No. 15-60634

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JAMES BAKER, JR.,
Petitioner

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR; GULF ISLAND MARINE FABRICATORS, L.L.C.,
Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT REGARDING ORAL ARGUMENT

The Director, Office of Workers' Compensation Programs, U.S. Department of Labor, agrees with the petitioner that oral argument would assist the Court in resolving the issues in this case.

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JURISDICTIONAL STATEMENT

This case involves James Baker Jr.'s claims for benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA or Longshore Act), 33 U.S.C. § 901 *et seq*., directly and as extended by the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1333(b). Administrative Law Judge (ALJ) Patrick M. Rosenow issued a decision and order denying Baker's claims on June 9, 2014. Record Excerpts (RE) at 23. Baker appealed the decision to the United States Department of Labor Benefits Review Board on July 8, 2014, within the thirty days allowed by 33 U.S.C. § 921(a). RE at 20. The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3). The Board affirmed the ALJ's denial on July 14, 2015. RE at 7. The Board's affirmance is a final decision within the meaning of 33 U.S.C. § 921(c). Baker petitioned this Court for review on September 9, 2015, within the sixty days allowed by 33 U.S.C. § 921(c). RE at 4. Thus, this appeal is timely.

Pursuant to 33 U.S.C. § 921(c), an aggrieved party may seek review of a final Board decision in the court of appeals with jurisdiction over the territory where the claimant was injured. Baker's injury occurred at Gulf Island Marine Fabricators, LLC's (Gulf Island or employer) facility in Houma, Louisiana. This Court therefore has jurisdiction over Baker's petition for review.

STATEMENT OF THE ISSUES

The Longshore Act provides workers' compensation benefits to certain maritime workers, including shipbuilders, injured in the course of their employment. As extended by the Outer Continental Shelf Lands Act, it also covers workers injured "as the result of operations conducted on the outer Continental Shelf" for the purpose of extracting oil or other resources. 43 U.S.C. § 1333(b).

Claimant/Petitioner James Baker, Jr., is a land-based marine carpenter who was injured while building a housing module at his employer's waterfront facility in Houma, Louisiana. The module Baker helped to construct was to be installed on Big Foot, an offshore oil rig that will operate on the outer Continental Shelf (OCS or the Shelf).

The ALJ rejected Baker's claim that he was a LHWCA shipbuilder, reasoning that the Big Foot oil rig was not a ship or "vessel" because it had no means of self-propulsion and was designed to be attached to the seabed and remain stationary for twenty years after being towed to the drilling location. He denied Baker's OCSLA claim because the nexus between Baker's work on land and resource extraction on the Shelf was not "substantial" as required by the Supreme Court's interpretation of the statute.

The questions presented are whether the ALJ's rulings are supported by substantial evidence and in accordance with law.

STATEMENT OF THE CASE

I. Legal Background

A. Longshore and Harbor Workers' Compensation Act

The Longshore Act "establishes a comprehensive federal workers' compensation program that provides longshoremen and their families with medical, disability, and survivor benefits for work-related injuries and death." *Howlett v. Birkdale Shipping Co.,* 512 U.S. 92, 96 (1994); *see also Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1354 (2012). Prior to 1972, the Act only covered injuries to employees (other than masters or members of a crew of a vessel) that occurred on the actual navigable waters[1] of the United States. *Dir., Office of Workers' Comp. Programs (OWCP) v. Perini N. River Assoc.*, 459 U.S. 297, 299 (1983). Longshoring operations by their nature often require employees to work on land and on water, sometimes moving back and forth between those locations many times in a given shift. To rectify this problem of employees walking in and out of coverage, Congress amended the Act in 1972. It broadened the definition of "navigable waters" to include adjoining lands that are commonly

[1] Like the Court in *Perini*, we use the phrase "actual navigable waters" to describe the situs requirement as it existed prior to 1972, which is to say injuries that occurred seaward of the land (or in a drydock). *See Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 223-24 (1969); *Southern Pac. Co. v. Jensen*, 244 U.S. 205 (1917).

