloading pipe was found by the jury to be a Jones Act seaman. The Fifth Circuit reversed the seaman status verdict because the drilling barge was not in navigation and the decedent was onboard as a member of a drilling crew and not as a member of a ship's crew. Without explanation, the Supreme Court reversed and remanded with instructions to reinstate the district court judgment granting Jones Act status. This series of confusing decisions marked the end of Supreme Court intervention until *Wilander*, but had generated an early attempt at synthesis in *Offshore Co. v. Robison*.\(^{105}\)

*Offshore Co. v. Robison*

Robison was a roughneck permanently assigned to a drilling rig mounted on a barge resting on the bottom of the Gulf of Mexico. Reviewing the series of Supreme Court cases decided in the 1950s which had continued to expand seaman status, Judge John Minor Wisdom found that the "aid in navigation" test had been "watered down until the words have lost their natural meaning."\(^{106}\) Following the Supreme

---

102. Id. at 99, 66 S. Ct. at 880.
105. 266 F.2d 769 (5th Cir. 1959).
106. Id. at 780.
Court's emphasis that seaman status was a factual issue to be determined by the jury, Judge Wisdom adopted the Robison test for Jones Act seaman status:

there is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel (including special purpose structures not usually employed as a means of transport by water but designed to float on water) or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips.107

Under this test, seaman status was no longer limited to members of the crew of the vessel or to the "ship's company," because a more or less permanent assignment or connection to the vessel was no longer required for crew member status. Under the Robison test as originally formulated, a worker satisfied the vessel-attachment requirement by simply performing "a substantial part of his work on the vessel."108 Over the next 25 years, the Fifth Circuit generally adhered to the Robison test with minor modifications.

The issue of the status of land-based maritime workers in and around the harbor and in the shipyard, the issue in contention in both Pizzitolo and Gizoni, has generated the most confusion in Jones Act seaman status decisions. Under the Fifth Circuit test, confusion resulted because the first two prongs of the Robison test, "permanent assignment" and "substantial work onboard a vessel," are alternative. Hence, ostensibly, all longshoremen and harbor workers satisfy the Robison test, because they perform:

a substantial portion of their work on a vessel

and

their duties contribute to the function or mission of the vessel or its operation and welfare in maintenance during movement or anchorage for future trips.

The application of the Robison seaman status test to a land-based harbor worker confers seaman status on every longshoreman who performs substantial work on vessels. The confusion generated by this over-expansive definition and its application by jurors not versed in the distinction between longshoremen and seamen resulted in the further

107. Id. at 779.
108. Id.
expansion of seaman status to cover virtually any worker injured on a vessel (or floating structure) and encouraged appellate resolution of every seaman status determination.

In 1986, in Barrett v. Chevron U.S.A., Inc., the Fifth Circuit sat en banc in an attempt to reduce the uncertainties which had developed from the application of the Robison test.

**Barrett v. Chevron**

In Barrett, a sharply divided court clarified the seaman status test for amphibious oilfield workers whose regular duties require them to divide their time between vessel and land or vessel and platform.

Barrett was a welder's helper assigned to repair and maintain fixed platforms offshore. Barrett ate and slept on a fixed offshore platform called "Mike's Structure." Although all of his work consisted of platform repair, in about 20% to 30% of the platform jobs the lack of space on the platform itself required the use of a jack-up barge alongside the platform to provide storage for equipment and materials. The accident occurred when Barrett's welding crew was performing repairs on a small fixed structure alongside of which a jack-up barge had been positioned. Barrett was injured while being transferred by personnel basket from the crewboat to the jack-up barge and later claimed to have aggravated that injury on the jack-up barge while lifting a pipe.

On rehearing en banc, the Fifth Circuit concluded that Barrett was not a member of the crew of the jack-up barge and formulated a seaman status test for amphibious oilfield workers who claim their seaman status under the "substantial work" prong of the Robison test by requiring that the worker's status be determined "in the context of his entire employment with his current employer." Additionally, in Barrett, the Fifth Circuit ruled that those workers who do not perform traditional seaman's duties must perform their duties on a "fleet of vessels." The majority opinion authored by Judge Davis considered "some inconsistent determinations of status" to be inevitable given its inherently factual dispute and accurately predicted that "the Supreme Court, which Robison followed, accepts these inconsistencies."

