No. 09-73328

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

AMERICAN MARINE CORPORATION

and

COMMERCE & INDUSTRY INSURANCE COMPANY/CHARTIS INSURANCE,
Petitioners,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

and

MATTHEW BOWES,
Respondents.

On Petition for Review of a Final Order
Of the Benefits Review Board

BRIEF FOR THE FEDERAL RESPONDENT

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BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case arises from a claim filed by Matthew Bowes for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950

("Longshore Act" or "Act"). The Administrative Law Judge ("ALJ") had jurisdiction to hear the claim pursuant to sections 19(c) and (d) of the Act, 33 U.S.C. § 919(c), (d). The ALJ's Decision and Order awarding Bowes benefits, dated August 14, 2008, Excerpts of Record ("ER") 8, was filed in the office of the District Director on August 19, 2008.

On September 4, 2008, within the thirty-day period provided by section 21(a) of the Act, 33 U.S.C. § 921(a), American Marine Corporation and its insurer, Commerce and Industry (collectively, "Employer") filed a Notice of Appeal with the Benefits Review Board ("BRB" or "Board"). ER 597. This appeal invoked the Board's review jurisdiction pursuant to section 21(b)(3) of the Act, 33 U.S.C. § 921(b)(3).

On August 21, 2009, the Board issued its Decision and Order, affirming the ALJ's decision. ER 1. Aggrieved by the decision, the Employer filed its petition for review with this Court on October 19, 2009, within the sixty-day period prescribed by section 21(c) of the Act, 33 U.S.C. § 921(c). The Board's order is final pursuant to section 21(c) because it completely resolved all issues presented. *See Bish v. Brady-Hamilton Stevedore Co.*, 880 F.2d 1135 (9th Cir. 1989). Bowes was injured in the State of Hawaii, within this Court's territorial jurisdiction. ER 445. Thus, pursuant to section 21(c) of the Longshore Act, this Court has jurisdiction over the Employer's petition for review.

STATEMENT OF THE ISSUES

Did the ALJ and Board correctly find that Bowes was not a "member of a crew of any vessel" and was therefore covered under the Longshore Act?

STATEMENT OF THE CASE

Bowes was injured on May 31, 2006, while working for the Employer. ER 443-46. He filed a claim for compensation under the Longshore Act. The Employer controverted that claim. ER 130. It asserted that, because Bowes held the job title "diver," he was excluded from Longshore Act coverage as a "member of a crew of any vessel" ("crew member") pursuant to 33 U.S.C. § 902(3)(G). ER 130. Instead, the Employer treated Bowes as a Jones Act seaman.[1] ER 9, 130. Under the maritime doctrines of maintenance and cure, the Employer paid Bowes $35 per day and medical benefits. ER 9.

After a hearing, the ALJ found that Bowes was not a crew member, and was covered by the Longshore Act. ER 8-25. He ordered the employer to pay compensation for temporary total disability beginning June 1, 2006, at a rate of

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[1] The Jones Act, formally known as the Merchant Marine Act of 1920, was enacted to remove the bar to negligence suits by seamen. 46 U.S.C. § 30104; *see Stewart v. Dutra Constr. Co*., 543 U.S. 481, 487 (2005).

$883.17 per week. ER 24. The Employer appealed to the Board, which affirmed the ALJ's order. ER 1-7.

STATEMENT OF FACTS

I. BOWES'S DUTIES

In 1997, Bowes was hired by the Employer on a part-time basis, and became a full-time employee in 1998. ER 38-39 at Tr. 48-49. Despite his title – diver – Bowes performed a mix of diving and non-diving duties, the latter of which included loading and unloading vessels. ER 42 at Tr. 59. Indeed, Bowes and his coworkers did enough longshore work that they referred to themselves as "stevedivers" or "divadores." ER 93 at Tr. 262-63.

A. Diving Duties

The Employer held a contract with Chevron to maintain and inspect an offshore mooring facility located 1-2 miles off the coast of Kapolei, Hawaii.[2] ER 445; ER 40 at Tr. 49-50. The contract required the Employer to inspect buoys, hoses and pipelines at the mooring facility, and to replace or repair the buoys and hoses, as well as the chains that secured the buoys to the ocean floor. ER 40 at Tr.

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[2] Oil tankers bound for Chevron's refinery moored at this facility by tying to its buoys. ER 33 at Tr. 22.

49. Most of this work required Bowes to dive, or to act as dive tender while others dove.[3] *Id.* For each dive he took part in, Bowes was transported to the mooring facility on one of the Employer's vessels, which also served as the platform for the dive. ER 75 at Tr. 189. For each trip, he spent several hours in transit. ER 13 (citing ER 42 at Tr. 64).