used for maritime purposes (the situs requirement), and also specified that injured employees must be engaged in maritime employment (the status requirement). *Id.* Maritime employees include "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). Although Congress added the "status" requirement, it did not intend to "withdraw coverage of the LHWCA from those workers injured on navigable waters in the course of their employment, and who would have been covered by the Act before 1972." *Perini*, 459 U.S. at 315. Thus, the Act covers injuries that occur on the actual navigable waters of the United States without regard to whether the employee's work qualifies as maritime employment. *Id.* at 324. In other words, employees who are injured on the *actual* navigable waters may be covered even if they have no connection to a vessel. *See id.* (covered employee was engaged in building a sewage treatment plant when injured over navigable waters). All other employees must satisfy the "situs," 33 U.S.C. § 903(a), and "status," 33 U.S.C. § 902(3), requirements. *New Orleans Depot Servs., Inc. v. Dir., OWCP*, 718 F.3d 384, 388-89 (5th Cir. 2013) (*en banc*) (*Zepeda*).

B. Outer Continental Shelf Lands Act

The Outer Continental Shelf Lands Act extends the provisions of the Longshore Act to the "disability or death of an employee resulting from any injury

occurring as a result of operations conducted on the outer Continental Shelf for the purpose of exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources, of the subsoil and seabed of the [Shelf.]" 43 U.S.C. § 1333(b). The Supreme Court recently interpreted the phrase "injury occurring as a result of" and determined that OCSLA covers injuries that bear a "substantial nexus" to operations on the OCS, even if the injuries do not occur on the Shelf itself. *Pacific Operators Offshore, LLP v. Valladolid*, 132 S. Ct. 680 (2012) (*Valladolid*).

OCSLA's definition of the OCS includes only the "submerged lands" beneath the ocean beyond state territorial waters (which generally extend three miles from the state's shore).[2] *Valladolid*, 132 S. Ct. at 685. It does not include the ocean waters above those submerged lands, or installations attached to the seabed (*e.g.* oil platforms). *Id.* Following the Supreme Court's lead, this brief refers to the entire area beyond state waters as the OCS.

[2] 43 U.C.S. § 1301(b) provides that, in certain circumstances, a State's territory may extend three marine leagues (roughly ten miles) into the Gulf of Mexico rather than three miles. Louisiana's territory, however, extends only three miles from its coast. *See United States v. Louisiana*, 363 U.S. 1, 79 (1960) ("Louisiana is entitled to submerged-land rights to a distance no greater than three geographical miles from its coastlines[.]").

II. Factual Background

Baker was employed for eight months as a marine carpenter by Gulf Island at its waterside marine fabrication yard in Houma, Louisiana. RE at 35-36, 44. He spent all of his worktime on land building a living quarters module that was designed for use on a tension leg offshore oil platform (TLP) known as "Big Foot." RE at 35, 44. Though the quarters he constructed were designed specifically for the TLP, Baker testified that "the only thing different [between the quarters he constructed and quarters for a Navy vessel] is the sizes. Everything is the same. Everything is metal, it's just the sizes. . . . And everything is done just the same, no difference." RE at 36-37; Hearing Transcript (HT) at 53-55; 60-62. The ALJ concluded that Baker's work "was essentially the same that he would do in fabricating living quarters for a naval or private vessel or an oil rig installed on state waters." RE at 24.

Baker was injured on October 22, 2012, before construction of the living quarters was completed. CX-2; RE at 44.[3] Had he not been injured, there is a possibility that he might have assisted in integrating the living module into the larger oil platform, but that work would have been completed in Texas, not on the OCS. HT at 54-55.

[3] Gulf Island did not stipulate that Baker suffered an injury but agreed that, if Baker was injured, it took place within the scope of his employment for the company. RE at 44. The ALJ did not make a finding on the issue because he ruled that Baker was not covered by the Longshore Act or OCSLA.

TLPs are a type of offshore oil platform used for deep water drilling. Big Foot's base, which is capable of floating, was built in Korea and transported on a heavy lift ship to Ingleside, Texas, where it was moored. RE at 44. As is customary in the construction of TLPs, Big Foot's component parts were fabricated separately in different locations and transported to Texas for integration with the base. Gulf Marine Fabricators, LP, a sister company to the employer in this case, fabricated Big Foot's operations modules in Aransas Pass, Texas. RE at 44. Gulf Island built the living quarters for Big Foot at its Houma facility. RE at 44. Upon completion, those living quarters were also transported to Ingleside, Texas for integration. The integration process was expected to take several months, if not years. EX-6 at 10. It had not been completed when the ALJ hearing was held in March 2014, 17 months after Baker's injury. RE at 45 (joint stipulation that Big Foot "is still under construction" in Ingleside).

