No. 16-_____

In The
Supreme Court of the United States

TANNER SERVICES, LLC,

Petitioner,

v.

ERNEST L. GUIDRY AND STACEY GUIDRY,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Louisiana

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

To qualify as a "seaman" under the Jones Act, 46 U.S.C. § 30104, App. F-2, a worker "must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368 (1995). For the substantiality of the **duration**, this Court has endorsed the "appropriate rule of thumb" that the worker must spend at least "30 percent of his time in the service of a vessel in navigation" in order to qualify as a seaman, *id*. at 371, and the rule that the worker's status "is determined 'in the context of his entire employment' with his current employer." *Id*. at 366 (quoting *Barrett v. Chevron, U.S.A., Inc*., 781 F.2d 1067, 1075 (5th Cir. 1986) (en banc)). However, if the worker "receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position." *Chandris*, 515 U.S. at 372. For the substantiality of the **nature**, this Court has held that "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." *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 555 (1997).

QUESTIONS PRESENTED FOR REVIEW – Continued

The questions presented are:

1. Do the duties of a land-based worker, who is welding a bulkhead for a dock, "take him to sea" when his work extends no farther from land than the welding leads to his pick-up truck or the leads from a docked barge, contrary to the decisions of this Court, the Ninth Circuit, the Eleventh Circuit, and the Maryland courts?

2. Can a worker who spends only 5 percent of his employment with his employer on vessels satisfy the 30 percent rule of thumb for the duration test when he had not undergone a permanent change in his essential duties, contrary to the decisions of this Court and the Fifth Circuit?

PARTIES TO THE PROCEEDINGS

Petitioner, Tanner Services, LLC, was a defendant in the district court, the appellant in the court of appeal, and the petitioner in the Louisiana Supreme Court.

Respondents, Ernest L. Guidry and Stacey Guidry, were plaintiffs in the district court, appellees in the court of appeal, and respondents in the Louisiana Supreme Court.

Although named in the caption in the lower courts, ABC Insurance Company was never made a party in the proceedings below. Energy XXI and Mississippi River Equipment Company were defendants in the district court but were not parties to the appeal. The sole parties before the Louisiana Court of Appeal and Louisiana Supreme Court were Petitioner, Tanner Services, LLC, and Respondents, Ernest L. Guidry and Stacey Guidry.

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly held company owning 10% or more of the stock of Tanner Services, LLC.

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Tanner Services, LLC, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Louisiana, declining to hear the application for a writ of certiorari to the Louisiana Court of Appeal, Third Circuit.

OPINIONS BELOW

The per curiam opinion of the Supreme Court of Louisiana, App. A-1, is reported at 209 So.3d 90 (La. 2017). The opinion of the Louisiana Court of Appeal, Third Circuit, App. B-1, is reported at 206 So.3d 378 (La. App. 3 Cir. 2016). The Reasons for Judgment of the District Court, App. D-1, is unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the judgment of the Louisiana Supreme Court that was entered on January 23, 2017.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution and federal statute (Jones Act) are set forth in Appendix F to this Petition.

STATEMENT OF THE CASE

A. Role of Admiralty Judges and this Court

Of all the grants of jurisdiction in Article III of the Constitution, there is *only one* that encompasses an area of substantive law – the power to hear "all Cases of admiralty and maritime Jurisdiction."[1] The importance of the grant of that authority to this Court was explained by Alexander Hamilton in the ratification debate: "The most bigoted idolizers of State authority have not thus far shown a disposition to deny the national judiciary the cognizance of maritime causes."[2] The "duty of the judicial department to say what the law is"[3] has no more important application than in the obligation to enunciate uniform principles of admiralty and maritime law pursuant to Article III.[4]

Although Article I of the Constitution contains no express grant of authority to Congress to legislate on admiralty law, this Court has recognized that the Commerce Clause[5] comprehends navigation, permitting Congress to legislate on maritime matters.[6] However, when Congress does exercise its authority to amend or

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[1] U.S. CONST. art. III, § 2, App. F-1.

[2] THE FEDERALIST NO. 80, at 502 (Alexander Hamilton) (Benjamin Fletcher Wright ed., 1961).

[3] *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

[4] "The grant of admiralty and maritime jurisdiction looks to uniformity." *Wash. v. W.C. Dawson & Co.*, 264 U.S. 219, 227-28 (1924).

[5] *See* U.S. CONST. art. I, § 8, cl. 3.

[6] *See Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 190-91 (1824).

revise maritime law, its legislation must be uniform throughout the country to avoid violating the Constitution: "The definite object of the grant was to commit direct control to the Federal Government; to relieve maritime commerce from unnecessary burdens and disadvantages incident to discordant legislation; and to establish, so far as practicable, harmonious and uniform rules applicable throughout every part of the Union."[7] In striking down a Congressional enactment providing for the application of state workers' compensation remedies for maritime workers, this Court reasoned that "the manifest purpose" of the statute "was to permit any State to alter the maritime law and thereby introduce conflicting requirements."[8] As the subject of maritime injuries is "national," the Court held that the Congressional legislation was unconstitutional: "Local interests must yield to the common welfare. The Constitution is supreme."[9] It is this Court's role of insuring application of uniform principles of maritime law in state and federal courts across the nation that is at issue in the present case.

As Congress has legislated on maritime subjects, the role of admiralty judges has evolved so that they "not only steer through channels of precedent that were charted by the leading admiralty jurists of the past, but they must also consider increasing numbers

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[7] *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920).

[8] *Wash. v. W.C. Dawson & Co.*, 264 U.S. at 228.

[9] *Id.*

of federal and state regulations and legislation."[10] Interpreting federal statutes and incorporating them into the general maritime law does not render admiralty judges "flotsam on the sea of maritime law."[11] However, the navigation of admiralty judges between the Scylla and Charybdis of statutes and general maritime law is "even more difficult" when this Court "defer[s] the formulation of general maritime law principles" to the lower courts.[12]

The law of seaman status – determining which maritime workers are entitled to recover as a "seaman" under the Jones Act[13] – went through a period of decades of what this Court described as "wayward case law"[14] that "led the lower courts to a myriad of standards and lack of uniformity in administering the elements of seaman status."[15] Finally, after allowing the lower courts to flounder for 33 years, this Court issued

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[10] W. Eugene Davis, *Admiralty Law Institute Symposium: A Sea Chest for Sea Lawyers: The Role of Federal Courts in Admiralty: The Challenges Facing the Admiralty Judges of the Lower Federal Courts*, 75 TUL. L. REV. 1355, 1356-57 (2001) (footnotes omitted).

[11] *Id*. at 1356 (quoting John R. Brown, *Admiralty Judges: Flotsam on the Sea of Maritime Law?*, 24 J. MAR. L. & COM. 249, 249 (1993)).

[12] *Davis*, 75 TUL. L. REV. at 1357.

[13] 46 U.S.C. § 30104, App. F-2.

[14] *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 353 (1991).

[15] *Id*. (quoting Kenneth G. Engerrand & Jeffrey R. Bale, *Seaman Status Reconsidered*, 24 S. TEX. L.J. 431, 494 (1983)).

a series of decisions[16] to "find our way out" of the "labyrinth" in which the courts had become "lost."[17]

Declining to follow the governing principles enunciated by this Court, the Louisiana courts have joined other lower courts in turning the determination of seaman status back to the lack of uniformity that this Court worked so hard to correct. By enhancing the *already existing* irreconcilable conflict among the lower courts,[18] the Louisiana courts have re-created the labyrinth that took this Court six years and three

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[16] In addition to *Wilander*, *see Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995); *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548 (1997).

[17] *Wilander*, 498 U.S. at 353 (quoting *Johnson v. John F. Beasley Constr. Co.*, 742 F.2d 1054, 1060 (7th Cir. 1984)).

[18] Prior to the decision of the district court and court of appeal in this case, lower courts across the United States had already reached diametrically opposed results in their interpretation of this Court's requirement that a worker's duties "take him to sea" in order to satisfy the "nature" requirement of the test for seaman status. *Papai*, 520 U.S. at 555. *Compare Dize v. Ass'n of Md. Pilots*, 77 A.3d 1016, 1028-29 (Md. App. 2013), *cert. denied*, 135 S. Ct. 56 (2014) (worker who spent between 42 percent and 50 percent of his time performing maintenance on vessels at the dock did not satisfy the nature test because he was not engaged in sea-based work) *with Naquin v. Elevating Boats, L.L.C.*, 744 F.3d 927, 933, 935 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1397 (2015) (worker who spent the majority of his time repairing, cleaning, and maintaining dockside vessels secured in a shipyard canal satisfied the nature test even though his duties did not literally take him to sea) *and* the present case (worker who spent less than 5 percent of his time welding on a bulkhead while tethered to land or to a docked barge satisfied the nature test even though his duties did not literally take him to sea).

opinions to escape. This Court should not wait another 33 years to lead the courts out of the "maze,"[19] and this case presents the ideal vehicle for the Court to restore uniformity from the "bewildering array of decisions"[20] that led the lower courts astray in this case.

B. Statutory Background

The general maritime law has differentiated the remedies available for different types of maritime workers since the beginning of our nation.[21] Likewise, when Congress legislated remedies for maritime workers, "[t]here was consensus that the 'peripatetic' sailors should be subject to 'a uniform Federal statute,' and the local workers 'should come under the State laws.' "[22] Congress, which had always "distinguished between these port workers and seamen," "assumed full control over the relation of master and servant at sea"[23] and enacted the Jones Act, affording a negligence remedy to seamen.[24] However, Congress differentiated

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[19] *Presley v. Healy Tibbits Constr. Co.*, 646 F. Supp. 203, 205 (D. Md. 1986).

[20] *Dize*, 77 A.3d at 1025.

[21] *See, e.g.*, *Black v. The Louisiana*, 3 F. Cas. 503, 503 (D. Pa. 1804) (No. 1,461) ("Although the cook and steward are authorized to sue in the admiralty court, as mariners and part of the crew, yet I have distinguished their cases, as their duties are distinct from those mariners employed in navigating the ship.").

[22] Kenneth G. Engerrand, *The Fleet Rule for Seaman Status: The Peril of Perils*, 2 LOY. MAR. L.J. 92, 97 (2003) (quoting H.R. REP. NO. 639, 67th Cong., 2d Sess. 2 (1922)).

[23] H.R. REP. NO. 639, at 4.

[24] 46 U.S.C. § 30104, App. F-2.

land-based workers, intending that they would "get the same compensation whether they are working on the coal heaps of a manufacturing concern or barges at its wharf."[25] Land-based harbor workers are not "centered in the few great ports" and "may work only occasionally in connection with vessels, their regular employment being on land."[26] When this Court declared that state workers' compensation remedies could not constitutionally be applied to the harbor workers who were injured on navigable waters,[27] Congress enacted a uniform federal compensation remedy for them so they would have a workers' compensation remedy like other land-based workers.[28]

Guidry was not a peripatetic seaman who traveled with a vessel. He was a land-based welder who was injured on a job that was performed in the harbor while welding a bulkhead for a dock. Therefore, the issues presented in this case address whether a land-based welder, who worked at a land-based shop for two years, could become a seaman from a single job of welding a bulkhead for a dock during which he was injured while attached to the welding leads from his pick-up truck.

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[25] H.R. REP. NO. 639, at 3.

[26] S. REP. NO. 94, 67th Cong., 1st Sess. 3 (1921). "Longshoremen and ship-repair men are land workers subject neither to the peculiar conditions nor to the laws which regulate seamen. They form a part of the labor force of each State exactly as other workmen in the port in which they are employed." *Id*. at 2.

[27] *See Wash. v. W.C. Dawson & Co.*, 264 U.S. at 227-28.

[28] Longshore & Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950.

C. Factual Background

Ernest Guidry worked as a welder for Tanner Services from February 2, 2010, until he was injured on May 8, 2012. App. B-3. He spent his first two years with Tanner performing welding work on land-based projects at Tanner's shop in Eunice, Louisiana. *Id*.; App. D-2. After Tanner was awarded a job of removing an old dock and building a bulkhead for a new dock extending from the land into the water in Grand Isle, Louisiana, App. B-3, Guidry was assigned from Tanner's land division to work for the marine division *for the project*. *Id*. The job of building the bulkhead lasted three to four months. *Id*. Guidry was assigned to work at Grand Isle on March 26, 2012, App. E-9, and his accident occurred 43 days later. Guidry had not worked on vessels before the Grand Isle project. App. E-3, E-10.

As the bulkhead extended out from the land into the water, vessels were used in the construction. Guidry spent the majority of his time on the Grand Isle project welding on the bulkhead from a floating mat, a large piece of wood, but he also spent time performing preparatory welding on barges that were tied off at the work site. App. B-4. The mat served as a walkway between the land and bulkhead, App. E-12, and as a "scaffold in the water" where the welders could weld the pilings for the bulkhead. App. B-4; E-1. Guidry attended safety meetings on a barge, and on one occasion he participated in a rescue mission when a barge came loose and was adrift. App. B-4.