Even with this restriction on the Robison test, traditional longshoremen and land-based ship repairmen and harbor workers such as Gizons, Wenzel, Simko, Johnson, and Pizzitolo satisfied the Robison/Barrett test whenever they worked on an identifiable group of vessels. For that reason, Barrett did not solve the confusion surrounding workers,

109. 781 F.2d 1067 (5th Cir. 1986) (en banc).
110. Id. at 1074.
111. Id.
land-based or harbor, who perform their duties on and about vessels which form a fleet. However, *Pizzitolo* has since solved that problem within the Fifth Circuit.

*Pizzitolo v. Electro-Coal Transfer Corporation*

A year later in 1987, Judge Davis (who authored the majority opinion in *Barrett*), substantially eliminated the confusion generated by application of the *Robison* test to longshoremen and harbor workers in *Pizzitolo v. Electro-Coal Transfer Corp.*

Pizzitolo was employed as an electrician by Electro-Coal, the owner and operator of a coal terminal and dock on the Mississippi River. Electro-Coal routinely transfers coal from vessel to vessel and from vessel to shoreside storage areas. Pizzitolo worked a standard forty-hour work week and arrived for work each morning at the shore-based electrical shop where he received assignments from a foreman. Although 75% of his work time was spent maintaining and repairing shore-based machinery and 25% was spent repairing electrical equipment on the vessels owned by Electro-Coal, he was repairing one of the conveyors used to load and unload the vessel when he fell into the river and was injured.

Pizzitolo filed suit against his employer under the Jones Act and general maritime law. The issue of Jones Act seaman status was submitted to the jury, which found seaman status. The district court judge disagreed with the jury's finding that Pizzitolo was a seaman and granted a judgment notwithstanding the verdict on the issue of seaman status.

The Fifth Circuit *Pizzitolo* opinion, like the Supreme Court decision in *Wilander*, rests on the chronology of statutory development under the Jones Act and the LHWCA. The *Pizzitolo* decision rests upon the intent of Congress in passing the LHWCA in 1927, following the passage of the Jones Act in 1920, and reiterated that:

The 1927 LHWCA, in effect, amended the Jones Act to make Jones Act benefits available only to maritime workers not covered by the LHWCA. Harbor workers engaged in occupations such as longshoring, shipbuilding and ship repairing, who were injured on navigable water, were the intended beneficiaries of the 1927 Act. The LHWCA as amended in 1972 expressly covered workmen engaged in these occupations. In 1972, coverage of these workmen's activities was extended beyond navigable water to cover their injuries on adjacent landbased work locations. Given the explicit coverage of workmen engaged in the enumerated occupations, we reject the notion that Congress could

have intended to exclude them from the benefits of the LHWCA as members of the crew of a vessel. In sum, we hold that because longshoremen, shipbuilders and ship repairers are engaged in occupations enumerated in the LHWCA, they are unqualifiedly covered by that Act if they meet the Act's situs requirements; coverage of these workmen by the LHWCA renders them ineligible for consideration as seamen or members of the crew of a vessel entitled to claim the benefits of the Jones Act.

The only work Pizzitolo performed aboard vessels was electrical repair work. Even if he spent a substantial portion of his work time aboard a recognized fleet of vessels performing electrical repairs, for reasons stated above he is covered by the LHWCA and cannot qualify as a seaman within the meaning of the Jones Act.

Thus, whenever the worker is within a category covered by the LHWCA and is engaged in any of the occupations enumerated in section 902(3) of the LHWCA, he is unqualifiedly covered by the LHWCA if he meets the LHWCA situs requirement (that is, if he was injured on navigable waters or an adjoining area under section 903(a)), and summary judgment dismissing a claim for Jones Act seaman status is appropriate. Where the worker is in an occupation expressly enumerated in the LHWCA, the Robison seaman status test is legally irrelevant. In other words, under Pizzitolo, he is not entitled to the benefit of Robison analysis. Stated otherwise, if the plaintiff in a Jones Act suit is a harbor worker, longshore worker, shipbuilder or ship repairer, Pizzitolo declares that he is no longer entitled to have his Jones Act claim considered under the Robison seaman status test of "substantial portion of work aboard a fleet of vessels" and "duties contribute to the function or mission of vessels."

In the circuits which had followed the now defunct navigational-function test, confusion still reigned in seaman status cases involving

113. See also Director, O.W.C.P. v. Perini North River Associates, 459 U.S. 297, 305, 103 S. Ct. 634, 641 (1983) ("The question of Churchill's coverage [under the LHWCA] is an issue of statutory construction and legislative intent.").