Once completed, Big Foot was to be towed to a location approximately 200 miles off the coast of Louisiana and anchored to the sea floor by over 16 miles of tendons. RE at 45. Moving Big Foot to its intended location was estimated to cost over 40 million dollars, and the TLP was expected to remain in place for the productive life of the oil field, estimated at 20 years. RE at 45. While under tow,

Big Foot would be tended by a small crew employed to keep Big Foot safe during its voyage. HT at 80.[4]

Though it can float, Big Foot does not have a raked bow,[5] a steering mechanism, thrusters for positioning on location, or any means of self-propulsion. RE at 45. According to the employer's expert, Adam Bourgoyne Jr.,[6] most TLPs are transported to their drilling location by a heavy lift ship, but Big Foot will be towed under its own buoyancy because it is too large to install on a ship. EX-6 at 7, 10.

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[4] Big Foot was completed and towed to the OCS in early 2015, well after the ALJ's decision. The tendons that would secure the rig to the seabed malfunctioned, however, and Big Foot was towed back to Texas while the cause of the malfunction was being investigated. *See Chevron to move deepwater U.S. Gulf of Mexico platform to sheltered waters following damage to installation tendons,* Press Release (June 1, 2015), available at http://www.chevron.com/chevron/pressreleases/article/06012015_chevrontomovedeepwaterusgulfofmexicoplatformtoshelteredwatersfollowingdamagetoinstallationtendons.news; Rhiannon Myers, *It's back to Texas for Chevron's Big Foot Platform*, Houston Chronicle (Oct. 14, 2015), available at http://www.houstonchronicle.com/business/energy/article/It-s-back-to-Texas-for-Chevron-s-Big-Foot-platform-6571579.php.

[5] The parties stipulated that Big Foot does not have a "raked bow," which is a type of bow that meets the waterline at an angle. RE at 44. The evidence suggests that Big Foot does not have any "bow" at all. *See* EX-2, EX-3, EX-4, EX-5 (photos of the floating portion of Big Foot showing a square bottom with no discernible "front").

[6] Dr. Bourgoyne is a registered professional petroleum engineer with over 45 years of experience in the oil and gas industry. He holds a BS, MS and Ph.D. in Petroleum Engineering and has been a professor emeritus on that subject at Louisiana State University since 2000. EX-6 at 4, 12.

Big Foot is classified by the U.S. Coast Guard as a floating OCS facility, and therefore it must be inspected by the Coast Guard before it can be towed to location. RE at 70. Chief Warrant Officer Joel Smith, a Coast Guard marine inspector, explained that his agency also classifies Big Foot as a non-self-propelled vessel. *Id.* He testified that he knew of no TLP that had ever been regularly used to transport cargo across the water and agreed that Bigfoot "is not designed to a practical degree for carrying people or things across water." HT at 92-3.

III. Proceedings Below

A. June 9, 2014 ALJ Decision and Order Denying Benefits

Baker filed a claim for disability benefits under the Longshore Act. He argued that he was covered by the LHWCA directly as a shipbuilder and, alternately, as extended by the OCSLA. After a formal hearing, ALJ Patrick M. Rosenow issued a decision and order denying benefits. RE at 23. The ALJ accepted the parties' stipulation that the overland facility where Baker was injured was a covered "situs." But he found that Baker was not engaged in maritime employment as a shipbuilder so as to satisfy the "status" requirement of direct LHWCA coverage.