Guidry did not ride with the vessels on the way to the worksite, instead driving his pick-up truck to and from the location of the vessels. App. B-5; E-4, E-5, E-6, E-7. He brought the truck with its self-contained welding unit to Grand Isle every time he went to work on the bulkhead, parked the truck on the land near the bulkhead with the welding unit on the back of the truck, and took the welding leads from the truck to the spot on the bulkhead where he was welding. App. E-4, E-5, E-9, E-10. During his welding work, Guidry was always attached either to the welding unit on his pick-up truck or to the unit on a docked barge. App. E-9, E-10. He was injured while welding piles for the bulkhead while standing on the floating mat, App. B-5, attached to his pick-up truck by the welding leads. App. E-4, E-5, E-9, E-10. The other worker on the mat was able to avoid injury by stepping onto the land from the mat. App. E-2, E-3.

D. Proceedings Below

Guidry brought this action in the District Court of St. Landry Parish, Louisiana, seeking to recover as a seaman under the Jones Act. The issue of Guidry's status as a seaman was tried to the court in a bench trial. App. C-1. Tanner argued that Guidry failed the test for seaman status, as enunciated by this Court, because his duties did not take him to sea so as to satisfy the *nature* test for seaman status and because he did not spend at least 30 percent of his employment with Tanner on a vessel or fleet of vessels so as to satisfy the

duration test.[29] App. D-10, D-11; B-10, B-11. In rejecting both arguments and concluding that Guidry was a seaman, the district court declined to apply the requirement from this Court for the nature test that the worker's duties must take him to sea, App. D-10, D-11, and misapplied this Courts' duration test by considering only Guidry's work on the single Grand Isle job rather than his employment as a whole with Tanner. App. D-11-D-13.

The Louisiana Court of Appeal, Third Circuit, affirmed the conclusion that Guidry was a seaman, App. B-1.[30] Like the district judge, the court of appeal declined to apply this Court's requirement that a worker's duties must take him to sea in order to be a seaman, App. B-10-B-11, and instead held that the nature element of the seaman status test was satisfied because the worker's duties contributed to the function and mission of the vessels.[31] App. B-13, B-14. The court of appeal also repeated the error of the district judge in assessing the duration of Guidry's work on vessels

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[29] Tanner also argued that Guidry's duties did not contribute to the function or mission of a vessel or fleet of vessels, App. D-8; B-7, and that the time Guidry spent on the mat should not count toward the 30 percent required for the duration element of the seaman status test. App. D-12; B-14.

[30] One judge dissented from the award of prejudgment interest that is not permitted in a Jones Act case. App. B-20.

[31] In assessing Guidry's connection to vessels on the Grand Isle job, the district court and court of appeal counted Guidry's time spent on the barge and on the floating mat, which the courts considered to be an appurtenance of the barge. App. B-15, B-16; D-12, D-13.

solely from his work on the job at Grand Isle, rather than from his entire employment with Tanner. App. B-11-B-13. In so doing, the court of appeal misread and misapplied this Court's clarification of the duration requirement and its rejection of a voyage rule,[32] App. B-11, B-12, to hold that Guidry, who spent no more than 5 percent of his work with Tanner on vessels, satisfied the 30 percent rule of thumb for the duration element of the test for seaman status.

The Louisiana Supreme Court granted a writ of certiorari to correct the district court's mistaken award of prejudgment interest on the judgment under the Jones Act, but declined to correct the erroneous application of the test for seaman status. App. A-1.

[32] In holding that seaman status is determined from the worker's entire employment with his employer, this Court rejected a "voyage" or "snapshot" approach in *Chandris*, 515 U.S. at 363, as it would allow a worker to oscillate back and forth from coverage as a seaman under the Jones Act.

REASONS FOR GRANTING THE WRIT

I. The decision of the court of appeal, declining to apply this Court's requirement that a worker's duties must "take him to sea" in order to satisfy the "nature" element of the test for seaman status, conflicts with the decisions of this Court, the Ninth Circuit, the Eleventh Circuit, and the Maryland courts, and this is an appropriate case to resolve the conflicts and confusion in the lower courts.

When this Court set out to correct the "wayward case law"[33] that "led the lower courts to a myriad of standards and lack of uniformity in administering the elements of seamen status,"[34] the Court provided a comprehensive review of the judicial and legislative history of the seaman status test and the Jones Act and concluded that "Congress established a clear distinction between land-based and sea-based maritime workers. The latter, who owe their allegiance to a vessel and not solely to a land-based employer, are seamen."[35] The Court emphasized: "Whether under the Jones Act or general maritime law, seamen do not include land-based workers."[36] In order to "separate the sea-based maritime employees who are entitled to

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[33] *Wilander*, 498 U.S. at 353.

[34] *Id*. (quoting Kenneth G. Engerrand & Jeffrey R. Bale, *Seaman Status Reconsidered*, 24 S. TEX. L.J. at 494).

[35] *Id*. at 347. The Court's distinction was expressly stated by Congress: "Congress has always in legislating distinguished between these port workers and seamen." H.R. REP. No. 639, at 4.

[36] *Wilander*, 498 U.S. at 348.

Jones Act protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation,"[37] the Court in *Chandris, Inc. v. Latsis* enunciated the test "that a seaman must have a connection with a vessel in navigation that is substantial in both duration and nature."[38]

The Court was then presented in *Harbor Tug & Barge Co. v. Papai* with the case of a harbor worker who was injured on a vessel on navigable water, and the Court emphasized: "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."[39] Thus, Papai, who was injured while working on a vessel at dockside, who was not going to sail with the vessel after the work was finished, was not a seaman as a matter of law because his work was not "of a seagoing nature."[40] As Guidry never sailed with any vessel, and his duties never took him farther from land than the bulkhead he was building adjacent to land, his duties, like those of Papai, did not, and could not, take him to sea.

The present case is not the first case to reconstruct the labyrinth that this Court sought to dismantle in *Wilander*, *Chandris*, and *Papai*. Before the present case was decided, the appellate courts were confused

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[37] *Chandris*, 515 U.S. at 368.

[38] *Id*. at 370.

[39] 520 U.S. at 555 (emphasis added).

[40] *Id*. at 559, 560.

and in conflict on the application of the nature element of the seaman status test to workers who are injured in the harbor and do not literally go to sea with a vessel, bringing back a lack of uniformity in the administration of the test for seaman status.

Contrast the following cases, holding that a worker's duties in the harbor were not sea-based:

> *Papai*, 520 U.S. at 559 (Papai was not a seaman because none of his assignments to the tug, which involved maintenance work while the vessel was docked, were of a seagoing nature);
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> *Cabral v. Healy Tibbits Builders, Inc.*, 128 F.3d 1289, 1290, 1293 (9th Cir. 1997) (crane operator on a project to remove and replace timber piles at a ferry landing, who spent 90 percent of his time on a barge operating the barge's crane, was a land-based worker who happened to be assigned to a project that required him to work on a barge and was not a seaman);
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> *Heise v. Fishing Co. of Alaska, Inc.*, 79 F.3d 903, 904-05, 906-07 (9th Cir. 1996) (assistant engineer performing repairs on a docked vessel, who slept on the vessel and secured the vessel's mooring lines, was not a seaman because he was not hired for "sea-based maritime work");
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> *Clark v. Am. Marine & Salvage, LLC*, 494 F. Appx. 32, 34-35 (11th Cir. 2012) (repair to

work barge performed on land or while tethered to the worker's welding machine on land "was not of a seafaring nature");

Dize v. Ass'n of Md. Pilots, 77 A.3d 1016, 1019, 1028-29 (Md. App. 2013) (worker who spent bet-ween 42 percent and 50 percent of his time performing maintenance on vessels at the dock was not engaged in sea-based work);

With cases holding that a worker's duties in the harbor were sea-based:

In re Endeavor Marine, 234 F.3d 287, 292 & n.3 (5th Cir. 2000) (crane operator who was injured on a crane barge that was used to unload a cargo vessel "on the brown waters of the Mississippi River" satisfied the nature test even though "his duties do not literally carry him to sea");

Naquin v. Elevating Boats, L.L.C., 744 F.3d 927, 933, 934, 935 (5th Cir. 2014) (worker who spent 70 percent of his time on lift boats that were "docked or at anchor" in the employer's shipyard canal, repairing, cleaning, painting, and maintaining the vessels, who "almost never ventured beyond the immediate canal area or onto the open sea," satisfied the requirement that his connection to the vessels be substantial in nature even though he was not literally taken to sea).

Although the lower courts have reached diametrically opposed results and have applied conflicting interpretations of this Court's formulation of the test that a worker's duties must take him to sea in order to

satisfy the nature prong of the seaman status test, this Court declined to hear petitions for certiorari in the *Dize* and *Naquin* cases – even though the petitions for certiorari were filed in the same year on the same issue and rehearing was requested in *Dize* after the petition in *Naquin* was filed.[41] Declining to hear the *Dize* and *Naquin* cases simply added to the labyrinth and encouraged the addition of a new section by the court of appeal in the present case.

The confusion in the lower courts over the proper interpretation of the nature test was exemplified by the court of appeal in the present case. The court of appeal not only failed to apply this Court's requirement that the worker's duties take him to sea but considered the argument that a worker's duties must take him to sea to be "misguided." App. B-11. It is not misguided to ask the courts of Louisiana to apply the principles enunciated by this Court, particularly when the principles derive from this Court's primary obligation under the Constitution to declare the general maritime law.

The reason given by the court of appeal for declining to follow the test set forth by this Court, App. B-11, B-12, was that the requirement set forth in *Papai* for the *nature* test, that a worker's duties take him to sea, conflicts with this Court's rejection of a "voyage" test in formulating the *duration* requirement for seaman

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[41] *See Dize v. Ass'n of Md. Pilots*, No. 13-1268, 135 S. Ct. 56 (Oct. 6, 2014), *reh'g denied*, 135 S. Ct. 698 (Nov. 17, 2014); *Elevating Boats, L.L.C. v. Naquin*, No. 14-306, 135 S. Ct. 1397 (Feb. 23, 2015).

status in *Chandris*. The analysis from the court of appeal demonstrates the confusion in the lower courts over the application of the requirement that a worker's duties must take him to sea, necessitating intervention by this Court.

A worker must satisfy *both* the duration and nature elements of the test for seaman status.[42] When considering whether a worker has a sufficient temporal connection to a vessel (duration), his duties are evaluated in the context of his entire employment and not on the particular assignment or voyage on which he was injured. In its "rejection of the voyage test,"[43] this Court explained that the rejection was meant to prevent a worker from "oscillat[ing] back and forth between Jones Act coverage and other remedies depending on the activity in which the worker was engaged while injured."[44] Rejecting the voyage test for the *duration* element in *Chandris* did not eviscerate the separate requirement for the *nature* element in *Papai* that workers who spend time working ashore must "spend the rest of their time at sea."[45] However, equating the requirement that a worker's duties take him to sea in order to satisfy the *nature* test with the rejected voyage rule for the *duration* test, the court of appeal turned the test for seaman status on its head. In order

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[42] *Chandri*s, 515 U.S. at 371 ("we think it is important that a seaman's connection to a vessel in fact be substantial in both respects").

[43] *Id*. at 363.

[44] *Id*.

[45] *Id*. at 364.

to determine if a worker is sea-based or land-based, the court of appeal declined to apply the critical requirement that a worker's duties must take him to sea.[46]

With the lower courts in such confusion that they do not feel compelled to apply the requirements enunciated by this Court, the time is ripe for this Court to grant the petition in this case to restore uniformity to the interpretation of the general maritime law and the federal statute that modifies it and to instruct the lower courts that it is not misguided to apply the test enunciated by this Court. The denial of certiorari from two cases in a five-month period that expressed conflicting views of this Court's test for seaman status continues to lead to confusion that is reflected in the mistaken analysis by the court of appeal in the present case. In granting a writ of certiorari in this case, the Court should hold that Guidry's injury, while he was tethered to his pick-up truck on the land, was not covered under the Jones Act because this land-based worker does not satisfy the requirement that his duties take him to sea.

The courts have created many categories of seaman, including the "blue-water seaman," the "brown

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[46] Rather than perform a voyage test here, we must look to the record for support of the trial court's finding that Plaintiff was a seaman under the second part of the *Chandris* test. Accordingly, we must determine whether Plaintiff's connection to this fleet was substantial in terms of its duration.

App. B-11.

water seaman," and the *Sieracki* seaman.[47] This Court should not create a new category, the "pick-up truck seaman."

II. The decision of the court of appeal, declining to apply this Court's requirement that the "duration" element of the test for seaman status must be determined in the context of the worker's entire employment, and not by a snapshot or voyage, conflicts with the decisions of this Court and the Fifth Circuit

When the Court in *Chandris* enunciated the requirement that seamen must have a connection to a vessel in navigation that is substantial in nature and duration in order to separate land-based workers from sea-based workers, the Court rejected a "snapshot" or "voyage" test for the necessary connection.[48] Instead the Court held that "[l]and-based maritime workers do not become seamen because they happen to be working on board a vessel when they are injured."[49]

In approving the 30 percent rule of thumb for the duration test that had been developed by the Fifth Circuit, the Court in *Chandris* quoted the Fifth Circuit's formulation: "Under *Barrett v. Chevron, U.S.A., Inc*.,

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[47] *Brown v. ITT Rayonier, Inc*., 497 F.2d 234, 236 (5th Cir. 1974); *Price v. Connolly-Pac. Co.*, 162 Cal. App. 4th 1210, 1214 (Cal. App. 2d Dist. 2008); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85 (1946).