114. 812 F.2d at 983.

115. On this point in Pizzitolo, Judge Davis again accurately presages a ruling of the Supreme Court. This time, the ruling is Chesapeake & Ohio Ry. v. Schwalb, 493 U.S. 40, 110 S. Ct. 381 (1989) which holds that "maritime employment" within the meaning of 33 U.S.C. §902(3) expressly includes all of the occupations specified in §902(3). Schwalb also establishes that if a railroad employee's injuries are covered by the LHWCA, the LHWCA remedy is exclusive and the railway worker cannot proceed to trial under the Federal Employers' Liability Act (45 U.S.C. §§ 51-60) which grants a negligence remedy to railroad employees.
land-based or harbor-based maritime workers because those workers frequently performed some maneuvering functions in connection with vessels or floating structures.116

For example, Gizoni and Wenzel were both ship repairmen, an occupation enumerated in the LHWCA, and were both injured on navigable water. In the circuits which followed the navigational-function test, both Gizoni and Wenzel may have been found to be seamen. However, under the *Pizzitolo* rule, both Gizoni and Wenzel meet the LHWCA situs requirement, are covered by the LHWCA, and thus are ineligible for consideration of seaman status under the Jones Act.117 In other words, before the Ninth Circuit's decision in *Gizoni*, the Fifth Circuit's *Pizzitolo* rule had resolved the confusion which had provoked these concerns created by applying seaman status tests to workers like Wenzel and Gizoni. As of 1987, the employee and work situation presented in the *Gizoni* case no longer presented a problem within the Fifth Circuit, and summary judgment denial of Jones Act status was proper.

SEAMAN STATUS CAN OFTEN BE DETERMINED BY SUMMARY JUDGMENT AND BY DIRECTED VERDICT

The indiscriminate application of seaman status tests by jurors to workers who are engaged in those specific occupations enumerated in section 902(3) of the LHWCA generates an over-expansive class of Jones Act seamen which includes many land-based ship repairmen, traditional longshoremen, and harbor workers whose only work on vessels is in port. Within the Fifth Circuit, the consistent practice prior to *Allen v. Seacoast Products, Inc.*,118 of submitting every marginal status issue to the jury panel served to increase confusion in the Jones Act arena, until its zenith when two Jones Act cases decided on the same date and on substantially identical facts yielded contradictory panel results on seaman status.119

In *Wilander*, the Supreme Court characterized the question of seaman status as a mixed question of law and fact.120 *Wilander* declared that

---

116. See, e.g., Gizoni v. Southwest Marine, Inc., 909 F.2d 385 (9th Cir. 1990), cert. granted, 111 S. Ct. 1071 (1991); Wenzel v. Seaward Marine Services, Inc., 709 F.2d 1326, 1327 (9th Cir. 1983) (diver-tender engaged in underwater ship repairs may have operated a SCAMP, a submerged cleaning and maintenance platform); Searcy v. E.T. Slider, Inc., 679 F.2d 614, 616 (6th Cir. 1982) (night-watchman at sand and gravel business on the bank of the Ohio River filled gas pumps and placed lanterns on moored barges).


118. 623 F.2d 355 (5th Cir. 1980).


"It is for the court to define the statutory standard. 'Member of a crew' and 'seaman' are statutory terms; their interpretation is a question of law." In cases where the underlying facts are established, and the rule of law is undisputed, the only issue is whether the facts meet the statutory standard. The Pizzitolo rule as a threshold status issue, can provide an appropriate statutory standard sufficient to support dismissal on summary judgment under Federal Rule of Civil Procedure 56 or its state counterpart in cases involving workers engaged in the occupations enumerated in the LHWCA, 33 U.S.C. section 902(3).

