SUPREME COURT OF LOUISIANA

98-C-1755

DOUGLAS WISNER

versus

PROFESSIONAL DIVERS OF NEW ORLEANS

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL,
FOURTH CIRCUIT, PARISH OF PLAQUEMINES

TRAYLOR, Justice*

We granted this writ to determine if a commercial diver, whose employment placed him on vessels for ninety percent of his work life, is a seaman and thus entitled to Jones Act coverage. After reviewing the record and applicable law, we reverse the lower courts' finding and hold that Jones Act coverage should not be withheld based upon the fact that the vessels upon which a diver works are not under his employer's common ownership and control. Because a commercial diver's duties continuously subject him to the perils of the sea, plaintiff is properly classified as a Jones Act seaman.

FACTS AND PROCEDURAL HISTORY

On January 15, 1994, Douglas C. Wisner (Wisner), a commercial diver by trade, was employed by Professional Divers of New Orleans, Inc. (PDNO) installing anodes on platforms and repairing pipelines while working aboard Exxon's fixed platform seventy-three in the West Delta region of the Gulf of Mexico. However, approximately twenty-one hours after making a dive of 165 feet, Wisner began to feel light headed and out of breath. On January 16, 1994, Wisner was flown to shore and subsequently sought medical attention at Jo Ellen Smith Regional Medical Center in New Orleans. After receiving hyperbaric treatment, Wisner was admitted to the hospital and later treated for tachycardia, which developed while he was in the hospital.

Wisner worked for PDNO as a diver from November 1992 until January 1994. In the course of his employment, Wisner was assigned to numerous jobs, ten percent (10%) of which required him to work off of fixed platforms and ninety percent (90%) of which required him to work from vessels. With the exception of the job at issue, Wisner slept and ate on the vessels from which he was diving. Wisner worked on approximately fourteen different vessels owned by

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* VICTORY, J., not on panel. See Rule IV, Part 2, § 3.

twelve different companies while employed by PDNO.

In May 1994, Wisner filed his original petition alleging that he was a Jones Act seaman employed by PDNO at the time of his injury. PDNO then moved for summary judgment, alleging that Wisner was not a Jones Act seaman, but rather, a maritime worker who should be compensated under the Longshore and Harbor Workers Compensation Act. The trial court found that Wisner did not have a substantial connection to a vessel or fleet of vessels under some degree of common ownership or control and thus granted PDNO summary judgment, which was later affirmed by the court of appeal. Because we find Wisner faced regular exposure to the perils of the sea as a Jones Act seaman, we now reverse.

LAW AND DISCUSSION

A major body of seaman status law developed in the Court of Appeals for the Fifth Circuit in the wake of *Offshore Co. v. Robison*, 266 F.2d 769 (5th Cir. 1959). *See, Chandris, Inc. v. Latsis*, 115 S.Ct. 2172 (1995). At the time of his injury, Robison was an oil worker permanently assigned to a drilling rig mounted on a barge in the Gulf of Mexico. In sustaining the jury's award of damages to Robison under the Jones Act, the court held as follows:

> [T]here is an evidentiary basis for a Jones Act case to go to the jury: (1) if there is evidence that the injured workman was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips. *Offshore Co. v. Robison*, 266 F.2d at 779 (footnote omitted).

The first prong of the *Robison* test has both a permanency requirement and a substantiality requirement. In order to fulfill the permanency requirement, a claimant must have "more than a transitory connection" with a vessel or a specific group of vessels. *Davis v. Hill Engineering, Inc.*, 549 F.2d 314, 326 (5th Cir. 1977); *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d 240 (5th Cir. 1983), *cert. denied*, 464 U.S. 1069, 104 S.Ct. 974, 79 L.Ed.2d 212 (1984). The court's focus in this regard is "meant to deny seaman's status to those who come aboard a vessel for an isolated piece of work, not to deprive a person whose duties are truly navigational of Jones Act rights merely because he serves aboard a vessel for a relatively short period of time." *Porche v. Gulf Mississippi Marine Corp.*, 390 F. Supp. 624, 631 (E.D. La. 1975); *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d at 247; *Buras v. Commercial Testing & Eng'g*