[48] *Chandris*, 515 U.S. at 363.

[49] *Id*. at 361.

supra, if an employee's regular duties require him to divide his time between vessel and land, his status as a crewmember is determined 'in the context of his entire employment' with his current employer."[50] The Court also quoted the decision of the Fifth Circuit in *Longmire v. Sea Drilling Corp.,* "explaining that a worker's seaman status 'should be addressed with reference to the nature and location of his occupation taken as a whole.' "[51]

The Fifth Circuit has permitted an exception to the general rule, noting that the rule "does not preclude assessment of the extent of the employee's work aboard a vessel over a shorter time period if the employee's *permanent job assignment* during his term of employment has changed."[52] This Court in *Chandris* agreed with the Fifth Circuit that there should be an exception for workers who have a change in "essential duties,"[53] stating that "we see no reason to limit the seaman status inquiry, as petitioners contend, exclusively to an examination of the overall course of a worker's service with a particular employer."[54] However, the latter statement was taken out of context by the Ninth Circuit in *Papai*,[55] to suggest that a worker's

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[50] *Id*. at 366 (quoting *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067, 1075 (5th Cir. 1986) (en banc)).

[51] *Chandris*, 515 U.S. at 366-67 (quoting *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342, 1347 (5th Cir. 1980)).

[52] *Barrett*, 781 F.2d at 1075 (emphasis added).

[53] *Chandris*, 515 U.S. at 372.

[54] *Id*. at 371-72.

[55] 67 F.3d 203, 206 (9th Cir. 1995), *rev'd*, 520 U.S. 548 (1997).

duties with other employers might be considered, causing this Court to correct the misinterpretation by stating that the exception was limited to the situation where "the employee was injured on a new assignment with the same employer, an assignment with different 'essential duties' from the previous ones."[56] The Court in *Papai* reiterated that "the Fifth Circuit consistently has analyzed the problem [of determining seaman status] in terms of the percentage of work performed on vessels for the employer in question."[57]

After *Chandris* and *Papai*, the Fifth Circuit has continued to apply the rule that a worker's duties must be considered in the context of his entire employment unless the worker establishes that he had *a permanent* change in duties. The Fifth Circuit's decision in *Becker v. Tidewater, Inc.*,[58] exemplifies that there was no permanent change in duties in the present case.

Like Guidry, Becker performed land-based work before he was assigned to work on a vessel, where he was injured. Becker argued that he was reassigned to the vessel to perform work as a seaman and at that point became a seaman. The Fifth Circuit disagreed, holding that Becker needed to show that (i) when he was assigned to the vessel, he was "removed from" his former land-based position and "assigned to a new, sea-based position, (ii) this reassignment permanently changed his status," and "(iii) by serving in this new

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[56] *Papai*, 520 U.S. at 556 (quoting *Chandris*, 515 U.S. at 372).

[57] *Papai*, 520 U.S. at 557 (quoting *Chandris*, 515 U.S. at 367).

[58] 335 F.3d 376 (5th Cir. 2003).

position," he "would spend at least 30% of his time aboard a vessel."[59] Becker failed to make that showing, and the Fifth Circuit held that Becker was simply "a land-based worker who had been assigned to a mission on a vessel at sea."[60] Otherwise, "a worker whose duties sometimes take him to sea could claim that the start of each voyage establishes a reassignment to a sea-based position and that his return to shore again shifts his status back to a land-based worker," contrary to the rejection of the "voyage test" by this Court in *Chandris*.[61] The Fifth Circuit emphasized: "To give teeth to the *Chandris* opinion's rejection of a voyage test, it must be held that merely serving an assignment on a vessel in navigation does not alter a worker's status."[62] The court in *Becker* reasoned that if Becker's assignment to the vessel constituted a change in assignment, "then the burden of proof would effectively be placed on defendants to prove that the plaintiff would be transferred away from the vessel and that the assignment was only temporary, rather than requiring plaintiff to show that his status had changed."[63]

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[59] *Id*. at 390.

[60] *Id*. at 393. Similarly, this Court rejected the worker's argument in *Chandris* that his status should be determined from the voyage on which he was injured and held that "Jones Act coverage" is determined "without regard to the precise activity in which the worker is engaged at the time of the injury." *Chandris*, 515 U.S. at 358.

[61] *Becker*, 335 F.3d at 389.

[62] *Id*. at 389-90.

[63] *Id*. at 392.

As the Ninth Circuit did in *Papai*, the court of appeal in the present case also misinterpreted this Court's language in *Chandris*. However, the court of appeal below did more than take the language out of context. The court then reasoned that it was not bound to apply the requirement that the worker's duties must be considered in the context of his entire employment:

> Defendant argues in brief that this court should consider Plaintiff's entire span of employment including the two and a half years prior to Plaintiff's injury. Under *Chandris*, this argument was specifically addressed when the court stated, "[W]e see no reason to limit the seaman status inquiry . . . exclusively to an examination of the overall course of a worker's service with a particular employer.["] *Chandris* at 371-72.

App. B-14. Therefore, the court of appeal made no attempt to apply the rule that the worker's duties must be evaluated in the content of his entire employment or the exception when there has been a permanent change in the worker's essential duties.

As the lower courts in this case did not believe they were required to address Guidry's entire employment with Tanner, they considered only his employment during the Grand Isle job, allowing Guidry to satisfy the 30 percent rule of thumb even though his work on vessels did not exceed 5 percent of his work for Tanner and even though he could not establish that he had a permanent change in his essential duties that

were different from his prior work.[64] Thus, by declining to apply the test as set forth by this Court, the court of appeal allowed Guidry's status to oscillate back and forth between assignments and converted a land-based worker into a seaman because he worked on one job

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[64] Although neither the district court nor the court of appeal addressed the exception to the rule that Guidry's duties must be considered in the context of his entire employment with Tanner, the evidence was unequivocal that Guidry had neither a change in essential duties nor was the change in his assignment permanent. Guidry was hired as a welder and performed that work in Tanner's land-based shop prior to the Grand Isle bulkhead project. App. E-3, E-7. Guidry drove his truck with the welding equipment to Grand Isle and performed welding work on the pipes and sheet piles that formed the bulkhead. App. E-4, E-5, E-6, E-9, E-10. He was a welder before his work at Grand Isle and he was a welder at Grand Isle. App. B-3-B-4; E-7, E-8. He may have worked in different locations, but he was still a welder.

Additionally, the evidence from both Guidry and his supervisor established that Guidry was assigned for a single project, which lasted only three to four months, App. B-3, so there was no permanent change in his job:

> Q. Okay, and you were reassigned to go work for the Tanner Marine Division for this particular job, right?
>
> Guidry: Yes, sir.

App. E-3.

* * *

> Q. Okay, and Lee Guidry was one of those land guys that got reassigned to that Tanner Marine project at Energy XXI, correct?
>
> Venezia: Yes.

App. E-2. The district judge confirmed that "Ernest Guidry was one of at least two welders assigned *to the project*." App. D-4 (emphasis added).

involving vessels, derogating the expressed intent of Congress and this Court.

The decision of the court of appeal that it would consider only Guidry's work on the Grand Isle project, rather than his work in the course of his entire employment with Tanner, does more than misinterpret and misapply the test enunciated by this Court in *Chandris* and *Papai*. It conflicts directly with the interpretation of the duration requirement as uniformly applied by the Fifth Circuit from *Barrett* to *Becker*. If Guidry had brought his action in federal court, rather than state court, it would have resulted in precisely the opposite result. As in *Becker*, Guidry would not have been a seaman as a matter of law.

The status of a worker under a federal statute, particularly in an admiralty case where application of uniform principles of law is required by the Constitution, should not depend on whether the case was brought in state court or federal court. "Local interests must yield to the common welfare. The Constitution is supreme."[65] Consequently, this Court should grant the writ of certiorari to restore a uniform interpretation of the test for seaman status.

CONCLUSION

The decision of the court of appeal below did not create the confusion and conflicts that divide the

[65] *Wash. v. W.C. Dawson & Co.*, 264 U.S. at 228.

courts from California to Maryland. However, the decision of the court of appeal continues and enhances the conflict that has returned the principles of seaman status to the wayward state that existed before this Court led the way out of the maze in *Wilander*, *Chandris*, and *Papai*.

It is the primary duty of admiralty judges from Article III of the Constitution to declare and apply uniform principles of admiralty law. Petitioner, Tanner Services, LLC, respectfully prays that the admiralty judges of this Honorable Court grant the writ of certiorari in this case and that they not wait another 33 years to restore uniformity to the interpretation of the Jones Act and general maritime law.

Respectfully submitted,

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SUPREME COURT OF LOUISIANA

NO. 2016-C-2013

ERNEST GUIDRY, ET UX.

V.

ABC INSURANCE COMPANY, ET AL.

PER CURIAM

Granted in part. The district court erred in awarding pre-judgment interest on the entire damage award. It is well settled that a court sitting in admiralty has no authority to grant interest on the general maritime and Jones Act awards for future damages, such as future lost earnings or future pain and suffering. *Milstead v. Diamond M Offshore, Inc.*, 95-2446 (La. 7/2/96), 676 So. 2d 89.

Accordingly, the judgment of the district court is vacated insofar as it awards pre-judgment interest on the entire damage award. The case is remanded to the district court for reformation of the judgment as to interest. In all other respects, the application is denied.

(January 23, 2017)

STATE OF LOUISIANA
COURT OF APPEAL, THIRD CIRCUIT

16-61

ERNEST GUIDRY, ET UX.

VERSUS

ABC INSURANCE COMPANY, ET AL.

Judgment rendered and mailed to all parties or counsel on October 19, 2016. Applications for rehearing may be filed within the delays allowed by La. Code Civ. P. art. 2166 or La. Code Crim. P. art. 922.

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APPEAL FROM THE TWENTY-SEVENTH
JUDICIAL DISTRICT COURT
PARISH OF ST. LANDRY, NO. 13-C-2180-A
HONORABLE JAMES P. DOHERTY, JR.,
DISTRICT JUDGE

****

JOHN D. SAUNDERS
JUDGE

****

[JDS] [SRC] Court composed of Sylvia R. Cooks, John D. Saunders, and Marc T. Amy, Judges.

AFFIRMED.

Amy, J., concurs in part, dissents in part, and assigns reasons.

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SAUNDERS, J.

This maritime injury dispute arose from an accident wherein a welder was injured while working on a floating mat for a bulkhead construction project. The Plaintiff, who suffered injuries when a vibrating hammer hit him, brought claims under the Jones Act. The

trial court found the Plaintiff to be a seaman under the Jones Act and awarded general and special damages along with legal interest from the date of the accident. Defendant appealed. The issue of the Plaintiff's seaman status and the trial court's award of general damages and prejudgment legal interest are at issue.

FACTS:

Ernest Lee Guidry, hereinafter Plaintiff, was employed as a welder by Tanner Services, LLC, hereinafter Defendant, from February 2, 2010, until his injury on May 8, 2012.

Defendant was awarded a contract to construct a bulkhead in Grand Isle, Louisiana, starting in January 2012. The project in Grand Isle, Louisiana, hereinafter "the project," was estimated to last for about three to four months. Defendant had both a land division construction crew and a marine division crew. Plaintiff was reassigned from the land division to work for the marine division for the project. Prior to the project, Plaintiff worked in Eunice, Louisiana, at Defendant's shop.

Three barges and two tugboats were used to move the equipment, supplies, and to store materials, as well as to act as "floating docks" or "work stations" for a crane and preparatory welding. The barges were also used to house an office for supervisors, a tool shed, a welding machine, slings for the crane, a bathroom facility, and a floating mat used by Plaintiff and several other crew members.

The project was done in several parts: preparatory work while on the barge, removal of the old dock, and welding of the sheet piles and the king piles for the bulkhead while on the floating mat. King piles are structural support pilings that are driven into the ground prior to excavation and are welded to the sheet piles. Sheet piles are typically vertical steel pilings that create a wall when driven into the earth.

Once the old dock was removed, the construction of the new bulkhead began. The crane and a vibrating hammer were used for moving and driving the piles into place. The crane operator on the barge would lift a king pile, bring it towards the crew, and the vibrating hammer would drive it into place. The crane would then bring a sheet piling, and the welders on a floating mat would weld the piles together, similar to a metal fence.

Plaintiff spent time on the barges for both preparatory work and down time. Some of the preparatory work Plaintiff performed included welding connectors, cutting holes in sheet piles, and welding sheet piles together. Plaintiff welded portions of the barges, helped tie them off, and participated in a rescue and repair mission aboard one of the tugboats when a barge sailed adrift. Each morning on one of the barges, Plaintiff also attended a job safety analysis conducted with the entire marine division crew.

The majority of Plaintiff's time was spent on the floating mat. The mat was a large piece of wood which was described as a "raft" and "scaffold in the water." It

could be moved from piling to piling, through the use of ropes or paddles. The floating mat would be lifted out of the water and placed back on the deck of one of the barges for storage. While on the floating mat, Plaintiff was in communication with the barges and tugboats using radio.

According to his timesheets, Plaintiff spent 90% of his time on the water, on both the barges and the floating mat. Plaintiff was driving back and forth to the jobsite in the remaining time.