Federal Rule of Civil Procedure 56(c) provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Substantive law identifies which facts are material to the determinative law for purposes of summary judgment, as only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment; factual disputes that are irrelevant or unnecessary will not be counted. Furthermore, Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury, but also for the rights of persons opposing such claims and defenses to demonstrate, in the manner provided by the rule prior to trial, that the claims and defenses have no factual basis. As explained by the then Justice Rehnquist, "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think [Rule 56] should be interpreted in a way that allows it to accomplish this purpose." Given the established legal framework surrounding the Jones Act seaman status rules enunciated in Wilander and in Pizzitolo, the factual disputes which are material to the seaman status issue have been significantly reduced. In many cases, such as Gizoni, the factual disputes are not material to the determining legal issues, and seaman status can

121. Wilander, 111 S. Ct. at 818.
be decided as a matter of law either on summary judgment or directed verdict.\footnote{125}

\section*{PROPOSED SEAMAN STATUS TEST}

In order to assist the trial courts in determining whether or not workers such as Gizoni are entitled to a jury trial on their Jones Act claims, in answering the question accepted for review in \textit{Southwest Marine, Inc. v. Gizoni}, the Supreme Court should clearly enunciate a seaman status test. Again, the focus should remain on the language and congressional intent underlying the LHWCA,\footnote{126} as in \textit{Wilander}, and

\begin{itemize}
\item 125. See Tullos v. Resource Drilling, Inc., 750 F.2d 380 (5th Cir. 1985); Bernard v. Binnings Const. Co., 741 F.2d 824 (5th Cir. 1984). Under the operation of Rule 56, failure of proof on a necessary element of seaman status renders all other facts immaterial. See Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548 (1986). The standards for summary judgment under Federal Rule of Civil Procedure 56 are identical to the standards for directed verdict at trial and judgment notwithstanding the verdict following trial under Federal Rules of Civil Procedure 50(a) and (b). Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250, 106 S. Ct. 2505, 2511 (1986). In 1963, after the Supreme Court’s seaman status cases in the 1940s and 1950s, Federal Rule of Civil Procedure 56(e) was amended to expressly provide that a party opposing a properly supported motion for summary judgment may not rest upon mere allegations or denials of the movant’s pleadings, but \textit{"must set forth specific facts showing that there is a genuine issue for trial."} Fed. R. Civ. P. 56(e) (emphasis added). See Advisory Committee Note to 1963 Amendment of Federal Rule of Civil Procedure 56(e), 28 U.S.C.A. 17-18 (1982). Opponents may not create a dispute as to a material fact merely by relying on conclusory contrary allegations or denials. To paraphrase a comment on summary judgment by Judge Alvin B. Rubin: \textit{The [plaintiff] contends that [he] might win a jury verdict. That, of course, is true. The question for the district court was not, however, whether advocacy would prevail despite insufficient evidence, but whether the case should even be submitted to a jury or whether, if it were, a finding in the [plaintiff’s] favor could withstand a motion to set the verdict aside. Professional Managers, 799 F.2d at 223.}
\item 126. The legislative history of the enactment and subsequent amendments to the LHWCA and the Jones Act spans most of this century. When considering the issues of this statutory interface, as was done in \textit{Wilander}, the Supreme Court should effectuate the express language of the coverage provisions of the LHWCA within the context of its entire legislative history. As noted in Director, O.W.C.P. v. Perini North River Associates, 459 U.S. 297, 317, 103 S. Ct. 634, 647 (1983), \textit{"The 1972 Amendments were enacted after Committees in both the House and Senate prepared full Reports that summarized the general purposes of the legislation and contained an analysis of the changes proposed for each section. See S.Rep., supra; H.Rep., supra."} Both the Senate Report and House Report accompanying the 1972 amendments to the LHWCA describe the changes to Section 902(3) in the following terms:
\end{itemize}

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in

\begin{itemize}
\item...
should encompass the entire crew of a vessel, but exclude workers who are not part of that ship's regular company.

The simplest and most reliable seaman status test is to require that the worker be more or less permanently assigned to a vessel or a fleet of vessels in navigation and perform the work of such vessel or vessels.\textsuperscript{127} Such a seaman status test, after an initial threshold application of the \textit{Pizzitolo} rule to eliminate land-based maritime workers and harbor workers, would create an appropriate class of Jones Act seamen consistent with the statutory interface between the Jones Act and the LHWCA and would clarify the now cloudy conceptual boundaries of seaman status. This test would eliminate the confusion surrounding land-based workers and would comply with congressional intent to restrict Jones Act coverage to masters and members of the crew of a vessel.\textsuperscript{128} The current Fifth Circuit seaman status test (without the "substantial portion of work on a vessel" element) has evolved to eliminate much of the confusion which had been created by earlier confusing and conflicting Supreme Court precedents and had initially occasioned the formulation of the original \textit{Robison} test which had expanded Jones Act seaman status to include many land-based workers who perform a significant portion of their work on vessels. The refined rule, including \textit{Pizzitolo}, best conforms to the statutory schemes.