Bowes also dove from piers or occasionally docked boats. ER 42 at Tr. 57; ER 71 at Tr. 176-77. Many of these dives were to inspect either the pier itself or vessels that were not owned by the Employer. ER 42 at Tr. 57; ER 41 at Tr. 56. At other times, he dove to perform repair work on the Employer's vessels, repairing rudders; hatch covers for fuel, water or ballast tanks; and transducers, which indicate the speed of the vessel and the depth of the water. ER 71-72 at Tr. 176-

Dives were recorded in dive logs, which listed the names of divers, tenders, and timekeepers, as well as the length of time each diver spent underwater and on the sea floor. ER 269-380, 388-436. The logs named the vessel from which the

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[3] Dive tenders monitored the diver's umbilical lines and air supply, and operated decompression chambers.

dive took place and its captain, or, if the dive took place from a pier, listed the pier number in place of a captain. *Id.*

B. Non-Diving Duties

Bowes was also required to perform other, non-diving duties as part of the Employer's operations at Pier 14 in Kapolei. These duties included loading and unloading vessels, including barges and whalers, as well as shop maintenance. ER 42 at Tr. 60. Loading and unloading gear and equipment was often done in the process of mobilizing or demobilizing a vessel, recorded as "MOB" or "DEMOB" on work assignment sheets.[4] ER 42 at Tr. 60; Post-Trial CX5. These loading and unloading duties required Bowes to operate forklifts, trucks, and occasionally a tractor. ER 80 at Tr. 212; Post-Trial CX5. The "shop maintenance" Bowes performed included pier and shop cleanup; welding; construction work including rigging cranes; painting; maintaining of forklifts; and cleaning, repairing and maintaining diving equipment. ER 42 at Tr. 59; ER 76 at Tr. 195. Dive equipment was cleaned after each dive, and maintained as needed. ER 76 at Tr. 195.

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[4] As Bowes testified, demobilization is the removal of gear from a vessel for storage, and mobilization is the removal of gear from storage so it can be placed on a vessel. ER 42 at Tr. 60.

II. BOWES'S INJURY

On May 31, 2006, Bowes was injured at Chevron's offshore mooring facility. He was repairing the chain that secured a buoy to the ocean floor, and had to dive to replace the "dip section" of the chain that rests on the ocean floor. ER 43-46; ER 43 at Tr. 61-62. The section of chain he was replacing, which weighed over 100 pounds, landed on Bowes's knee when an ocean swell lifted the buoy and shifted the chain. ER 13, 43 at Tr. 61-62. As a result, Bowes injured his right knee and back. *Id.*

BACKGROUND

I. LEGAL STANDARD APPLIED BY THE ALJ: THE *CHANDRIS* TEST

Before the ALJ, as here, the central dispute was whether Bowes is a "member of a crew of any vessel" and therefore excluded from Longshore Act coverage. 33 U.S.C. § 902(3)(G).[5] It is well-established that the term "member of a crew" is synonymous with the term "seaman" under the Jones Act. *Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 87 (1991). Thus, the Longshore Act and the

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[5] There is no dispute that Bowes is covered by the Act if the crew member exclusion does not apply. Section 2(3) of the Act broadly defines "employee" as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker." 33 U.S.C. § 902(3).

Jones Act are mutually exclusive. *Id.*; *see also Stewart v. Dutra Constr. Co*., 543 U.S. 481, 488 (2005) (the "Jones Act provides tort remedies to *sea*-based maritime workers, while the [Longshore Act] provides workers' compensation to *land*-based maritime employees.") (emphasis in original).

To determine whether Bowes was a crew member/seaman, and therefore excluded from the Longshore Act, the ALJ applied the test adopted by the Supreme Court in *Chandris, Inc. v. Latsis*, 515 U.S. 347, 370 (1995). Under the *Chandris* test, a worker is a crew member if: (1) his duties contributed to the vessel's function or the accomplishment of its mission; and (2) he had a connection with the vessel that is substantial, both in terms of (a) nature and (b) duration. *Chandris,* 515 U.S. at 357, 370; *see Harbor Tug & Barge v. Papai*, 520 U.S. 548, 554 (1997).[6]

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[6] "Vessel" includes not only a single ship but a group or fleet under common ownership. *Chandris*, 515 U.S. at 368. Moreover, the definition of "vessel" is very broad: "any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at the particular moment." *Stewart*, 543 U.S. at 497. A vessel need not be actually moving or navigating to be "in navigation," *id.* at 495-96, and "does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside." *Chandris*, 515 U.S. at 373. There is no dispute that the ships from which Bowes undertook dives at Chevron's mooring facility – primarily tug boats and whalers – were vessels.