Plaintiff was injured when the vibrating hammer fell and struck him while he was welding piles on the floating mat. Plaintiff was knocked into the water by the hammer. Plaintiff endured multiple injuries and several surgeries after the incident including the amputation of four fingers, a crushed foot, herniated discs, a concussion, depression, post-traumatic stress, and total and permanent disability.

After a bench trial on the merits, the trial court issued its Reasons for Judgment and found that Plaintiff was a seaman under the Jones Act and imposed liability against his employer in the amount of $3,885,911.69. Judgment was rendered on October 23, 2015.

ASSIGNMENTS OF ERROR:

1. The trial court erred in concluding that Plaintiff contributed to the function or mission of a vessel or fleet of vessels to satisfy the first element of the test for seaman status;

2. The trial court erred in concluding that Plaintiff had a connection to a vessel or fleet of vessels that was substantial in both nature and duration to satisfy the second element of the test for seaman status;

3. The trial court erred in determining that Plaintiff was a seaman based only on his work in Grand Isle;

4. The trial court erred in concluding that the floating mat on which Plaintiff worked for Defendant was an appurtenance of a vessel so that any time that Plaintiff spent working the floating mat would be considered to contribute to Plaintiff's connection to a vessel or fleet of vessels for the second element for seaman status;

5. The trial court erred in its award of general damages based on state law, not maritime law, and decisions that are factually inapplicable;

6. The trial court erred in awarding prejudgment interest on all damages from the date of Plaintiff's accident.

ASSIGNMENTS OF ERROR NUMBERS ONE, TWO, THREE, FOUR:

In their first four assignments of error, Defendant asserts that the trial court erred in concluding that Plaintiff is a seaman under the Jones Act. We will address these four together since they are governed under the same standard of review and involve a singular issue: Plaintiff's seaman status.

STANDARD OF REVIEW:

The question of seaman status under the Jones Act is a mixed question of law and fact. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 111 S.Ct. 807, 112 L.Ed.2d 866 (1991). When the underlying facts are established, and the rule of law is undisputed, the issue is whether the facts meet the statutory standard. *Id.* Louisiana courts of appeal apply the manifest error standard of review in Jones Act cases. *Milstead v. Diamond M Offshore, Inc.*, 95-2446 (La.7/2/96); 676 So.2d 89; *Day v. Touchard, Inc.*, 97-1180 (La.App. 5 Cir. 5/27/98); 712 So.2d 1072; *Gaston v. G & D Marine Servs., Inc.*, 93-182 (La.App. 4 Cir. 1/19/94); 631 So.2d 547, *writ denied*, 94-436 (La.4/4/94); 635 So.2d 1112.

While factual determinations by the trier of fact are given great deference on appeal, if the trial court's decision was based on an erroneous application of law, rather than a valid exercise of discretion, the trial court's decision is not entitled to the deference it would otherwise enjoy. *Lasha v. Olin Corp.*, 625 So.2d 1002 (La.1993); *We Sell Used Cars, Inc. v. United Nat'l Ins. Co.*, 30,671 (La.App. 2 Cir. 6/24/98); 715 So.2d 656; *Richard v. Mike Hooks, Inc.*, 99-1631 (La.App. 3 Cir. 10/4/00, 3), 772 So.2d 148, 150-51, *writ granted sub nom, Richard v. Hooks, Inc.*, 01-0145 (La. 4/12/01), 788 So.2d 1197, *and rev'd*, 01-0145 (La. 10/16/01), 799 So.2d 462.

In their first assignment of error, Defendant contends the trial court erred in concluding that Plaintiff contributed to the function or mission of a vessel or

fleet of vessels to satisfy the first element of the test for seaman status. We disagree.

In *Chandris, Inc. v. Latsis*, 515 U.S. 347, 368, 115 S.Ct. 2172, 2190, 132 L.Ed.2d 314 (1995) (citations omitted), the United States Supreme Court stated the following:

> [W]e think that the essential requirements for seaman status are twofold. First . . . "an employee's duties must 'contribute to the function of the vessel or to the accomplishment of its mission.'" The Jones Act's protections, like the other admiralty protections for seamen, only extend to those maritime employees who do the ship's work. But this threshold requirement is very broad: "All who work at sea in the service of a ship" are eligible for seaman status.
>
> Second, and most important for our purposes here, a seaman must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature.

In the current case, the following is an excerpt of the deposition of Mr. David Smith, a representative of one of the appellants, Tanner Services, LLC:

> Q: Fair enough. What – what was this Energy XXI job that Tanner Marine Division [Defendant] was doing?
>
> A: Building a bulkhead.

Q: And what was the mission – well how many – how many vessels were out there, tugboats and barges?

A: There was, uh, two boats and I think there was [sic] four barges.

Q: Okay, and what was the mission of those vessels? What were they there to do?

A: To haul in the, uh, sheet piling, the crane, the – all the equipment.

Q. Okay, and what was the purpose of having those barges and tugboats out there at this Grand Isle location?

A: To build this bulkhead.

Q: Okay, and that's the – that's the mission of this what we call fleet or flotilla of vessels, all these vessels, four, five to six vessels, was to do pile driving work an build a bulkhead?

A: Yes.

Q: Were the barges necessary to accomplish this mission of pile driving and building this bulkhead?

A: Yes.

. . . .

Q: What other kind of work did Lee Guidry [Plaintiff] do on this floating mat?

A: Welding.

Q: And that was all in furtherance of this pile driving and bulkhead construction work, correct?

A: Correct.

This testimony from a representative of Defendant supports the trial court's finding of the fact that the first requisite of the test in *Chandris* is met. Defendant states that the mission of the vessels was to build the bulkhead. Plaintiff's primary job duty was to build the bulkhead via welding. As such, Plaintiff "contribute[d] to function of the vessel or to the accomplishment of its mission," *Chandris, Inc.*, 515 U.S. at 347, 115 S.Ct. 2172.

In their second assignment of error, Defendant contends the trial court erred in concluding that Plaintiff had a connection to a vessel or fleet of vessels that was substantial in both nature and duration to satisfy the second element of the test for seaman status.

Regarding the second component of the *Chandris* test, we must next determine whether Plaintiff was "connected to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature." *Chandris* at 368. It is clear from the record that the tugboats and barges were owned, operated and under the control of Plaintiff's employer and Defendant in this case. These tugboats and barges plainly constituted a fleet of vessels.

Defendant argues in brief that Plaintiff's duties did not take him to sea. They cite *Harbor Tug & Barge*

Co. v. Papai, 117 S.Ct. 1535, 137 L.Ed.2d 800 (1997) in support of this argument. We find this argument misguided.

Chandris explicitly denied a "voyage" test, which requires a party to set out to sea to qualify as a seaman under the Jones Act, when it stated, in pertinent part:

> A brief survey of the Jones Act's tortured history makes clear that we must reject the initial appeal of such a "voyage" test and undertake the more difficult task of developing a status-based standard that, although it determines Jones Act coverage without regard to the precise activity in which the worker is engaged at the time of the injury, nevertheless best furthers the Jones Act's remedial goals.

Id. at 358.

Rather than perform a voyage test here, we must look to the record for support of the trial court's finding that Plaintiff was a seaman under the second part of the *Chandris* test. Accordingly, we must determine whether Plaintiff's connection to this fleet was substantial in terms of its duration. *Id.* at 368. We find such support.

Defendant further contends the trial court erred in determining that Plaintiff was a seaman based only on his work in Grand Isle.

As a general rule, a worker who spends less than 30 percent of his time in the service of a vessel in navigation should not qualify as a seaman under the Jones

Act. *Id.* at 371. We see no reason to limit the seaman status inquiry, [as Defendant contends], exclusively to an examination of the overall course of a worker's service with a particular employer. *Id.* at 371-372.

Regarding the duration of the work Plaintiff performed and its connection to the fleet, Plaintiff testified that he spent 90 percent of his time at work during the project either on the barges or the floating mat. The following is the pertinent testimony of Plaintiff:

> Q: How much time on this Tanner Marine job, if you could give it to us in a percentage, did you spend on the water? When you were actually out at Energy XXI [project location] at the dock doing your work, how much time was on the water versus land, either barge or on a – on a raft?
>
> A: Fifty percent fir [floating] mat and then forty percent the barge and then ten percent land.

This testimony was corroborated by a representative of the Defendant and follows in pertinent part:

> Q: Okay, do you have a breakdown of how much time he [Plaintiff] spent on the floating mat versus the barge versus land or anything like that?
>
> A: Yes.
>
> Q: And what is it?
>
> A: Uh, probably 60 percent of his time was on the mat.

> Q: On the mat, okay, and how much of his time would be on the barge?
>
> A: Thirty, 30 percent, ten, time on the dock, ten percent on the dock.

As such, there is only one reasonable view of this evidence, that Plaintiff worked well above the generally required thirty percent of his time on the vessels under the jurisdiction of the Jones Act. We find no error by the trial court in its judgment that Plaintiff was a seaman under the second requirement of *Chandris*.

After establishing Plaintiff's connection to the fleet was substantial in duration, we must resolve whether Plaintiff's connection to the fleet was substantial in nature. We find that Plaintiff did have a connection that was substantial in nature to this fleet of vessels based on his work and time spent on the barges and most substantially, the time spent on the floating mat.

Although it is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel . . . a seaman must be doing the ship's work. *Id.* at 357. Further, the Court found that "seaman status is not coextensive with seamen's risks." *Id.* at 361. Ultimately, the Court found "it is not the employee's particular job that is determinative [of seaman status under the Jones Act), but the employee's connection to a vessel." *Id.* at 364.

Plaintiff was employed primarily for welding, but he also attended safety meetings, assisted with navigation of the barges, did repair work, and completed various other ancillary duties.

Defendant argues in brief that this court should consider Plaintiff's entire span of employment including the two and a half years prior to Plaintiff's injury. Under *Chandris*, this argument was specifically addressed when the court stated, "[W]e see no reason to limit the seaman status inquiry . . . exclusively to an examination of the overall course of a worker's service with a particular employer. *Chandris* at 371-72.

As evidenced through testimony, Plaintiff's duties contributed to the barges' mission and function, the building of the bulkhead, thus making them inherently vessel-related and fulfilling of the substantial nature requirement of the *Chandris* test. See *Scheuring v. Traylor Bros., Inc.*, 476 F.3d 781 (9th Cir.2007) and *Delange v. Dutra Constr. Co. Inc.*, 183 F.3d 916 (9th Cir.1999). As such, we find that Plaintiff meets every part of the *Chandris* test and that Plaintiff's connection to the fleet of vessels was substantial in both its duration and its nature. *Id.* at 368.

Next, in their fourth assignment of error, Defendant contends the trial court erred in concluding that the floating mat on which Plaintiff worked for Defendant was an appurtenance of the vessels so that any time that Plaintiff spent working the floating mat

would be considered to contribute to Plaintiff's connection to a vessel or fleet of vessels for the second element of seaman status. We find this contention lacks merit.

The issue before us is to decide whether the trial court erred in concluding the floating mat was an appurtenance of the vessels, the barges owned and operated by Defendant. As indicated in *Parks v. Pine Bluff Sand & Gravel Co.*, 712 So.2d 905 (La.App. 3 Cir. 1998), an appurtenance must be essential to the vessel's mission, the vessel cannot perform the mission without the appurtenance, despite the appurtenance being "readily removable." *Id*. at 911.

The following testimony from a representative supports the aforementioned nature of the floating mat as an appurtenance:

> Q: What do y'all use that mat for in the water?
>
> A: Well, like I say [sic], to keep floating, you know, so you can walk on it. It floats. Like I say [sic] it's a – a floating mat.
>
> Q: Okay. Did it help you guys do this bulkhead job?
>
> A: Yeah.
>
> Q: Did you need the mat to do the job?
>
> A: Right, yeah.
>
> Q: And you needed the barge and the crane to do the job, too?
>
> A: Yeah.

Q: You needed the mat to help with getting the sheet pilings in place and stabbing them in place?

A: Right, correct.

After considering the mission of the vessels and the process involved in constructing the bulkhead in the case before us, we find the trial court did not err in finding that the floating mat is an appurtenance of the vessel. We agree with the trial court that the floating mat "[w]as a necessary requirement on this project[.]" We find that the trial court did not err in this conclusion based on the record before us.

Accordingly, we find no merit to Defendant's assignments of error questioning the trial court's classification of Plaintiff as a seaman under the Jones Act or the classification of the floating mat as an appurtenance of the vessels.

ASSIGNMENT OF ERROR NUMBER FIVE:

In their fifth assignment of error, Defendant contends the trial court erred in its award of general damages based on state law, not maritime law, and decisions that are factually inapplicable. We disagree.

Defendant argues that seamen are not entitled to general damages, citing *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32-33, 111 S.Ct. 317, 326, 112 L.Ed.2d 275, 291 (1990). This case dealt primarily with wrongful death and survival claims brought by the mother of a seaman fatally assaulted by another crew member.

The court in Miles states that "the Jones Act does not explicitly limit damages to any particular form." *Miles* at 325. The court in *Miles* also found that the "Jones Act applies when a seaman has been killed as a result of negligence; and it limits recovery to pecuniary loss." *Id.* at 326. We find this specific limitation inapplicable to the case at hand due to the distinction of the cases' facts and type of claims brought before the courts.