Co., 736 F.2d 307, 310 (5th Cir. 1984). The Fifth Circuit Court of Appeal has specifically noted that this requirement should not be given a "wooden application," *Brown v. ITT Rayonier, Inc.*, 497 F.2d 234, 237 (5th Cir. 1974), and has characterized the permanency requirement as being "more frequently an analytical starting point than a self-executing formula." *Brown v. ITT Rayonier, Inc.*, 497 F.2d at 237; *Buras v. Commercial Testing & Eng'g Co.*, 736 F.2d at 310. For a claimant to satisfy the substantial work requirement of *Robison*, "it must be shown that he performed a significant part of his work aboard the vessel with at least some degree of regularity and continuity." *Barrios v. Engine & Gas Compressor Services, Inc.*, 669 F.2d 350, 353 (5th Cir. 1982); *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d at 246. Since *Barrett v. Chevron, U.S.A., Inc.*, 781 F.2d 1067 (5th Cir. 1986), the Fifth Circuit has consistently analyzed the problem in terms of the percentage of work performed on vessels for the employer in question, and has declined to find seaman status where the employee spends less than 30 percent of his time aboard ship. *Chandris, Inc. v. Latsis*, 115 S.Ct. 2172, 2189 (1995). The substantial connection requirement may be used to distinguish between sea-based employees and land-based employees, as land-based employment is inconsistent with Jones Act coverage. *Harbor Tug & Barge Co. v. Papai*, 117 S.Ct. 1535, 1542-43 (1997).

The second prong of the *Robison* two-part test for determining seaman status under the Jones Act, that an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission, is easily met. The United States Supreme Court has noted in both *McDermott Int'l, Inc. v. Wilander*, 111 S.Ct. 807, 817, and *Chandris* that it is not necessary that a seaman aid in navigation or contribute to the transportation of the vessel. Rather, a seaman must be doing the ship's work. *Chandris, Inc. v. Latsis*, 115 S.Ct. at 2184. Although this element is not disputed in the case at hand, seaman status is not so easily deciphered, as the jurisprudential interpretation of a seaman encompasses several factors, none of which is conclusive. *See, e.g.*, *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d at 246 (while the fact that a claimant's work places him on several different vessels does not preclude seaman status, it is relevant in making that determination).

The principle developed in *Bertrand* and *Buras*, that determination of seaman status should not be controlled by an employer's chartering arrangement, was later used in *Wallace v.*

Oceaneering Int'l, 727 F.2d 427 (5th Cir. 1984), to hold that a commercial diver has the legal protections of a seaman when a substantial part of his duties are performed on vessels. *See, Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d at 245; *Buras v. Commercial Testing & Eng'g Co.*, 736 F.2d at 312. The *Bertrand* court found Jones Act coverage should not be withheld because the vessels are not under the employer's common ownership or control, when claimants are continuously subjected to the perils of the sea and engaged in classical seaman's work. *Bertrand v. International Mooring & Marine, Inc.*, 700 F.2d at 245. The Fifth Circuit specifically held that, in light of the purposes of the Jones Act, employers will not be allowed to deny Jones Act coverage to seamen by arrangements with third parties regarding a vessel's operation or by the manner in which work is assigned. *Id.* With these principles in mind, the *Wallace* court found a commercial diver, who was employed with a diving service contractor for only several days at the time of his accident, to be a seaman. The court specifically held:

> A diver's work *necessarily* involves exposure to numerous marine perils, and is inherently maritime because it cannot be done on land. It is not, like so many offshore field occupations, an art developed in land work and transposed to a maritime setting. Oil field divers who regularly spend days or weeks at a time working, eating, and sleeping on vessels are exposed to the same hazards as other seamen. Moreover, when a diver descends from the surface, braving darkness, temperature, lack of oxygen, and high pressures, he embarks on a marine voyage in which his body is now the vessel. Before he can complete his assigned task, he must successfully navigate the seas. *Wallace v. Oceaneering Int'l*, 727 F.2d at 436. (citations omitted)