The first element, contribution to a vessel's function, "is very broad." *Chandris*, 515 U.S. at 368. "All who work at sea in the service of a ship" satisfy it. *Id.* (quoting *McDermott Int'l v. Wilander*, 498 U.S. 337, 354 (1991)). This includes "almost any workman sustaining almost any injury while employed on almost any structure that once floated or is capable of floating on navigable water." *Offshore Co. v. Robinson,* 266 F.2d 769, 771 (5th Cir. 1959).

The two-pronged "substantial connection to the vessel" element is more demanding. This requirement separates sea-based maritime workers from land-based ones, who have only a sporadic or transitory connection to a vessel in navigation. *Chandris*, 515 U.S. at 368; *Papai*, 520 U.S. at 555; *Cabral v. Healy Tibbits Builders, Inc*., 128 F.3d 1289, 1293 (9th Cir. 1997). In determining whether an employee's work is substantially connected to a vessel in nature, the focus is on "whether the employee's duties take him to sea." *Scheuring v. Traylor Bros., Inc*., 476 F.3d 781, 785-86 (9th Cir. 2007) (quoting *Papai*, 520 U.S. at 555). In making this determination, this Court examines "the specific activities or duties" of the worker in question rather than his job title. *Scheuring*, 476 F.3d at 786.

However, the mere fact that a worker performs duties that are, by nature, substantially connected to a vessel does not necessarily render that worker a seaman. "A maritime worker who spends only a small fraction of his working time on board a vessel is fundamentally land based and therefore not a member of the

vessel's crew, regardless of what his duties are." *Chandris*, 515 U.S. at 371. Thus, the second prong of the substantial connection test is "a temporal element" addressing the percentage of time a worker spends on such duties. *Chandris*, 515 U.S. at 370-72; *Papai*, 520 U.S. at 556-57. Specifically, "an appropriate rule of thumb for the ordinary case [is that a] worker who spends less than about 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

II. THE ALJ'S DECISION

Applying the *Chandris* test, the ALJ found that Bowes was not a crew member, and was therefore covered by the Longshore Act. The ALJ found that Bowes satisfied the first element of the test because Bowes's work contributed to the mission of the Employer's vessels, which was to transport divers and serve as a diving platform at Chevron's mooring facility. ER 19.

The ALJ also found that Bowes's diving and dive-tending duties – which required him to travel on the Employer's vessels for several miles and perform work undersea – were substantially related to the Employer's vessels in nature. ER 20-21. The ALJ found that Bowes's other duties were not so related because they did not take Bowes to sea.

The ALJ rejected the Employer's argument that Bowes's work loading and unloading vessels and maintaining diving equipment onshore should be considered

time spent as a seaman because the duties aided in the function of a ship. In the ALJ's view, this argument went to the first prong of the *Chandris* test – whether Bowes contributed to accomplishment of the vessel's mission – a question the ALJ had already answered affirmatively. ER 20.

He noted that the crux of the substantial connection analysis is whether the relevant duties took Bowes to sea, and found that Bowes's loading and unloading duties did not do so. *Id*. He observed, rather, that loading and unloading vessels "are the quintessential duties of a longshoreman." ER 21. Cleaning and repairing diving equipment similarly did not take Bowes to sea because those duties were performed on land. *Id.* Nor were they vessel-related, because the equipment was not a component part of any vessel but rather stored at Pier 14 and loaded onto a vessel only when needed for a dive. *Id*. The ALJ also found that Bowes did not become a crew member on the vessels he loaded after his loading duties were complete. *Id*. He further noted that, except for a brief period in late July to early August of 2005, Bowes slept ashore; that he had no seaman's papers; and that his trips to sea were infrequent and brief. ER 21.

The ALJ then turned to the temporal prong of the *Chandris* substantial connection test. The parties disputed what portion of Bowes's time was spent on those duties the ALJ found to be substantially connected to the Employer's vessels in nature (*i.e.* diving and dive-tending, including time spent aboard ship traveling

to and from dive sites). On this issue, the ALJ found Bowes to be "very credible," ER 15, and gave his testimony concerning his various job duties and the hours he spent performing them "great weight." ER 16. By contrast, he described the testimony of Employer witness James Santo as "much less credible than the Claimant's," and "unreliable," largely because Santos's dive logs were inconsistent with Bowes's pay stubs. ER 16. The ALJ treated the testimony of Employer witness Roger Nall as "untrustworthy" and "less credible" because it was based exclusively on Santos's inaccurate documents. ER 17.