The trial court in the case before us found that Louisiana law provided an avenue for recovery under general damages not limited to pain and suffering. The trial court cites in support of their decision *Williams v. Enriquez*, 41,200 (La.App. 2 Cir. 6/28/06, 7), 935 So.2d 269, which states, in pertinent part:

> General damages involve mental or physical pain and suffering, inconvenience, loss of intellectual or physical enjoyment, or other losses of lifestyle which cannot be measured exactly in monetary terms. *Nelson v. City of Shreveport*, 40,494 (La.App. 2d Cir. 01/27/06), 921 So.2d 1111, *writs denied*, 06-0453, 06-0600 (La.05/05/06), 927 So.2d 313, 317; *Sallis v. City of Bossier City*, 28,483 (La.App. 2d Cir.09/25/96), 680 So.2d 1333, *writs denied*, 96-2592, 96-2599 (La.12/13/96), 692 So.2d 376, 1063.

Id. at 274.

The standard for appellate review of general damage awards has been discussed in *Youn v. Maritime Overseas Corp.*, 623 So.2d 1257 (La.1993). It states, in pertinent part, "[d]iscretion vested in the trier of fact

is 'great,' and even vast, so that an appellate court should rarely disturb an award of general damages." *Id.* at 1261. The court in Youn stated farther:

> Reasonable persons frequently disagree about the measure of general damages in a particular case. It is only when the award is, in either direction, beyond that which a reasonable trier of fact could assess for the effects of the particular injury to the particular plaintiff under the particular circumstances that the appellate court should increase or reduce the award. *Id.*

With consideration for Plaintiff's amputation of four fingers, crushed foot, herniated discs, post-traumatic, stress, depression, flashbacks, nightmares, concussion, and suicidal thoughts, and the court's vast discretion on the matter, we do not find the trial court erred in their award of general damages and that it would be an exercise in futility to remand on this particular issue.

ASSIGNMENT OF ERROR NUMBER SIX:

In their sixth assignment of error, Defendant contends the trial court erred in awarding prejudgment interest on all damages from the date of Plaintiff's accident. We disagree.

This court in *Watterson* stated the following on the issue of prejudgment interest:

> When as in this case a Jones Act suit is brought under the court's admiralty jurisdiction (tried to a judge), the award of prejudgment interest lies within the sound discretion of the trial judge. Doucet v. Wheless Drilling Company, 467 F.2d 336 (5th Cir. 1972); Williams v. Reading and Bates Drilling Co., 750 F.2d 487 (5th Cir.1985). *Watterson v. Mallard Bay Drilling, Inc.*, 93-1494 (La.App. 3 Cir. 10/12/94, 14), 649 So.2d 431, 439, writ denied, 94-2769 (La. 1/27/95), 650 So.2d 241

We conclude that this result is reasonable and not an abuse of the trial court's discretion.

DISPOSITION:

Defendant, Tanner Services, LLC, raised six assignments of error. For the foregoing reasons, we affirm the trial court's finding of Ernest L. Guidry's seaman status under the Jones Act and affirm the trial court's award of general damages and prejudgment interest. We assess all costs of this appeal to Defendant, Tanner Services, LLC.

AFFIRMED.

[MTA] AMY, J., concurring in part and dissenting in part.

Like the majority, I find that the trial court's finding as to the plaintiff's Jones Act seaman status is supported by the record. I further agree that the damages

awarded must be affirmed. However, I do not join the majority's suggestion that the trial court determined that "general damages" were available beyond the type of pecuniary damages available for Jones Act recovery.

Rather, the trial court's reasons for ruling indicate that its award of damages was related to pain, suffering, and physical limitations associated with the significant injuries sustained. That type of award is plainly recoverable under the Jones Act. *See, e.g.*, *Todd v. Delta Queen Steamboat Co.*, 07-1518, p. 11 (La.App. 4 Cir. 8/6/08), 15 So.3d 107, 115 (considering an award of "general damages" within the context of the Jones Act and stating that a Jones Act plaintiff "may recover all of his pecuniary losses (e.g., loss of earning capacity, medical expenses, and pain and suffering.)"). Additionally, in its appellant's brief to this court, Tanner Services, LLC concedes that Jones Act seamen are entitled to "pecuniary damages and pain and suffering." In my opinion, whether styled as "general damages" or otherwise, the trial court's award is supported by the record given the grievous injuries sustained by this plaintiff.

Additionally, I respectfully dissent from the majority's affirmation of the prejudgment interest as awarded. Rather, I would reverse the trial court's award of interest from date of the accident on the award of future damages, finding such an award is inconsistent with the supreme court's ruling in *Milstead v. Diamond M Offshore, Inc.*, 95-2446 (La. 7/2/96), 676 So.2d 89. While the supreme court noted that prejudgment interest is due "on the sums awarded as past damages" in a Jones Act matter, it further determined

that a trial court has "no authority to grant interest on the general maritime and Jones Act awards for *future* damages, be they future lost earnings or future pain and suffering[.]" *Id.* at 97. Accordingly, I would reverse this aspect of the trial court's judgment and remand for reformation of the judgment as to interest.

For these reasons, I concur in part and dissent in part.

ERNEST L. GUIDRY AND STACEY GUIDRY	*	**DOCKET NO.: 13-C-2180-A**
VERSUS	*	**27TH JUDICIAL DISTRICT COURT**
TANNER SERVICES, LLC AND ENERGY XXI GOM	*	**PARISH OF ST. LANDRY**
	*	**STATE OF LOUISIANA**

JUDGMENT

MAY IT PLEASE THE COURT:

This matter came up for bench trial by on the merits, by regular assignment, on July 13, 2015, before the Honorable James P. Doherty, Jr., District Judge, Parish of St. Landry, 27th Judicial District, Division A.

Present in court were the following:

Plaintiffs, ERNEST L. GUIDRY and STACEY GUIDRY, represented by Blake R. David and J. Derek Aswell, Broussard & David, LLC, 557 Jefferson Street, Post Office Box 3524, Lafayette, LA 70502-3524; and

Defendants, TANNER SERVICES, LLC and ENERGY XXI GOM, represented by represented by Jonathan A. Tweedy and L. Lane Roy, Brown Sims, 650 Poydras Street, Suite 2200, New Orleans, Louisiana 70130.

Trial began on July 13, 2015, completed on July 15, 2015, and Reasons for Judgment were rendered by this Honorable Court on October 7, 2015 (attached as Ex. A). The trial court found, as detailed in the attached Reasons for Judgment, that TANNER SERVICES, LLC is liable to ERNEST LEE GUIDRY for damages totaling $3,885,911.69. The trial court found that, based on the facts and evidence, ERNEST LEE GUIDRY was a Jones Act seaman entitled to recover the following damages for this May 8, 2012 incident:

Past medical expenses:	$ 110,041.69
Future medical expenses (life care plan):	$1,030,000.00
Loss of wages and benefits:	$ 160,638.00
Loss of earning capacity:	$1,119,150.00
Loss of future benefits:	$ 166,082.00
General damages:	$1,300.000.00
TOTAL:	**$3,885,911.69**

In accordance with the trial court's verdict and its findings in its Reasons for Judgement final judgment is rendered as follows:

IT IS ORDERED AND ADJUDGED that Judgment be and is hereby rendered in favor of petitioner, ERNEST LEE GUIDRY, and against defendant, TANNER SERVICES, LLC, in the amount of $3,885,911.69 in compensatory damages.

IT IS FURTHER ORDERED AND ADJUDGED that TANNER SERVICES, LLC must pay legal interest on this $3,885,911.69 compensatory damages award from the date of the accident, May 8, 2012, until paid.

IT IS FURTHER ORDERED AND ADJUDGED that all claims of ERNEST LEE GUIDRY against ENERGY XXI arising from the May 8, 2012 incident are hereby dismissed with prejudice.

IT IS FURTHER ORDERED AND ADJUDGED that TANNER SERVICES, LLC is entitled to a credit for the past medical expenses that were paid and also for the amount paid as compensation against plaintiff's past wage loss claim.

IT IS FURTHER ORDERED AND ADJUDGED that TANNER SERVICES, LLC must pay all costs of these proceedings.

JUDGMENT READ, RENDERED AND SIGNED in Opelousas, Louisiana, this 23rd day of October, 2015.

/s/ James P. Doherty, Jr.
Honorable James P. Doherty, Jr.
District Judge, Parish of St. Landry
27th Judicial District, Division A

Respectfully Submitted,

BROUSSARD & DAVID, L.L.C.

/s/ Blake R. David

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[Certificate Of Service Omitted]

ERNEST L. GUIDRY, ET AL	DOCKET NO.: 13-C-2180-A
VERSUS	
TANNER SERVICES, LLC, ET AL	27TH JUDICIAL DISTRICT COURT
	ST. LANDRY PARISH OF LOUISIANA

REASONS FOR JUDGMENT

I. FACTS

Ernest L. Guidry was a 26 year old welder for Tanner Services, LLC ("Tanner") who was severely injured on May 8, 2012.

Tanner is a construction company who, at the time of the accident, was performing a contract to rebuild a bulkhead for Energy XXI, LLC ("Energy") at its facility in Grand Isle, Louisiana.

The evidence disclosed that Energy previously had a bulkhead at the site that had failed and Tanner had been awarded the contract at a fixed price to rebuild and/or construct a new bulkhead. The evidence further showed that Tanner was awarded the contract because the job could not have been done land side and the work would have to be done on the water. The reasons set forth for the water based operation was the limited land available to store equipment and supplies, the inability to get Tanner's work crane to site by land and the requirement that the Construction not interfere with Energy's fueling/refueling operations.

The evidence also indicated that Tanner was awarded the job because it had vessels available to work on the water and its bid provided that a tug(s) would be on site to move barges when required to allow Energy to utilize its fueling docks.

As a consequence of the construction requirements, Tanner committed three barges and two tugs to the project. One of the barges accommodated the lift crane that was essential for this project. That same barge also contained a building used as an office/break room. The other two barges were used as work platforms and to store materials and equipment.

For the project, Tanner, which had a marine division and a land division, appointed the head of its marine division, Judson Venezia ("Venezia"), as its project manager on site. Venezia was responsible for marshaling the workforce necessary to perform the work. Venezia assembled the fleet of vessels and the laborers that were necessary. Except for the tug captains and deck hands, the evidence disclosed that the remainder of the workforce came primarily from Tanner's land base division.

Prior to this job, plaintiff had been assigned as a land based welder at Tanner's yard in Eunice, Louisiana. (The evidence did disclose that the plaintiff also did prep work for this project on land at the Port of Iberia.)

Once all materials were gathered and prep worked completed, materials and equipment were loaded on Tanner barges at the Port of Iberia and moved to the

Energy site. At the work site, Energy had retained Donald Camel ("Camel") as it's "corporate man" to oversee the project. Camel's general duty was to insure that the contract was carried out according to its terms and conditions which included that the work to be done was done according to the safety rules and regulations of Energy.

Once at Grand Isle, and shortly after the work began, it was discovered that the old bulkhead had fallen into the waterway and was interfering with the construction of the new bulkhead so the scope of the project was changed. Divers were brought into to remove submerged portions of the old bulkhead but the decision was made to construct the new bulkhead further into the water (approximately twenty feet from the shoreline). The contract also changed at that time from a fixed price to time and materials.

Work to be performed constituted "stubbing in" forty-two inch diameter and sixty-four foot long "king piles" at five feet intervals and then sinking the piles to a set depth by use of a vibrating hammer. Between the king piles was metal sheeting that was welded to the king piles. Once the piping and sheeting is in place then there is the backfill upon which the dock is built. This is a typical construction for the building of a seawall. The evidence disclosed that the king piles were stored on one of the barges where final prep work was done, then lifted by crane and placed at a designated location where it was "stubbed in." Thereafter, the vibrating hammer, which weighed between 16,000 and 19,000 pounds, was placed on top of the king pile and

was turned on to drive the pile into the water bottom. The controls for the vibrating hammer were located onshore. Once the king pile was aligned with the sheet piling and set in place, the sheet pilings were welded on and the king piles driven to the appropriate depth. This was a continuous and repeating process until the bulkhead was completed.

Ernest Guidry was one of at least two welders assigned to the project. The evidence disclosed that one welder was stationed primarily on the barge and one on the water doing the welding. Evidence further indicated that the plaintiff was the welder working primarily on the water although there was testimony that he sometimes did prep work on the barges.

The welder working on water usually stood on a "fir mat" which was described as a floating raft constructed out of wood and further described as being approximately four feet in width and approximately twenty-five to thirty feet long (large enough to hold two men – one welder and one helper).

At the time of the accident, plaintiff was standing on the fir mat and the vibrating hammer was untethered on top of a king pile next to where the plaintiff was working. The vibrating hammer, for a reason never explained, came loose and fell. The vibrating hammer struck the plaintiff on the left hand, severing most of his fingers. The hammer also knocked the plaintiff into the water. Fortunately, the plaintiff was wearing a life vest and within a short period of time re-surfaced and was drug to the shore where he was attended to and

thereafter taken to the hospital. The plaintiff, Ernest Lee Guidry, suffered the following injuries:

1. Full or partial amputation of four of his fingers;
2. A concussion;
3. A crushed left foot diagnosed as a lisfranc fracture;
4. Herniated disc at the C5-C6 and C6-C7 level;
5. Herniated disc at the L4-S-1 level;
6. General depression and post traumatic stress.