After thirty-three years of silence, the United States Supreme Court in *McDermott Int'l, Inc. v. Wilander*, 111 S.Ct. 807 (1991), considered the question of seaman status and affirmed the *Robison* requirement that a worker's duties must contribute to the function of the vessel or the accomplishment of its mission. Wilson L. Maloz, III, *Harbor Tug & Barge Co. v. Papai: The United States Supreme Court Takes a Fleeting Glance at Jones Act Seaman Status*, 72 Tul. L. Rev. 2227 (1998). However, *Wilander* did not provide a complete definition of "seaman" in that it did not address the permanent connection aspect of the *Robison* test; it simply stated that an "employment-related connection" was required. *Id.* at 2231. The Supreme Court followed *Wilander* with a ruling in *Chandris, Inc. v. Latsis*, 115 S.Ct. 2172, that solidified the test for determining seaman status. In addition to affirming *Wilander*, the court stated that a seaman's connection to a vessel in navigation, or to a group of such vessels, must be substantial in terms of both its duration and its nature. The purpose of this provision was to ensure Jones Act coverage

to true seamen, while precluding land-based workers who have only a transitory or sporadic connection to a vessel in navigation and, therefore, whose employment does not regularly expose them to the perils of the sea. *Chandris, Inc. v. Latsis*, 115 S.Ct. at 2190. The *Chandris* court poignantly stated that in defining the prerequisites for Jones Act coverage, one should focus upon the essence of what it means to be a seaman rather than allowing jurisprudential "tests" to obscure such a finding. In so doing, the court recommended that the total circumstances of an individual's employment be considered, as the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time. *Chandris, Inc. v. Latsis*, 115 S.Ct. at 2190-91.

The United States Supreme Court most recently explored the boundaries of Jones Act coverage in *Harbor Tug & Barge Co. v. Papai*, 117 S.Ct. 1535 (1997). Relying on the principles set forth in *Chandris*, the court noted that a requisite degree of common ownership or control is required when determining if an injured worker has a substantial connection to a group of vessels. *Harbor Tug & Barge Co. v. Papai*, 117 S.Ct. at 1541. However, it is contended, as found in *Papai*, that a substantial connection to a vessel or fleet of vessels is a *part* of the test for determining who is a seaman. *Harbor Tug & Barge Co. v. Papai*, 117 S.Ct. at 1542-43. This view is shared with the United States Supreme Court which found that "the total circumstances of an individual's employment must be weighed to determine whether he had a sufficient relation to the navigation of vessels and the perils attendant thereon." *Chandris, Inc. v. Latsis*, 115 S.Ct. at 2190 *citing Wallace v. Oceaneering Int'l*, 727 F.2d at 432.

Papai and *Chandris* dictate that when we determine whether the nature of Wisner's connection to vessels in navigation is substantial, we should focus on whether Wisner's duties were primarily sea-based activities. *Harbor Tug & Barge Co. v. Papai*, 117 S.Ct. at 1540; *Chandris, Inc. v. Latsis*, 115 S.Ct. at 2190-91; *Cabral v. Healy Tibbits Builders, Inc.*, 118 F.3d 1363, 1366 (9th Cir. 1997). In both cases, the Supreme Court emphasized that the purpose of the substantial connection test is to separate land-based workers who do not face the perils of the sea from sea-based workers whose duties necessarily require them to face those risks. *Id*. In sum, the formulations or "tests" employed by the various courts are simply different ways to arrive at the same basic point: the Jones Act remedy is reserved for sea-based maritime employees whose

work regularly exposes them to "the special hazards and disadvantages to which they who go to sea in ships are subjected." *Chandris, Inc. v. Latsis*, 115 S.Ct. at 2190 *citing Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104, 66 S.Ct. 872, 882, 90 L.Ed. 1099 (1946) (Stone, C.J., dissenting).

CONCLUSION

After a thorough consideration of the law and the "total circumstances" surrounding Wisner's employment with PDNO, this court holds that Wisner is a seaman under the Jones Act. Particularly persuasive is the fact that Wisner's work as a commercial diver placed him on vessels for ninety percent of his work-life with PDNO, during which time he slept and ate on such vessels. However, it is the inherently maritime nature of the tasks performed and perils faced by Wisner as a commercial diver, perhaps the most precarious work at sea, and not the fortuity of his tenure on various vessels, that makes Wisner a seaman. *Wallace v. Oceaneering Int'l*, 727 F.2d at 436. We reverse the trial court and court of appeal's finding of summary judgment in favor of PDNO, and hereby remand this case to the trial court for further proceedings consistent with this opinion.