Relying on Bowes's testimony, pay stubs, and accompanying evidence, the ALJ found that Bowes spent only between 21.3 and 23.6 percent of his time performing sea-based or vessel-related duties. ER 22.[7] As this was below the thirty percent threshold set forth in *Chandris*, the ALJ found that Bowes's

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[7] The ALJ considered the one-year period prior to Bowes's injury, June 1, 2005 through May 31, 2006. ER 13. Although the parties submitted a series of spreadsheets covering all of 2005 and up to May 31, 2006, the ALJ wanted to be able to verify as much of the information in the spreadsheets as possible against Bowes's weekly paystubs. *Id.* Because there were four missing paystubs from the first half of 2005, and only two in the full-year period prior to the injury, the ALJ chose to use the period with fewer missing paystubs. ER 12. Notably, the ALJ used the same one-year period to determine Bowes's average weekly wage, the basis of his compensation rate, under section 10(c) of the Act, 33 U.S.C. § 910(c). ER 22-24.

connection to the Employer's vessels was not substantial in duration and, consequently, that he was not a crew member. *Id*. He therefore awarded benefits under the Longshore Act.

III. THE BOARD'S DECISION

The Board noted that whether a worker is a seaman is a mixed question of law and fact, and "[i]f reasonable persons, applying the proper legal standard, could differ as to whether the employee was a 'member of the crew' it is a question for the [fact-finder]." ER 6 (quoting *Chandris*, 515 U.S. at 369). It affirmed the ALJ's finding that Bowes's job incorporated the duties of both divers and longshoremen, ER 5, and held that he had correctly applied the *Chandris* test to determine that Bowes was not a crew member. ER 3-7.

SUMMARY OF ARGUMENT

Under *Chandris*, a worker is a crew member only if he spends a significant portion (in most cases, at least thirty percent) of his time aboard a vessel or in sea-based work. The Employer's primary argument is that this temporal requirement applies only to "land-based" workers seeking Jones Act coverage, and not to "sea-based" workers seeking Longshore Act coverage. This argument incorrectly assumes that a worker can be identified as land- or sea-based before the *Chandris* test is applied. The very purpose of the *Chandris* test is to determine whether a worker is land- or sea-based.

Alternatively, the employer argues that Bowes actually did spend more than thirty percent of his time in sea-based activities. The ALJ's delineation of Bowes's sea-based duties, and his conclusion that Bowes spent well under thirty percent of his work time engaged in those duties, are reasonable, consistent with controlling caselaw, and supported by substantial evidence. Accordingly, the petition for review should be denied.

STANDARD OF REVIEW

The question of whether the *Chandris* test governs this claim is a question of law over which this Court exercises *de novo* review. *Gilliland v. E.J. Bartells Co., Inc.*, 270 F.3d 1259, 1261 (9th Cir. 2001). Because the Director is the administrator of the Longshore Act, however, the Court accords "considerable weight" to his construction of the Act, and "will defer to the Director's view unless it constitutes an unreasonable reading of the statute or is contrary to legislative intent." *General Constr. Co. v. Castro*, 401 F.3d 963, 965 (9th Cir. 2005).

The question of whether the ALJ properly applied the *Chandris* test is a mixed question of law and fact. *Chandris*, 515 U.S. at 369. With regard to the ALJ's factual findings, the Court applies the substantial evidence standard of review, *Brady-Hamilton Stevedore Co. v. Director*, *OWCP*, 58 F.3d 419, 421 (9th Cir. 1995), and will affirm if those findings are supported by relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *Lockheed*

Shipbuilding v. Director, *OWCP*, 951 F.2d 1143, 1144-45 (9th Cir. 1991). The ALJ's conclusion that those facts demonstrate that Bowes is not a crew member is also entitled to deference. *Chandris*, 515 U.S. at 369 ("If reasonable persons, applying the proper legal standard, could differ as to whether the employee was a 'member of the crew,' it is a question for the [fact-finder.]").

ARGUMENT

THE ALJ AND BOARD PROPERLY APPLIED THE *CHANDRIS* TEST TO FIND THAT BOWES'S EMPLOYMENT WAS COVERED BY THE LONGSHORE ACT.

The ALJ found that Bowes was not a seaman or crew member and therefore not excluded from Longshore Act coverage. In making this determination, the ALJ properly applied the test set forth by the Supreme Court in *Chandris*. The ALJ found that Bowes met the first prong of the *Chandris* test because he contributed to accomplishing the mission of the Employer's vessels. He correctly concluded, however, that Bowes did not meet the second prong of the test because his work lacked a substantial temporal connection to a vessel in navigation.