The parties stipulated the injuries occurred on navigable waters and that the five Tanner vessels were vessels for maritime law and Jones Act purposes.

This Court also notes the extensive and quality briefing that was done by both sides presenting their cases to the Court.

II. ISSUES

The threshold issue in this case is the status of the plaintiff, Ernest Lee Guidry. Defendants maintain plaintiff was a land based welder whose sole recovery is under the Louisiana Workers Compensation Act.

Plaintiff, on the other hand, maintains that he was a seaman entitled to recovery under the Jones Act, or alternatively, he has a maritime claim based on a tort,

or alternatively, that he is a Sieracki seaman, or alternatively, he has a Longshoreman Harbor Worker's claim for recovery.

The determination of the plaintiff's status will also help to bring into clearer focus the plaintiff's other claims such as the fault of the facility owner, Energy, exemplary or punitive damages and other incidental issues.

At a minimum, the parties recognize that plaintiff is entitled to recovery but which recovery is dependent upon his status.

III. LAW AND STATUS

When this case began, the undersigned stated that the issues in this case were as clear as the Mississippi River in New Orleans. This reference was primarily to the issue of status. Other jurist, more learned than this author, in addressing this type of status issue have resorted to quoting Diderot: "We have a made a labyrinth and got lost in it." *Johnson versus John F. Beasly Construction Company*, 742 Fed.2d 1054 (CA7, 1984); *McDermott International, Inc. versus Wilander*, 498 US 337 (1991), 111 S.Ct. 207.

Fortunately, the Supreme Court has, subsequent to *McDermott*, *supra*, provided some guidance to assist the courts in finding its path out of the labyrinth by determining if an injured worker is a seaman or not.

The question of seaman status under the Jones Act is normally a determination for the fact finder. 46 App. USCA Section 688(a).

In *Chandris, Inc. versus Latsis*, 115 S.Ct. 2172, 1995, AMC 1840; 132 La.Ed 2d 314, the U.S. Supreme Court fashioned two essential requirements in the test for seaman status.

The first is a broad threshold requirement that makes all maritime employees who do the ship's work eligible for seaman status.

The second requirement determines which of these eligible maritime employees have the recognized employment related connection to a vessel in navigation to make them in fact a Jones Act seaman.

If either requirement is lacking, then the injured employee is not considered a Jones Act seaman.

Chandris, *supra*, sets forth a detailed history of seaman status and how it has changed over the years, including the enactment and amending of the Jones Act and the passage of the Longshore and Harbor Workers' Compensation Act (LHWCA).

The law clearly establishes that land based employees are not included in Jones Act or general maritime law status and the distinction between Jones Act and LHWCA employees depends not on the place where the injury is inflicted but on the nature of the employee's services, his status as a member of a vessel and his relationship as such to the vessel and its operation in navigable waters.

In this case, it was stipulated Tanner was the owner of the five vessels, that the water upon which the work was being done were navigable waters and that plaintiff Guidry was within the course and scope of his employment with Tanner.

In navigating the labyrinth of seaman status, *Chandris* requires a two part test. First, an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission. Second, a seaman must have a connection to a vessel in navigation that was substantial in terms of both its duration and its nature.

The first requirement under the *Chandris* analysis is a broad inquiry, that is typically easier to satisfy than the second inquiry.

Defendants in this case argue that plaintiff fails to satisfy the first inquiry of *Chandris*. The argument submitted is that plaintiff was not a member of the crew aiding in navigation or transportation of the vessels nor did the plaintiff aid or assist in the performance of the vessel's mission.

The evidence does not indicate or prove that the plaintiff aided in the navigation or transportation of the vessel so in order to meet the first *Chandris* requirement, the plaintiff would have to prove he assisted in the mission of the vessel and it is on this point the Court's attention is focused.

Plaintiff argues the mission of the vessels was the construction of a bulkhead. Defendants argue the mission of the vessels was to provide a work platform and storage and prep area for the bulkhead construction.

Defendants argue that Tanner assembled a land based crew to accomplish a job that could have been done landside.

Plaintiff, on the other hand, presented evidence in support of their contention that the vessels were essential and necessary to first obtaining the contract for Energy and secondly, to be able to actually construct the bulkhead.

Despite defendants' argument that the mission of the vessel was limited to providing storage and a work platform, the Court is of the opposite opinion.

The focus and aim of the contract between Tanner and Energy was the construction of a bulkhead.

The function of Tanner's welders and "land crew" was to operate the equipment necessary to put the construction pieces together to complete the ultimate goal (i.e., build a bulkhead). The function of the vessels was to provide a work platform, a storage area for equipment and supplies and to maneuver equipment and supplies to least disrupt Energy's other uses of its Grand Isle facility.

It is the Court's opinion these functions joined together were parts that made up the whole of the mission and that was the construction of the bulkhead.

The Court does not accept the argument that the vessels' mission was as narrowly argued by the defendants. The Court finding that the mission of Tanner was the building of the bulkhead and further finding that the vessels were a necessary and essential part of that mission and further that the services of the plaintiff were also a part of or contributed to the mission, the Court finds that the plaintiff has met his burden of proving that he contributed to the mission of the vessels as required under the first inquiry of *Chandris*.

The more problematic inquiry in determining status is whether the plaintiff's connection to the vessel (or fleet of vessels) was substantial in terms of duration and nature.

In order to answer this inquiry, the Court is required to consider the total circumstances of the plaintiff's employment.

Prior to the project, plaintiff was clearly a land based welder working primarily at Tanner's land base yard in Eunice, Louisiana. The evidence showed that Tanner obtained the contract to construct Energy's bulkhead because Tanner had the barges and tugs necessary to perform the work as required by the owner. The evidence also disclosed that the head of Tanner's marine division, Judson Venezia, was the person in charge of the project and he was charged with assembling a work force from available Tanner personnel, which included boat captains, deck hands, crane operator, welders and roustabouts. It was this work force, as a unit, that was responsible to build the bulkhead.

The evidence further showed that the welders and roustabouts did not live on the tugs or barges, did not take their meals there and in fact only used the office on one of the barges for daily safety meetings, breaks, storage and also used two of the barges for prepping of the king and sheet piles.

The Court has already held that the mission of the vessels was the driving of the pilings and the construction of the bulkhead. In connection with that work, plaintiff, as a welder, was placed on the fir mat to assist in the placing and stubbing in of the king piles, aligning the sheet piling with the king piles and then welding the sheet piling to the king piles.

Certainly, if the work of the vessels was to construct the bulkhead, evidence showed that the work being done by the plaintiff was substantial in connection to the vessels' mission. The plaintiff, as the welder, and the crane operator are considered by the Court to be the two most important or necessary employees to construct the bulkhead.

The next requirement of the second prong of the*Chandris* inquiry is that the temperal element of duration of the contract of plaintiff to the vessels. Both parties have cited the thirty percent time general rule as enumerated in *Becker versus Tidewater*, 335 Fed.3d 388. (Plaintiff must have at least thirty percent of his time on a vessel to be considered for seaman status.) Plaintiff's argument is that from the plaintiff's own testimony (as supported by David Scobie Smith) that

at least thirty percent of the plaintiff's time was on the barge and/or the raft.

The Court is of the opinion the temporal element is not clearly shown as to how much time the plaintiff spent on the tugs and the barges as argued by plaintiff's counsel but when the time spent on the fir mat is considered, then the evidence clearly shows that at least thirty percent, and probably more than sixty-five percent of plaintiff's time would have been spent on a combination of the tugs, barges and the fir mat or raft.

Defendants argue that the fir mat was not a vessel in and of itself and with which the Court agrees. The defendants further argue that since the mat is not a vessel, the time plaintiff spent on the raft should not be considered in determining the temporal element of the second part of the second *Chandris* requirement.

Plaintiff, on the other hand, argues that the fir mat is an appurtenance to the vessel, not a vessel itself, and as an appurtenance the time spent on such should be considered in determining the duration of plaintiff's connection to the vessel. Defendants argues the fir mat was not an appurtenance.

The fir mat in question was basically a raft that was used to allow the welders to get to the level where the pilings needed to be joined together. The barges were too high above the water to allow access to the work area. The pilings were too far from the shore to allow the connection work to be done from the land. It was a necessary requirement on this project that the fir mat be utilized. When not in use, the fir mat was

stored on the barge and evidence indicated that this mat stayed with the barge because it had been used on other projects.

The Court is of the opinion that the fir mat was an appurtenance of the vessel and is considered a part of the vessel. *Parks versus Pine Bluff Sand and Gravel Company*, 97-682 (La. App. 3rd Cir., 2/18/89), 712 So.2d 905, 911; *Bell versus Dunn*, 2004-2117 (La. App. 4th Cir., 12/21/05), 924 So.2d 224.

Having found that the fir mat was an appurtenance to the vessel and as such is part of the vessel, the Court finds that the time the plaintiff spent on the fir mat is to be included in calculating the temporal element of duration to the vessel. The Court finds that including plaintiff's time on the fir mat as well as on the barge clearly establishes substantially more than thirty percent of the time the plaintiff was connected to the vessel.

Based upon the above, this Court finds that the plaintiff has met his burden of proving his status as a Jones Act seaman under the particular circumstances, facts and evidence of this case.

Further, having found plaintiff to be a Jones Act seaman and because of the finding of negligence as hereinafter set forth, this Court finds that the plaintiff's remedies under the Jones Act are exclusive of any other remedies, including general maritime claims, Sieracki seaman recovery, LHWCA recovery and Louisiana Workman's Compensation recovery.

IV. NEGLIGENCE OF TANNER

There is clear negligence on the part of Tanner. The positioning of a 19,000 pound bulky, untethered hammer on top of a forty-two inch diameter king pile and in close proximity of workers is clear negligence. Tanner's crane operator was, by testimony, considered to be an experienced operator, having done this type of construction before working on the Energy project.

Additionally, the crane operator was in charge of rigging on this job and his untying the crane cables from the vibrating hammer was a clear violation of his duties that was a proximate cause of the plaintiff's injuries.

Further, Tanner project manager testified there was a safety rule that the hammer was to be positioned two king piles from where the welder was working while not being operated. Evidence also showed that at the time of the accident the hammer was within two king piles from the plaintiff.

In *Gutierrez versus Waterman S.S. Corp.*, 373 US 206, 83 S.Ct. 1189, 10 L.Ed.2d 297 (1963), the Court stated:

> "There is no distinction in admiralty between torts committed by the ship itself and by the ship's personnel while operating it . . . "

The plaintiff proved by a preponderance of the evidence that a tort was committed as a result of the negligence of Tanner resulting in the injuries to the plaintiff.

V. NEGLIGENCE OF ENERGY

Plaintiff has argued that plaintiff has a general maritime claim against Energy regardless of his seaman status.

Plaintiff's argument on this issue appears to be predicated upon the Court finding plaintiff's remedy under the Louisiana Worker's Compensation Act; however, the Court has found seaman status as hereinabove set forth.

Having found plaintiff was working and fulfilling the mission of the vessels and that his status as a seaman was significant as to the nature and duration of the vessel's mission, it is the Court's determination that plaintiff has no claim or cause of action against Energy under the Jones Act.

Energy did not own any vessels and was not the employer of the plaintiff. Although Energy had a "company man" on the work site overseeing the work, the job was run by Tanner and their employees. There was no evidence that Energy's representative exercised any control over Tanner's method of operation. Energy's representative was tasked to do periodic inspection of the site to see that the work was being done according to contract.

The master service agreement executed between Tanner and Energy for this project provided:

> "It is expressly understood that contractor shall be and is an independent contractor and that contractor is not a servant, agent or

> employee of Energy XXI . . . Energy XXI is interested only in the results obtained and has only the general right of inspection and supervision in order to secure the satisfactory completion of any work or services. Contractor shall assign qualified personnel to carry out the operations. Energy XXI shall not have the right to direct or control the details of the work performed by contractor."

Despite contract language, the courts have determined independent status based on the following:

1. Whether there is a valid contract between the parties;
2. Whether the work being done is of an independent nature, such that the contractor may employ a non-exclusive means in accomplishing it;
3. Whether the contract calls for specific piece work as unit to be done according to the independent contractor's own methods, without being subject to control and direction of the principal, except as to the result of the services rendered;
4. Whether there is a specific price for the overall undertaking agreed upon; and
5. Whether the duration of the work is for a specific time and not subject to termination or discontinuance at the will of either side without a corresponding liability for its breach.

> *Certified Cleaning and Restoration, Inc. versus Lafayette Ins. Co.*, 67 So.3d 1277, 1281 (La. App. 5th Cir. 2001).

In this case, the Court finds that Tanner was an independent contractor both under the written terms of their agreement with Energy was well as under the facts of the relationship.

As an independent contractor, the Court finds that Energy is not vicariously liable for Tanner's tort. *Loftus versus Kuyper*, 46, 961 (La. App. 2nd Cir. 3/14/12), 87 So.3d 963.

Also, the Court finds that the exceptions to finding a principal guilty for the negligence of a contractor are not present.