The ALJ began his analysis of the shipbuilder question by observing that shipbuilding must involve a ship, but the Longshore Act does not meaningfully define "ship" or "vessel." RE at 26-27. He then turned to the two most recent

Supreme Court decisions applying 1 U.S.C. § 3's definition of vessel, which "includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[7] First, the ALJ looked at the characteristics of the Super Scoop dredge that was the subject of *Stewart v. Dutra Construction Co.*, 543 U.S. 481 (2005). The dredge, which had limited means of self-propulsion, navigational lights, and a captain and crew, was found to be a vessel because "in performing its work it 'carried machinery, equipment and crew over water.'" RE at 27 (quoting *Stewart*, 543 U.S. at 492). After detailing this Court's application of *Stewart*, the ALJ turned to the Supreme Court's recent decision in *Lozman v. City of Riviera Beach, Fla.*, 133 S. Ct. 735 (2013), in which the Court held that a floating home with no means of self-propulsion and a square, flat bottom was not a vessel despite the fact that it had been towed over 200 miles and was capable of being towed again. RE at 29. Because *Lozman* counsels that the definition of a vessel "must be applied in practice rather than theory[,]" the ALJ explained that a watercraft is a vessel if a

[7] 1 U.S.C. § 3 defines the term "vessel" for purposes of the Longshore Act. *See Stewart v. Dutra Construction Co.*, 543 U.S. 481, 490 (2005). The Longshore Act provision purporting to define the term is tautological. 33 U.S.C. § 902(21) ("the term *'vessel' means any vessel* upon which or in connection with" a covered employee suffers a workplace injury or death) (emphasis added).

reasonable observer "'would consider it designed to a practical degree for carrying people or things over water.'" RE at 29 (quoting *Lozman*, 133 S. Ct. at 741).

The ALJ found that Big Foot's characteristics were more similar to the floating house in *Lozman* than to the dredge in *Stewart*. Like the floating house, Big Foot will be towed to a location and has no means of self-propulsion or movement. The ALJ also noted that, like the *Lozman* floating house, the only things Big Foot will transport during the limited time when it will be mobile are "those items that are essentially part and parcel of the rig and will go no further than Big Foot itself." ALJ Decision and Order at 10.[8] Observing that Big Foot "will be mobile only to the extent required to tow it to the proper location, at which time it will become (for all practical and design purposes) totally immobile for the next 20 years[,]" he concluded that the oil rig was not a vessel and, accordingly, that Baker was not a maritime shipbuilder. *Id.*[9]

The ALJ also denied Baker's claim for coverage under the OCSLA. He noted that the Supreme Court interpreted OCSLA to require a "significant causal

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[8] Page 10 of the ALJ's decision is missing from the Record Excerpts provided to the Court. The complete decision is attached to this brief for the reader's convenience.

[9] The ALJ considered and rejected the employer's argument that Baker would not be covered by the LHWCA even if Big Foot was a vessel because it had not yet been completed when Baker was injured. The ALJ correctly pointed out that requiring a completed vessel to find coverage would render the LHWCA's coverage of "shipbuilders" superfluous. RE at 31.

link" between a claimant's injury and operations on the outer Continental Shelf to prove entitlement to benefits. RE at 30 (citing *Valladolid*). The ALJ found the required significant causal link absent here for several reasons, including the fact that there was no operational rig on the OCS when Baker was injured, that Baker and his employer would have no role in installing or operating the rig, and that the quarters Baker constructed were not unique to OCS platforms, but were typical of quarters used for other purposes, including ships and non-OCS platforms. RE at 32.

B. July 14, 2015 Benefits Review Board Order Affirming the ALJ's Denial of Benefits

The Benefits Review Board affirmed the ALJ's decision in a published opinion. RE at 7-17. Agreeing with the ALJ's conclusion that Baker must prove that he was building a "vessel" to be eligible for Longshore Act coverage as a shipbuilder, the Board summarized recent Supreme Court and Fifth Circuit law addressing 1 U.S.C. § 3's definition of a vessel. The Board noted that "[n]ot every floating structure is a vessel," and concluded that a reasonable person looking at Big Foot, which "cannot self-propel[, . . .] must be towed, and . . . will only carry those items that are part of the rig itself," would not conclude that it was designed to carry people or things over water. RE at 15. Thus, it affirmed the ALJ's finding that Baker was not covered by the Longshore Act.