A. The *Chandris* test governs this case.

The Employer's primary argument is that the temporal element of the Supreme Court's *Chandris* test – which requires a worker to spend a significant portion (typically thirty percent or more) of his time performing sea-based activities in the service of a vessel to be considered a "crew member" – should

apply only to "land-based" workers who assert that they are subject to the Jones Act, but not to "sea-based" workers who assert that they are subject to the Longshore Act. Pet. Br. at 28. The Employer posits that the *Chandris* test does not apply to Bowes because he was "a literal crew member" of the Employer's vessels, Pet Br. at 16, 19, 21, and his "essential duties . . . are inherently sea-based." Pet. Br. at 16. This argument is deeply flawed.[8]

The primary problem with the Employer's argument is that it assumes that workers with mixed duties can be identified as "land-based," or "sea-based" without applying the *Chandris* test. The very purpose of the *Chandris* test, however, is to distinguish land-based from sea-based workers.[9] If mixed-duty

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[8] To the extent that the Employer argues that the test need not be applied simply because of Bowes's job title, Pet. Br. at 8, the Supreme Court has rejected that argument. *Wilander*, 498 U.S. at 354; *see also* n. 12, *infra*. Likewise, if it is arguing that Bowes is automatically a crew member because he was injured on actual navigable waters, Pet. Br. at 16, 28-29, the Court has rejected that argument, as well. *Chandris*, 515 U.S. at 360-61 (recognizing that land-based workers remain covered by the Longshore Act even if injured on a vessel in navigation); *see also Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 300 n.4 (1983) (same); *Parker v. Motor Boat Sales, Inc.*, 314 U.S. 244, 244-45 (1941) (same).

[9] Indeed, the *Chandris* Court itself recognized this. *See* 515 U.S. at 368 ("The fundamental purpose of this substantial connection requirement is . . . to separate sea-based maritime employees who are entitled to Jones Act protection from . . . land-based workers[.]").

workers were so easy to categorize, the Court would not have found it necessary to devise a test for distinguishing between them. Nothing in *Chandris* or its progeny suggests that the test applies only to claimants seeking Jones Act coverage (by proving that they are "seamen") and not to those seeking Longshore Act coverage (by proving that they are not "crew members").

Indeed, any such suggestion would be nonsensical: the question of whether a worker qualifies as a "seaman" under the Jones Act or a "crew member" under the Longshore Act is the same question. *See Wilander,* 498 U.S. at 347 ("'[M]aster or member of a crew' is a refinement of the term 'seaman' in the Jones Act; it excludes from LHWCA coverage those properly covered under the Jones Act. Thus, it is odd but true that the key requirement for Jones Act coverage now appears in another statute"). Because these inquiries are opposite sides of the same coin, they are necessarily governed by the same legal test – the one announced in *Chandris.*

A closely related problem is that the Employer's argument renders the second, temporal prong of the *Chandris* substantial connection test superfluous. If the temporal prong is inapplicable to Bowes because a portion of his work is necessarily sea-based, it is difficult to imagine why the same would not be true of *any* worker who satisfies the first prong – which asks whether the nature of an employee's work is substantially connected to a vessel in navigation. In essence,

an employee would be required to demonstrate that he is exposed to the perils of the sea, but not that he had been so exposed for any particular portion of his time.

The Supreme Court specifically repudiated this reasoning in *Chandris*. Rejecting the circuit court's suggestion that a worker's sea-based work need not be "temporally significant," 515 U.S. at 370 (quoting *Latsis v. Chandris, Inc.*, 20 F.3d 45, 53 (5th Cir. 1994)), the Court stated that "seaman status cannot be established by any worker who fails to demonstrate that a *significant portion* of his work was done aboard a vessel . . . *[s]ome workers who unmistakably confront the perils of the sea, often in extreme form, are thereby left out of the seamen's protections*." 515 U.S. at 361-62 (citation and internal quotations omitted, emphasis added); *accord id. at*. 371 ("[S]eaman status . . . necessarily includes a temporal element. A maritime worker who spends only a small fraction of his working time on board a vessel is fundamentally land based and therefore not a member of the vessel's crew, regardless of what his duties are."). To this end, the Court rejected the circuit court's suggestion that the substantial connection test was disjunctive – *i.e.*, that a plaintiff whose contribution to the function of a vessel "was substantial in terms of its duration *or* nature" was a seaman. 515 U.S. at 370. Instead, the Court explained that "we think it is important that a seaman's connection to a vessel in fact be substantial in both respects." *Id.* at 371.