The accident was caused not because of the intrinsically dangerousness of the work but because the work was carried out negligently. Further, the evidence was lacking that the principal (Energy) exercised any degree of control over the project or how the work was being performed to subject Energy to the liability of Tanner's negligence.

Plaintiff argues that Energy's representative had supervision over the safety of the property and was there to enforce Energy's safety rules and regulations; however, that was also Tanner's obligation under the contract.

Energy's representative admitted that in hindsight the methodology of untethering the vibrating hammer, while resting on a king pile, was unsafe but

at the time of the accident the representative was not present and his ability to shut down the job was actually the same authority that was available to Tanner's supervisors and crew members. In other words, Energy's representative's ability to correct any perceived unsafe practice was the same as any other person who was on the project.

VI. DAMAGES

A. Medical Issues and Costs

The evidence is clear that the plaintiff suffered severe disabling and life altering injuries.

Injuries suffering by the plaintiff include:

1. Concussion.

   Claiming loss of consciousness with attention deficit and continuing severe headaches;

2. Traumatic amputation of the index, middle, ring and small fingers of his left hand (plaintiff is right-hand dominant).

   Plaintiff has had at least two surgeries since this accident. On May 8, 2012, he underwent irrigation and debridement of the wound with closure of the wound. On September 24, 2014, he had surgery to remove two neuromas. Testimony indicated that additional surgeries for reoccurring neuromas will be necessary. Plaintiff also testified to his phantom pain that he expressed in connection with the loss of his fingers. Dr. Porubsky assigned an eighty

percent impairment of his left upper extremity and thirty-one percent of the whole body disability based upon this injury alone.

3. Displaced lisfranc fracture of the left foot.

   Plaintiff has had two surgeries in connection with this injury. First, there was a closed reduction and hardware pinning of the fracture and dislocation and a second surgery for the pin removal. Plaintiff testified as to his inability to stand, walk or run because of his foot. He described the sensation felt in his foot and his inability to wear footwear for any appreciable amount of time.

4. Herniated disc at the C5-6 and C6-7 level.

   Dr. George R. Williams, the treating orthopaedist, has recommended interior cervical discectomy and fusion surgery at both levels. Plaintiff has also followed with Dr. John Martin for pain management. Plaintiff testified he was not opposed to surgery but wanted to try alternative conservative treatment seeking relief before consenting to the surgery. Dr. Martin has performed cervical epidural injections, steroid injections, prescribed chiropractic care, has given trigger point injections and has prescribed various medications to deal with the plaintiff's pain. Dr. Martin opined that if plaintiff would follow the same regime of treatment now undergoing, he would need five to six epidural injections a year for the rest of his life. Dr. Williams, on the other hand,

opined that surgery is the preferred treatment for the plaintiff and would grant relief for some of his complaints of pain to his back.

5. Herniated disc at the L4-5 and posterior annular tear.

   Dr. Williams, as with the cervical herniation, recommended surgery. The recommended procedure is a transforaminal lumbar interbody fusion at the L4-5 level. Also, as with the cervical spine, plaintiff has been under the care of Dr. Martin for pain management with treatment consisting of chiropractic care, injections and prescription medications. Dr. Williams again is of the opinion surgery is the preferred treatment to get plaintiff relief from his pain symptoms concerning his lower back.

6. Depression and post traumatic stress.

   Plaintiff testified as to flashbacks, nightmares, suicidal thoughts and loss of self-worth and esteem. These symptoms were testified to by the plaintiff but no evidence was presented that plaintiff was undergoing any type of psychiatric or psychological counseling for these complaints.

7. Insomnia.

   Plaintiff testified as to his inability to sleep because of the injuries and the pain.

The Court finds that all of the above injuries and/or complaints are results and consequences of the accident of May 8, 2012.

The parties stipulated that plaintiff had incurred medical expenses causally related the accident of $110,041.69.

B. Future Medical Costs

Plaintiff and defendants both presented life care plans.

Pre-trial the plaintiff's life care plan called for $1,173,740.00 and the defendants' life care plan provided for future medicals of approximately $17,000.

Additionally, at trial, Dr. Gorman, plaintiff's vocational rehabilitation expert, after hearing the testimony of Dr. Martin and his recommendation concerning treatment by epidural injections, trigger point injections and medications with additional medical care, adjusted the plaintiff's expert life care plan to over $2,000,000.

This large difference in life care plans is related to the plaintiff's position that plaintiff was severely and permanently disabled, as opposed to the defendants' expert IME, that the plaintiff could return to the workforce.

After reviewing both plans and the medical information introduced and considering the testimony of the treating physicians as to the plaintiff's physical condition, it is clear that plaintiff's position is the more acceptable although the Court does not concur in Dr. Gorman's addition and recommendations of adding an

additional $1,000,000.00 to plaintiff's pre-trial life care plan.

Dr. Gorman opined that based on Dr. Martin's courtroom testimony that the epidurals given to the plaintiff, their benefit, the frequency of occurrence over the plaintiff's lifetime and adding the costs to these procedures, it would take an additional $1,000,000.00 in care for the plaintiff.

The Court finds that it was improper to add $1,000,000.00 for pain management without taking a deduction from the original life care plan of the cost of the surgery and associated costs of post-surgery rehabilitation and associated diagnostic testing.

Dr. Martin's testimony was presented as substituting the epidural spinal injections as an alternative to surgery and the injections would last over the plaintiff's lifetime.

Dr. Williams, on the other hand, testified that it was his opinion that plaintiff would medically benefit from having the cervical and lumbar surgeries and should obtain relief from pain with those procedures.

There was no testimony that the epidural injections would be required if surgery was performed.

The Court finds that the evidence fails to show plaintiff should recover both cost of surgery and lifetime epidural injections. It may be the injections will give plaintiff temporary relief and although plaintiff testified he wanted to give alternative non-surgical

options a chance, he also testified that the surgery was still a possible option for him.

The Court will award plaintiff for his lifetime care the amount set forth on plaintiff's life care plan pre-Gorman adjustments and excluding financial management costs, but adding in the cost of epidural injections and Dr. Martin's services for an additional three year period for a total life care plan of $1,030,000.

C. Loss of Earnings and Earning Capacity

At the time of the accident, plaintiff was making $43,976.03 annually. (Both economic experts used this figure in their reports.)

At the time of trial, the plaintiff had lost $139,880.00 in wages. (Dr. Boudreaux used the figure of $139,865.94). Although defendants' expert, Dr. Kenneth Boudreaux did not calculate loss of benefits in his report, he acknowledged "if the accident caused Mr. Guidry to lose fringe benefits, the cost of replacing this is part of his present economic loss," but failed to subscribe a specific value. Plaintiff's economic expert, John Theriot, did calculate plaintiff's loss of fringe benefits up to the time of trial of $20,758.

Based upon the above, the Court finds that the plaintiff has a loss wage and loss benefit claim of $160,638.

As to the loss of earning capacity or future earning, again there is a wide difference in amounts between the plaintiff's expert, John Theriot, and

defendants' expert, Kenneth Boudreaux and that is based on the methodology and assumptions used by the economists.

Mr. Theriot, in his report, presented three alternatives for the Court to consider. The first calculation used plaintiff's annual income at the time of the accident of $43,976. The second and third alternatives used wages from the Bureau of Labor statistics for welders in Louisiana at the 90th and 75th percentiles. All of Mr. Theriot's calculations were based on the assumption plaintiff would not be able to return to work and a 1% discount factor. The final calculations for loss of earnings (without loss of benefits) ranged from $1,119,000.00 to a high of $1,539,671.

Dr. Boudreaux, on the other hand, also based his calculations on the annual salary of plaintiff at the time of the accident of $43,975.32 but assessed that plaintiff could return to the workforce earning an annual salary of $18,720.00 to $27,040. Dr. Boudreaux then used these amounts and gave a range of values under discount rates of 1.14 percent to .93 percent and annual increase rates of -1% to +1% and calculated loss of earnings pre-tax from a low of $388,222.18 to a high of $759,869.26 and after-tax loss from a low of $290,542.15 to a high of $567,312.05.

Dr. Boudreaux's calculations reflect loss of income net of earnings for the plaintiff of $18,720.00 and $27,040.00 per annum. Dr. Boudreaux made no calculation on the assumption that plaintiff would not be able to return to work.

Also, Dr. Boudreaux made no calculations for loss of any fringe benefits and that may be due in part to the assumption that plaintiff would be able to earn $18,720.00 to $27,040.00 per annum.

First, the Court finds that the best evidence of the plaintiff's earning capacity is based upon his past history of earnings up to the date of accident and that the Court accepts the average annual salary of $43,976.00 as the most appropriate gauge to use in analyzing earning capacity.

Secondly, after having the medical testimony and reviewing of the medical reports in this case and after having the opportunity to view plaintiff and how this injury has affected his daily movements, the Court is not convinced plaintiff would be able to return to the workforce.

The testimony presented plaintiff as an average student who participated in shop class while in high school. There was no other evidence that plaintiff was a candidate for retraining or re-education to do sedentary type work and even if such work was available, it was not clear that the plaintiff had the capacity to perform it. The evidence did show that the plaintiff was not able to sit or stand for any appreciable amount of time to do any of the referenced alternative work as opined by the rehabilitation experts.

The Court finds that the proper assumption to be used in calculating earnings capacity and based upon the facts and proof in this case is that the plaintiff will not return to pre-accident work form. The Court is of

the opinion that this was also the conclusion of Dr. Gorman.

Based upon the above, the Court finds that John Theriot's calculation of loss of earning capacity at an annual salary at the time of the accident of $43,976.00 without any deviation for future earnings is appropriate and awards plaintiff loss of earning capacity of $1,119,150.00 and loss of fringe benefits of $166,082.

D. General Damages

The term "damages" refers to pecuniary compensation, recompense or satisfaction for an injury sustained. The most common type of damages in a delictual context is compensatory damages, which encompasses those damages designed to place the plaintiff in the position in which he would have been if the tort had not been committed.

Compensatory damages are further divided into the broad categories of special damages and general damages. Special damages are those which either must be specifically or specially pled or have a ready market value, i.e., the amount of the damages supposedly can be determined with relatively certainty. On the other hand, general damages are those which are inherently speculative in nature and cannot be fixed with mathematical certainty. Those include pain and suffering. *Wainwright versus Fontenot*, 00-0492 (La. 10/17/00), 774 So.2d 70.

The nature and the extent of the injuries is extensively catalogued and set forth in the plaintiff's pretrial and post-trial memorandums. Defendants concentrated its argument on the law of the plaintiff's status and offered little guidance on the issue of damages. The Court has previously stated that the plaintiff received horrific injuries. In fact, in its over ten years on the bench, the Court is presented with a claimant with the most severe and serious injuries it has encountered.

The traumatic amputation of four fingers was tragic but it, as a disability standing alone, would still allow an individual to function, although somewhat diminished, but overlaying that injury with a concussion, a lisfranc fracture of the foot, herniated disc at C5-6 and C6-7 and L-4-5, what you have is the plaintiff – a physical wreck.

The plaintiff and his wife testified extensively as to how this accident has affected their livelihoods. It is certainly plausible and believable that such injuries can alter a psychic as well as the daily living patterns of the individual.

What the Court recalls specifically is that plaintiff could not roll down the window on the driver's side of his truck when driving because they are manually operated and he has to reach across his body to reach the handle. He cannot open a jar without difficulty and his prior recreational activities were either curtailed or impossible.

Plaintiff continues to have stabbing pains in his foot and is limited in footwear because of the pain.

The Court has conducted its own survey of damages and finds no case that is similar with one plaintiff having all of the injuries that the plaintiff in this case has suffered.

In state court reported cases, there have been cases of amputation of one finger from $50,000.00 (partial thumb) to $45,000.00 for two fingers amputated and up to $1,500,000.00 for the loss of a small finger and a pen fixate on the ring finger. *Hughes versus Bossier Parish School Bd.*, 32, 225 (La. App. 2nd Cir. 10/29/99), 745 So.2d 816; *Williams versus Enrique*, 41, 200 (La. App. 2nd Cir. 6/28/06), 935 So.2d 269; and *Thorton versus National R.R. Passenger Corp.*, 00-2604 (La. App. 5th Cir. 11/14/01), 802 So.2d 816.

Damages for concussions have run between $20,000.00 and $25,000. *Sinon versus Nat. Casualty Comp.*, 633 So.2d 720 (La. App. 1st Cir. 1993).

A fractured foot has been awarded up to $45,000. *Thomas versus Sports City, Inc.*, 31, 994 (La. App. 2nd Cir. 6/16/99), 738 So.2d 1153.

Back surgeries with multiple levels of the spine have ranged in general damage awards from $175,000.00 to $1,750,000. *Thrasher versus Maerhofn*, 99, 375 (La. App. 3rd Cir. 11/17/99); 745 So.2d 1238; *Joseph versus Entergy*, 00, 2213 (La. App. 4th Cir. 12/13/02); 811 So.2d 54; *Cooper versus Lacoete*, 99, 1726 (La. App. 4th Cir., 1/31/01), 775 So.2d 704.

In view of the tiered injuries to the different parts of plaintiff's anatomy and the seriousness of those injuries that the plaintiff has suffered, this Court finds that the plaintiff is entitled to general damages of $1,300,000.