CONCLUSION

The decision of the Ninth Circuit in \textit{Gizoni} should be reversed because the opinion is contrary to the legislative development of the Longshore and Harbor Workers’ Compensation Act\textsuperscript{129} and the Jones Act\textsuperscript{130} and directly contradicts United States Supreme Court precedents,\textsuperscript{131}

\begin{itemize}
  \item maritime employment (excluding masters and members of the crew of a vessel).
\end{itemize}

Thus, the legislative reports clarify that the statutory exclusion for masters or members of a crew of a vessel does not properly refer to the enumerated occupations of longshoremen, harbor workers, ship repairmen, ship builders, or shipbreakers, but is intended to refer only to those "other employees engaged in maritime employment." S. Rep. No. 92-1125, at 12-13 (1972); H. Rep. No. 92-1441, at 10-11; U.S. Code Cong. & Admin. News 1972 at 4708.

\textsuperscript{127} See \textit{Wilander}, 111 S. Ct. at 817. Such a seaman status formulation was denominated as the "real test" by Judge Skelly Wright in Perez v. Marine Transport Lines, 160 F. Supp. 853, 855 (E.D. La. 1958).


\textsuperscript{130} 46 U.S.C. app. § 688(a) (1988).

\textsuperscript{131} The Ninth Circuit ruling in \textit{Gizoni} is also in conflict with the Supreme Court's decision in Chesapeake & Ohio Ry. v. Schwab, 493 U.S. 40, 110 S. Ct. 381 (1989) holding that railroad employees whose injuries fall within LHWCA coverage are precluded from bringing negligence actions under the FELA by the exclusivity provisions of 33 U.S.C. § 905(a). The Jones Act simply adopts the FELA remedy for masters and members of a crew of a vessel. 46 U.S.C. app. § 688(a).
including the recent unanimous decision in *McDermott International, Inc. v. Wilander*, defining the term "seaman" and delineating the distinction between land-based maritime workers covered by the LHWCA and those relegated to Jones Act remedies. The principles enunciated by the Ninth Circuit in *Gizoni*, and in its earlier decision in *Wenzel v. Seaward Marine Services, Inc.*\(^{132}\) contravene the legislative history and development of the Jones Act and the LHWCA by including land-based maritime workers and harbor workers within the class of Jones Act seamen. The Ninth Circuit *Gizoni* decision, in both result and analysis, also conflicts with the body of jurisprudence denying seaman status, as a matter of law, to land-based harbor workers and ship repairmen,\(^ {133}\) and restricting Jones Act coverage to members of the crew of a vessel who have more or less permanent attachment to that vessel or fleet of vessels.\(^ {134}\) The Ninth Circuit *Gizoni* opinion also ignores the principle that Jones Act status should be determined in the context of the worker's

---

132. 709 F.2d 1326 (9th Cir. 1983).

133. See, for example, Sharp v. Wausau Ins. Companies, 917 F.2d 885 (5th Cir. 1990) (welder/pile driver who lived ashore engaged in rebuilding a train bridge over Lake Pontchartrain); Williams v. Weber Management Services, Inc. 839 F.2d 1039 (5th Cir. 1987) (repairman, hired from a pool of temporary workers to repair the drum and brake assembly of a crane on a moored barge and to hose off its deck); Pizzitolo v. Electro-Coal Transfer Corp., 812 F.2d 977 (5th Cir. 1987), cert. denied, 484 U.S. 109, 108 S. Ct. 1013 (1988) (electrician employed by operator of a coal terminal and dock on the Mississippi River who lived on shore and worked out of a shore-based electrical shop maintaining and repairing both shore-based machinery and electrical equipment on vessels owned by his employer); see also Balfer v. Mayronne Mud & Chemical Co., 762 F.2d 432, 434 (5th Cir. 1985); Buras v. Commercial Testing & Eng'g Co., 736 F.2d 307 (5th Cir. 1984); White v. Valley Line Co., 736 F.2d 304 (5th Cir. 1984); Jones v. Mississippi River Grain Elevator Co., 703 F.2d 108 (5th Cir.), cert. denied, 464 U.S. 856, 104 S. Ct. 175 (1983); Bouvier v. Krenz, 702 F.2d 89, 90 (5th Cir. 1983); Fox v. Taylor Diving & Salvage Co., 694 F.2d 1349 (5th Cir. 1983); Guidry v. Continental Oil Co., 640 F.2d 523 (5th Cir.), cert. denied, 454 U.S. 818, 102 S. Ct. 96 (1981); Cox v. Otis Engineering Corp., 474 F.2d 613 (5th Cir. 1973); Thomas v. Peterson Marine Serv., Inc., 411 F.2d 592 (5th Cir. 1969), cert. denied, 396 U.S. 1006, 90 S. Ct. 562 (1970); Rotolo v. Halliburton Co., 317 F.2d 9 (5th Cir.), cert. denied, 375 U.S. 852, 84 S. Ct. 111 (1963).