None of the post-*Chandris* cases cited by the Employer is to the contrary. None of these cases holds that workers who spend just a small portion of their time actually diving from (or sailing on) ships are automatically Jones Act seaman because those activities necessarily expose the worker to the perils of the sea. As in *Chandris*, all of the cited cases recognize that a seaman's connection with a vessel must be substantial in duration as well as in nature. *Cabral*, 128 F.3d at 1292 (9th Cir. 1997) (crane operator "must have a *connection* to a vessel in navigation . . . that is *substantial* in terms of both its duration and nature") (quoting *Chandris*, 515 U.S. at 368-70); *Roberts v. Cardinal*, 266 F.3d 368, 375 (5th Cir. 2001) ("We have left no doubt that the 30 percent threshold for determining substantial temporal connection must be applied"); *Foulk v. Donjon Marine Co.*, 144 F.3d 252, 257 (3d Cir. 1998) (citing *Chandris* for the proposition that "the worker's connection to the vessel in navigation must be substantial in terms of both its duration and its nature") (internal citations omitted); *Boy Scouts of America v. Graham*, 86 F.3d 861, 864 (9th Cir. 1996) (stating that, with regard to a literal crew member, a volunteer mate, "[t]he issue . . . is with the second part of the *Chandris* test and whether Graham's connection to the vessel was substantial in terms of both its duration and its nature."); *Wisner v. Professional Divers of New Orleans*, 731 So.2d 200, 204-05 (La. 1999) (finding it "[p]articularly persuasive . . . that Wisner's work as a commercial diver placed him on vessels for ninety

percent of his work-life with [the employer], during which time he slept and ate on such vessels").[10]

Even most of the cases decided prior to *Chandris* recognize that a worker must meet a temporal requirement. *See Dean v. McKie Co.*, 771 F. Supp. 466, 471 (D. Mass. 1991). The Employer claims that the Fifth Circuit determined that commercial divers are seamen "without finding it necessary to engage in a quantitative analysis" in *Wallace v. Oceaneering Int'l*, 727 F.2d 427 (5th Cir. 1984). Pet. Br. at 29-30. Such a holding could not, of course, survive *Chandris*. However, the *Wallace* court's conclusion that the diver in question was a crew member was drawn in light of the fact that he spent ninety-five percent of his time

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[10] Contrary to the Employer's suggestion, *Wisner* did not purport to exempt divers from the requirement that they spend a significant portion of their working hours at sea. Pet. Br. at 33. It exempted divers only from establishing that all of the vessels on which they worked were owned or controlled by their employer. *See Little v. Amoco Prod. Co.*, 734 So.2d 933, 938 (La. App. 1999) ("At issue in *Wisner* was the seaman status of a commercial diver *whose employer did not own or control a vessel or fleet of vessels.*") (emphasis added). The Employer's reliance on *Roberts* is similarly misplaced, for two reasons. First, the case holds nothing about divers, since the employee in question there was a "plugging and abandonment" worker on an oil platform. 266 F.3d at 371. Second, the Court's statement about divers being deemed seamen without the necessary temporal connection came within the context of a discussion about *Wisner* and *Little*, and thus clearly refers to the diver's connection to an identifiable fleet of vessels, not the requirement that he spend a significant portion of his time in sea-based duties. *Id*. at 377-78.

at sea, eating and sleeping aboard the vessel. 727 F.2d at 436. Indeed, the court specifically distinguished Wallace from other workers whose duties included work of "a type ordinarily associated with activities based on land or fixed platforms." *Id*. at 433. Workers, for example, like Bowes.[11]

Put simply, the Employer's argument that the temporal element of the *Chandris* substantial connection test for determining whether a worker is a crew member does not apply to some workers makes no sense, and finds no support in *Chandris* or any other authority. This Court, therefore, should reject the Employer's argument, and hold that the ALJ correctly applied all of elements of the Chandris test in determining that Bowes was not a crew member.

B. <u>The ALJ's delineation between Bowes's vessel-related and non-vessel-related duties is reasonable and consistent with controlling caselaw</u>.

Alternatively, the Employer argues that the ALJ misapplied *Chandris* by improperly categorizing portions of Bowes's work as not substantially related to its

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[11] Other cases relied upon by the Employer are irrelevant because they predate *Chandris* and its now-controlling test for who is, and who is not, a seaman. *See, e.g., Kjar v. American Divers, Inc*., 851 F.Supp. 388, 393-94 (D. Haw. 1991) (holding that connection-to-vessel prong of crew member test was to be measured at the time of the diver's accident, and did not depend on the hours he worked in land- or sea-based activities) (cited in Pet. Br. at 33-34).

vessels in nature. If these duties had been properly categorized, posits the Employer, Bowes sea-related duties would exceed the thirty percent threshold. This argument should be rejected; the ALJ properly delineated Bowes's duties under the *Chandris* test.