E. Punitive Damages

Plaintiff argues that he is entitled to recover punitive damages under general maritime law from both Tanner and Energy.

Punitive damages are meant to punish and deter and under general maritime law are recoverable upon a showing of willful and wanton misconduct by the ship owner. Usually, besides willful and wanton, the acts or omissions are usually found to be a callous disregard for the safety of others with a showing of bad faith. Simple negligence cannot form the basis for an award of punitive damages. *Poe v. PPG Indu., Inc.*, 2001-1239 (La. 6/22/01), 794 So.2nd 80.

This Court has already held Energy is not liable for plaintiff's accident.

Additionally, the Court is not convinced punitive damages are allowed under the Jones Act.

The Jones Act allows for recovery of pecuniary damages and punitive damages are not considered to be pecuniary. *Theriot versus McDermott, Inc.*, 611 So.2d 129 (La. App.. 1992).

Further in brief, plaintiff seems to have acknowledged that a Jones Act seaman cannot recover punitive damages from his employer except for possibly maintenance and cure. *McBride versus Estis Well Service*, 768 Fed.2d 387 (5th Cir. 2014).

Lastly, plaintiff argues that he is entitled to punitive damages against his employer for the failure to pay maintenance and cure.

At issue is the failure of Tanner to authorize neck and back treatment from approximately November, 2012 until February, 2013, causing plaintiff to incur approximately $14,720.49 in out-of-pocket expenses for medical treatment.

In order to obtain punitive damages from his employer, the plaintiff is required to show that the employer's conduct was willful and wanton. *Atlantic Sending Company versus Townsend*, 557 US 404, 424 (US 2009). Such conduct has to be callous and with disregard for the safety of others.

This Court finds this particular case is more analogous to the *Theriot* case, *supra*, in that both cases the status of the plaintiff was a serious issue at question.

As in this case, the Court finds that the plaintiff's status was the primary issue for which other issues became clear once determined and therefore, like in *Theriot*, *supra*, this Court refuses to find Tanner unreasonable, arbitrary or capricious in paying maintenance and cure that is due to the plaintiff.

Additionally, the additional charges plaintiff incurred and not reimbursed for appear to be obligations incurred without the knowledge of Tanner or at the least were not submitted to Tanner for prior approval. There was no proof Tanner had refused to certify plaintiff for the uncompensated treatment or that the provider notified Tanner of the services incurred.

VII. CONCLUSION

This was a case well argued, briefed and presented by both sides.

What occurred to the plaintiff is both traumatic and catastrophic, both to himself and his spouse.

The labyrinth of who is seaman or what constitutes seaman status is a maze that can only be navigated with the facts of each case. There is no bright line rule of who is and who is not a seaman. There is no definition of a seaman in the Jones Act. Triers of fact are left to make this final determination as best they can.

In this case, the Court based upon the particular facts and evidence, found plaintiff to be a Jones Act seaman. As such, other remedies posited by both sides fall by the wayside.

Further, the Court has found that the plaintiff's injuries were caused by or were the result of the negligence of his employer.

As set forth hereinabove, the Court finds that the plaintiff, Ernest Lee Guidry, is entitled to recover the following damages:

Past medical expenses	$ 110,041.69
Future medical expenses (life care plan)	$1,030,000.00
Loss of wages and benefits	$ 160,638.00
Loss of earning capacity	$1,119,150.00
Loss of future benefits	$ 166,082.00
General damages	$1,300.000.00
Total:	$3,885,911.69

The Court finds that the plaintiff is entitled to also recover legal interest from the date of the accident of May 8, 2012 until paid.

The Court also finds that the defendant Tanner is entitled to a credit for the past medical expenses that were paid and also for the amount paid as compensation to be applied against the plaintiff's loss wage claim.

All costs of these proceedings are assessed to the defendant, Tanner Services, LLC.

Counsel for the plaintiff in this matter will prepare a Judgment in accordance with these Reasons and will submit it to opposing counsel for approval as to form under the provisions of Article 9.6 of the Uniform District Court Rules.

The original Judgment will be forwarded to the Clerk of Court's Office for filing and submission to the Court for execution.

THUS DONE AND SIGNED at Opelousas, St. Landry Parish, Louisiana on this 7th day of October, 2015.

/s/ James P. Doherty, Jr.
JAMES P. DOHERTY, JR., JUDGE
Division A

THE TWENTY-SEVENTH JUDICIAL
DISTRICT COURT IN AND FOR THE
PARISH OF ST. LANDRY
STATE OF LOUISIANA

ERNEST L. GUIDRY, ET AL

VERSUS DOCKET NO 13-C-2180-A

ABC INSURANCE COMPANY, ET AL

TRANSCRIPT OF EVIDENCE

RELATING TO TRIAL ON THE MERITS

(July 13, 14, 15)

* * *

Testimony of Judson Venezia
(Rec. 340, 351)

* * *

[66] Q. And it's used as a work platform?

A. It's like a water – a scaffold in the water is what it is.

Q. Is there a certain weight limit that can be put on that – that floating mat and it will sink? Do y'all have to be mindful of how much weight y'all put on that?

A. Yes, sir.

Q. How is it moved?

A. With the crane.

Q. And then you also have ropes?

A. While it's in the water, once we put it in the water, we just use it with a rope and a man on each end. Once we drove a pipe, they had somebody on the bank pulling them away from the, uh –

Q. Did it have any self-propulsion?

A. No.

* * *

[77] Q. Okay, and Lee Guidry was one of those land guys that got reassigned to that Tanner Marine project at Energy XXI, correct?

A. Yes.

* * *

Testimony of Spencer Rounds
(Rec. 404)

* * *

[130] Q. Let me ask you this. You had enough time when you saw the hammer fall off to get off the mat and onto the bank?

A. Yeah.

Q. Could Lee have followed you off the mat?

A. Well, he'd of followed me off but it happened so quick. I was running. He could have ran to me or he could have jumped in the water.

* * *

Testimony of Ernest Guidry
(Rec. 551, 556, 586, 589, 592, 606, 607, 608, 618)

* * *

[277] Q. And you were working at Tanner when this happened?

A. Yes, sir.

Q. How long had you been at Tanner?

A. Two and a half years.

Q. Up until this 2012 Energy XXI-Tanner Marine project, were you working as basically a shop welder for Tanner on land?

A. Yes, sir, just a shop hand at the time.

Q. Okay, and you were reassigned to go work for the Tanner Marine Division for this particular job, right?

A. Yes, sir.

Q. And you had never worked on rafts or mats before this job, right?

A. No, sir.

Q. You never worked on barges or tugboats before?

A. No.

* * *

[282] Q. There was a bunch of talk about how much time you were on the water so you were still a welder on this Tanner Marine Division job, right?

A. Yes, sir.

* * *

[312] Q. Whose welding unit was out there allowing you to weld and the work that you were doing on the bulkhead?

A. The one we was using on the barge to weld the connectors, that was the one on the barge.

Q. While you were working on the bulkhead on the water, whose welding unit were you using?

A. Tanner's.

Q. And how did it – how was it located? Where was it located?

A. On the truck.

Q. Whose truck?

A. Tanner.

Q. Who drove the truck down there?

A. Me.

Q. Okay, so you drove the truck there. It had a welding unit on the back of the truck?

A. Yes, sir.

Q. What was that, a three-quarter ton, a one ton short bed?

A. Uh, one ton.

Q. And you parked it there on the land near the bulkhead?

A. Yes, sir.

Q. It was – how was it powered? How was that unit powered?

A. It had a diesel engine.

Q. So it was a self-contained unit on this truck that when you got it in place and you wanted to weld, you turned on the diesel generator and you generator the power for your welding machine?

A. Yes, sir.

Q. And you took your leads from there and you would run it to where on that bulkhead that you were working?

A. Yes, sir.

* * *

[315] Q. Five days per week and when you all would go home, how did you go home for the weekend?

A. We drive home.

Q. You would take the welding truck?

A. Yeah.

Q. Okay, that was the one you drove over there that you drove back. You got paid for your time driving?

A. Yeah.

Q. Okay, you drove there, you drove back, that was paid time for you because you were coming from where, around Ville Platte?

A. Eunice.

Q. Eunice, okay, so you would drive – what would you do with the truck for the weekend?

A. Park it at my house.

Q. And when would you go back to Grand Isle during that job, Sunday night, Monday morning?

A. Early Monday morning.

Q. And were you driving down there in that welding truck by yourself or did you have a passenger?

A. I was by myself.

Q. Had you used that truck, that welding truck, before in your work for Tanner before this Grand Isle job?

A. I think twice. Well – yeah, twice.

Q. And where was the truck normally kept if it was not in the Grand Isle job? Suppose you hadn't been there, where do they normally keep it?

A. At the shop.

Q. And the shop for Tanner was located in what town?

A. Repeat that.

Q. Where was the Tanner shop located?

A. In Eunice.

* * *

[318] Q. And when you first got to Grand Isle, you came there on the truck and not on the barge or the tugboat?

A. Yeah, in the truck.

* * *

[332] Q. And I understand the whole job lasted about three months and that – as I understand it your accident took place maybe three-quarters of the way into the job?

A. Correct.

* * *

[333] Q. Okay, otherwise at the shop you would be able to come home each day?

A. I was supposed to be a shop welder.

Q. I understand you were supposed to be a shop welder and – and you were a shop welder the bulk of the time?

A. Yeah.

Q. From time to time I think you told us they would – you'd get called out to go somewhere but the vast majority of your time was in the shop and you were able to come home after work each day?

A. Yeah.

Q. So this was the first time that you had a job where you were stationed somewhere you had to stay out for five days at a time without coming home? You were sleeping and so forth on the job?

A. Right.

Q. When you were working in the shop as a shop welder, you were paid on a 40 hour plus overtime basis?

A. Yeah, plus – we always had overtime.

Q. That's what I'm saying. In other words, you got time and a half for your overtime there just like you did in Grand Isle?

A. Yeah.

Q. Did you get the same rate of pay in the shop or when you were out of the shop, same hourly rate?

[334] A. Yeah, I got the same pay.

* * *

Q. Have you ever worked on a boat before?

A. No.

* * *

[344] Q. They talked about you were a shop welder and then you were working out here. Was it about March 26th, 2012 when you got reassigned on this water job?

A. Yes, sir.

Q. They talked about the backhoe. It had a 65 foot boom, does that sound about right? It was really long.

A. I think so.

Q. A long boom. Was that brought out by the Tanner barges?

A. Yes, sir.

Q. And that belongs to Tanner Marine?

A. Yes, sir.

Q. And you mentioned at the beginning of the job you were using the welding machines that were on the barges, right?

A. Yes, sir.

Q. So throughout the job, you used the barge welding machine when you were on the barge and you'd use the new extension you got from the land

based welding machine to reach you in the water when you were on the mat?

A. Yes, sir.

Q. And they asked you a question, "Have you ever worked on a boat before." I didn't have a – I didn't finish that preposition. You never worked on a boat before this – before this job, right?

A. No.

Q. But you did work on boats for this job?

A. Yeah.

* * *

27th JUDICIAL DISTRICT COURT

PARISH OF ST. LANDRY

STATE OF LOUISIANA

* *

ERNEST L. GUIDRY and
STACEY GUIDRY,

NO. 13-C-2180-A

VS.

ABC INSURANCE COMPANY,
ENERGY XXI and
MISSISSIPPI RIVER
EQUIPMENT COMPANY, INC.

* *

VIDEOTAPED DEPOSITION OF
SPENCER ROUNDS
(Rec. Ex. 1899-1900)

taken on Thursday May 15, 2014

Commencing at 10:42 a.m.

at the offices of

BROWN SIMS, ESQS.

650 Poydras Street

Suite 2200

New Orleans, Louisiana 70002

Reported By: MARYBETH E. MUIR, CCR, RPR

* *

* * *

[99] Q. You're telling me that the mat touched the piling and touched the land?

(Witness indicating.)

A. On a 45 like this.

Q. Okay:

So you were able to run, walk on the mat [100] touching the piling and get to land without any problem?

A. If I wouldn't, I would have fallen in that water with him.

Q. Did y'all consider that mat kind of like a walkway between the land and the piling?

A. Yeah.

* * *

27TH JUDICIAL DISTRICT COURT

PARISH OF ST. LANDRY

STATE OF LOUISIANA

ERNEST GUIDRY, ET AL Plaintiffs,	*	
VERSUS	*	No. 13-C-2180-A
ABC INSURANCE COMPANY, ET AL Defendant.	*	

* *

(Rec. Ex. 1852)

The deposition of ERNEST GUIDRY, taken in connection with the captioned cause, pursuant to the following stipulations before Betty C. Minton, RPR, CCR, LCR, at the offices of Broussard & David, 600 Jefferson Street, Suite 700, Lafayette, Louisiana, on the May 13, 2014, beginning at 10:00 a.m.

* * *

[60] Q. And just for clarification, you said your welding pack was in the truck. You brought that from home or from the Eunice site?

A. From the Eunice site.

Q. And y'all left it in the truck while you were staying at Energy 21?

A. Yeah.

Q. So you at least had to bring that truck out to the site every time you went to work –

A. Yeah.

* * *

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. III, § 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States, – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

* * *

Jones Act § 30104. Personal injury to or death of seamen.

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