134. Some maritime employees with undisputed maritime duties or navigational functions are not Jones Act seamen because they are not members of the crew of a vessel and they have no permanent attachment to a vessel or identifiable fleet of vessels. Fontenot v. AWI, Inc., 923 F.2d 1127 (5th Cir. 1991) (a wireline operator employed by an oilfield service company who performed wireline services for operators of various oilfield production facilities both onshore and in state and federal waters); Kenor v. Automatic Power, Inc., 850 F.2d 236, 237-238 (5th Cir. 1988) (a service technician employed to check and repair lights and horns on oil and gas wells in state territorial waters and in the Gulf of Mexico); Barrett v. Chevron U.S.A., Inc., 781 F.2d 1067, 1068-1069 (5th Cir. 1986) (en banc) (welder's helper engaged in maintenance and repair work to offshore platforms and fixed structures in the Gulf of Mexico who was quartered on a fixed platform called "Mike's Structure").
entire employment with his current employer\textsuperscript{135} or in view of the nature and location of his work as a whole.\textsuperscript{136}

The Supreme Court should adopt the rule enunciated in \textit{Pizzitolo v. Electro-Coal Transfer Corp.},\textsuperscript{137} which is entirely consistent with the Supreme Court's unanimous decision in \textit{Wilander},\textsuperscript{138} in restricting the definition of Jones Act seamen to "members of a crew of a vessel" in accordance with the expressed legislative intent of the LHWCA and the Jones Act. Such a seaman status rule, already developed and fine-tuned by the Fifth Circuit, eliminates confusion surrounding the status of harbor workers and furthers the purposes and intent underlying the LHWCA to confine Jones Act coverage to members of a crew of a vessel. Additionally, this status rule, when considered with the principles enunciated in \textit{Wilander}, includes all employees permanently aboard a vessel and accounts for the technology of special purpose oil field vessels engaged in operations on navigable waters.

LHWCA coverage operates differently in the oil field and in the harbor. These distinct circumstances have confounded the formulation of a general seaman status test which effectuates the congressionally intended interaction among the Jones Act, the LHWCA, and the Outer Continental Shelf Lands Act (OCSLA),\textsuperscript{139} which applies the LHWCA to workers on fixed platforms or other structures on the Outer Continental Shelf. The OCSLA also expressly excludes masters and members of a crew of any vessel from its coverage.\textsuperscript{140} Considering the legislative development of the Jones Act, the LHWCA, and the OCSLA, the \textit{Pizzitolo/Wilander} rule is a valid and reliable seaman status test which adheres to the statutory boundaries intended by Congress.

\textsuperscript{135} Barrett at 1075.
\textsuperscript{136} See Prinzi v. Keydril Co., 738 F.2d 707, 711 (5th Cir. 1984); White v. Valley Line Co., 736 F.2d 304, 306 (5th Cir. 1984); Buras v. Commercial Testing & Engineering Co., 736 F.2d 307, 311 (5th Cir. 1984); Wallace v. Oceaneering International, 727 F.2d 427, 432 (5th Cir. 1984); Bouvier v. Krenz, 702 F.2d 89, 90 (5th Cir. 1983); Longmire v. Sea Drilling Corp., 610 F.2d 1342, 1347 (5th Cir. 1980); Brown v. ITT Rayonier, Inc., 497 F.2d 234 (5th Cir. 1974).
\textsuperscript{139} 43 U.S.C. § 1301-1356, at 1333(b) (1988).
\textsuperscript{140} 43 U.S.C. § 1333(b)(1) in pertinent part provides that the term "employee" does not include a master or a member of a crew of any vessel.