"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." *Scheuring*, 476 F.3d at 785-86 (9th Cir. 2007) (quoting *Papai*, 520 U.S. at 555). The ALJ correctly concluded Bowes's duties related to diving from the Employer's vessels – including diving, dive-tending, and traveling to and from dive sites – were substantially connected in nature to a vessel. ER 21. These activities literally sent Bowes to sea and thereby exposed him to "the special hazards and disadvantages to which they who go down to sea in ships are subjected." *Chandris*, 515 U.S. at 370.

The ALJ also correctly found that none of Bowes's other duties did so. In fact, virtually all of his other duties were land-based. Bowes loaded and unloaded vessels, operating fork lifts, trucks, and occasionally a tractor to do so. ER 80 at Tr. 212. These are the quintessential tasks of longshoremen, not of sailors or divers. *See P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 80 (1979). He spent most of the remainder of his time in "Pier 14 shop maintenance," which included pier and shop cleanup; welding; construction work; painting; maintaining forklifts; and

cleaning, repairing and maintaining diving equipment. ER 42 at Tr. 59; ER 76 at Tr. 195. As the description "Pier 14 shop maintenance" suggests, all of these tasks were performed on a pier. They consequently did not take him to sea. This work was no more connected to a particular vessel or fleet of vessels than a typical longshoreman's or harbor worker's duties.

The fact that these duties were performed on a pier is also significant because a pier is one of the sites specifically covered by the Longshore Act. *See* 33 U.S.C. § 903(a) (The Act covers injuries and deaths resulting "from an injury occurring upon the navigable waters of the United States (including any adjoining pier[).]"). Because these tasks did not expose Bowes to the perils of the sea, and were performed on land – at a situs specifically covered by the Longshore Act – the ALJ was correct to conclude that they were not sea-based duties.

The ALJ was also correct in finding that Bowes's dives from the pier were duties within the coverage of the Longshore Act, rather than the Jones Act. Some of these dives were made to inspect piers, ER 42 at Tr. 57, which creates no connection to the Employer's vessels, and is a task not within the purview of a seaman. *See O'Hara v. Weeks Marine, Inc*., 294 F.3d 55 (5th Cir. 2001) (holding that a worker who was engaged in pier repair was not a seaman even though he spent more than fifty percent of his time aboard a barge). Other dives were made

from the pier to inspect vessels that were not owned by the Employer, and thus established no connection to the Employer's vessels. ER 41 at Tr. 56.

Bowes's remaining dives from the pier – those which did involve the Employer's vessels – also fell under the Longshore Act rather than the Jones Act because Bowes was acting as a ship repairman when he undertook them: repairing rudders; hatch covers for fuel, water or ballast tanks; and transducers, which indicate the speed of the vessel and the depth of the water. ER 71-72 at Tr. 176-77. That he was acting as a ship repairman is significant because, just as a pier is a location specifically covered by the Longshore Act, "ship repairman" is an occupation specifically covered by the Act. 33 U.S.C. § 902(3) (defining "employee" to include "a ship repairman");[12] *see also Smith v. Eastern Seaboard Pile Driving, Inc.*, 604 F.2d 789 (2d Cir. 1979) (jury found worker injured while diving to inspect a dredge was not a seaman, after which circuit court held he was

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[12] While Bowes's title was not "ship repairman," a worker's title does not determine whether or not he is crew member; the focus is on his actual duties. *See Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81, 92 (1991) (ship repairman with seaman's duties not precluded from Jones Act coverage); *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 354 (1991) (same for "paint foreman"); *Figueroa v. Campbell Indus.*, 45 F.3d 311, 313-14 (same for harbor worker) (9th Cir. 1995). Despite his "diver" title, Bowes spent a significant portion of his time in ship repair and other land-based duties.

entitled to damages for negligence under section 5(b) of the Longshore Act, 33 U.S.C. § 905(b)); *Roach v. M/V Aqua Grace*, 857 F.2d 1575, 1579 (11th Cir. 1988) (worker scraping barnacles from hull of a vessel was engaged in ship maintenance or repair, thus meeting the Longshore Act's definition of "employee").[13] Moreover, Bowes did not stay aboard any of the vessels he repaired after the repairs were complete. He was no more a crew member of the repaired vessel than any harbor worker hired to do repair work would have been.

C. <u>The ALJ's finding that Bowes spent less than thirty percent of his time in sea-based or vessel-related duties is supported by substantial evidence</u>.

Finally, the ALJ's conclusion that Bowes spent less than thirty percent of his time diving or dive-tending from the Employer's vessels, including travel to and from those dive sites, is supported by substantial evidence and should be affirmed. In determining the percentage of time Bowes spent in various duties, the ALJ relied primarily on Bowes's testimony, ER 38-199; his pay stubs, ER 138-174; and

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[13] The Employer's heavy reliance on *Scheuring*, 476 F.3d 781, in support of its argument that the ALJ misapplied the temporal prong of the *Chandris* test is unjustified. Pet. Br. at 43-44. *Scheuring*, in fact, did not discuss the temporal prong because the employer in that case conceded the issue. *Id.* at 785 ("Nor does the defendant question the 'substantial duration' component of the [*Chandris* substantial connection test]). *Scheuring* considered only whether the plaintiff's work was substantially related by nature to a vessel.

a spreadsheet that separated Bowes's work hours into two columns: duties covered by the Jones Act, and those covered by the Longshore Act, ER 243-252. Bowes's pay stubs showed the hours he spent performing duties for which he received different pay rates, including diving, tending, machinery operation (forklifts or other heavy equipment), loading barges or crane-rigging, shop work, and travel. ER 76-77 at Tr. 196-199; *see* ER 138-74 (pay stubs); ER 175-242 (pay records). The spreadsheet was originally submitted by the Employer based solely on the personal diving diary of Employer's witness James Santo. ER 12. Bowes submitted a separate version of the spreadsheet in which he amended the information by cross-referencing Santo's diary entries with his own pay stubs, as well as the testimony presented by both parties. *Id.*

The ALJ found Bowes to be "very credible and forthright in his testimony about . . . his job duties and his rates of pay," ER 15, and gave his testimony "great weight." ER 16. By contrast, he gave "Mr. Santo's testimony little weight where it conflicts with Claimant's testimony particularly on estimates of Claimant's work at sea and in the shop cleaning diving equipment." ER 16. He did so because Bowes's pay stubs demonstrated that Santo's dive logs systematically overstated the amount of time Bowes worked at sea and understated the time Bowes spent performing land-based shop and dock work. ER 16 (citing ER 46-68 at Tr. 75-161; ER 95 at Tr. 269-70.) The ALJ found the testimony of the Employer's other

witness, Roger Nall, similarly "untrustworthy" because it was based exclusively on Santo's already-impeached documents. *Id.* Such credibility determinations are the domain of the ALJ, and should not be disturbed on review. *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 1081 (9th Cir. 1988).

Having credited Bowes's testimony and documentation, the ALJ used that evidence to divide Bowes's working hours in the year prior to his injury into two categories. The first included time spent on the Employer's vessels, either performing diving duties or traveling to and from dive sites, which the ALJ found were sea-based and sufficiently connected to the Employer's vessels by nature. The second included the time Bowes spent performing duties that were either land-based or not connected to the Employer's vessels, including loading and unloading, cleaning and maintaining dive equipment, dives made from sites other than the Employer's vessels, and all other shop work that occurred on Pier 14. He found that Bowes spent between 21.3 and 23.6 percent of his time in sea-based duties.

The ALJ applied the thirty-percent rule set out in *Chandris*, found that Bowes did not meet that threshold, and correctly concluded that he was not a crew

member.[14] Because he was engaged in the type of maritime work covered by the Longshore Act, and was not a crew member, Bowes was not excluded from the Longshore Act's definition of "employee," and was, therefore, covered by the Act.

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[14] While the Employer is correct that the thirty percent requirement is not a hard-and-fast rule, but a guideline, *Chandris*, 515 U.S. at 371, it certainly cannot be said that the ALJ erred by adhering to that guideline. Indeed, the Court stated its belief in *Chandris* "that courts, employers, and maritime workers can all benefit from reference to" the standard. *Id.* Further, when applied to a diver, the test does not, as Employer suggests, require a finding that the diver spent thirty percent of his time actually diving. Pet. Br. at 37. Rather, it simply requires that he spend that portion of his time on board a vessel or in sea-based activities. Here, for instance, the ALJ included all of the time that Bowes spent being transported to and from dive sites on one of the Employer's vessels. *See* ER 22.

CONCLUSION

For the foregoing reasons, the Court should affirm the ALJ's and Board's decisions concluding that Bowes's employment was covered by the Longshore Act.

Respectfully submitted,

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STATEMENT OF RELATED CASES

The Director is aware of no related cases within the meaning of Circuit Rule 28-2.6.

s/ Matthew W. Boyle
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C)
and Ninth Circuit Rule 32-1

I certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached brief for the Federal Respondent is proportionally spaced, has a typeface of 14 points, and contains 6,621 words.

s/ Matthew W. Boyle
MATTHEW W. BOYLE

CERTIFICATE OF SERVICE

I hereby certify that on July 12, 2010, I electronically filed the foregoing Brief for the Federal Respondent with the Clerk of the Court through the appellate CM/ECF system, and that all participants in the case are registered users of, and will be served through, the CM/ECF system.

s/ Matthew W. Boyle
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