The Board also affirmed, as rational and supported by substantial evidence, the ALJ's finding that Baker was not covered by OCSLA. RE at 16. The Board agreed that Baker's activities were geographically, temporally, and functionally distant from any resource-extraction operations to be conducted on the outer Continental Shelf. As a result, Baker failed to establish the significant causal link between his injury and OCS operations required by *Valladolid.*

SUMMARY OF THE ARGUMENT

The ALJ's holding that Baker is not directly covered by the Longshore Act as a maritime shipbuilder because Big Foot is not a ship or "vessel" should be affirmed. As the Supreme Court recently held, a watercraft is a vessel only if a reasonable person, looking at its physical characteristics and activities, would consider it to be designed to regularly transport people or cargo over water. *Lozman*, 132 S. Ct. at 741. The ALJ's conclusion that Big Foot fails to satisfy the *Lozman* test is amply supported by substantial evidence. Big Foot has no raked bow or means of self-propulsion. It will be towed to the drilling location and affixed to the sea floor for 20 years. The rig is not designed to transport people or cargo aside from equipment that is essentially part and parcel of Big Foot itself. It is therefore not a vessel.

The ALJ's conclusion that Baker is not covered by the Longshore Act as extended by OCSLA should also be affirmed. Baker never worked on the outer

Continental Shelf. He worked on land constructing a housing module that would be used on an OCS oil platform, but was otherwise identical to modules constructed for ships or non-OCS platforms. In light of these facts, the ALJ permissibly concluded that Baker failed to prove the "substantial nexus" between his injury and OCS resource-extraction operations that is required to bring him within OCSLA's coverage under the Supreme Court's *Valladolid* decision. The petition for review should be denied.

ARGUMENT

I. Standard of Review

In reviewing a decision of the Board, this Court's "only function is to correct errors of law and to determine if the BRB has adhered to its proper scope of review *i.e.*, has the Board deferred to the ALJ's fact-finding or has it undertaken de novo review and substituted its views for the ALJ's." *Avondale Shipyards, Inc. v. Vinson*, 623 F.2d 1117, 1119 n.1 (5th Cir. 1980). Only the ALJ is entitled to assess the weight of the evidence and the credibility of witnesses. *Ceres Gulf, Inc. v. Dir., OWCP*, 683 F.3d 225, 228 (5th Cir. 2012). The Court will not disturb the ALJ's factual findings so long as they are supported by substantial evidence. *Mendoza v. Marine Pers. Co.*, 46 F.3d 498, 500 (5th Cir. 1995). "Substantial evidence is that relevant evidence – more than a scintilla but less than a preponderance – that

would cause a reasonable person to accept the fact finding." *Dir., OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d 303, 305 (5th Cir. 1997).

With regard to questions of law, the Court's review is *de novo*. *Zepeda*, 718 F.3d at 387; *Ceres Gulf v. Cooper*, 957 F.2d 1199, 1204 (5th Cir. 1992). Although no deference is owed to the Board's rulings of law as it is not a policymaking agency, this Court "does afford *Skidmore* deference to the Director's interpretations of the LHWCA." *Avondale Indus., Inc. v. Alario*, 355 F.3d 848, 851 (5th Cir. 2003) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). "Under this approach, the amount of deference owed the Director's interpretation 'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'" *Id.* (quoting *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001)).

II. The ALJ properly concluded that Baker is not covered by the Longshore Act.

A. Baker is not a shipbuilder.

Shipbuilders are explicitly included within the Longshore Act's definition of a covered "employee," *see* 33 U.S.C. § 902(3), but the Act does not specify what "shipbuilding" entails. *Easley v. Southern Shipbuilding Corp.*, 936 F.2d 839, 843 (5th Cir. 1991), *abrogated on other grounds by* 503 U.S. 930 (1992). This Court has concluded that an employee who is "directly involved in the shipbuilding or

repair process" is a covered shipbuilder even if the employee does not personally build or repair ships. *Id.*; *see also Ala. Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 178 (5th Cir. 1977). Thus, this Court has affirmed benefits awards to various shipyard employees who do not actually build ships because their work directly furthers the employer's general shipbuilding goals. *See, e.g.*, *Easley*, 936 F.2d at 844 ("As a mechanic who repaired and maintained equipment used in the shipbuilding and repair process [Easley] supported those who actually built and repaired ships."); *Kininess*, 554 F.2d at 178 (worker injured while sandblasting a crane was covered because task "was necessary to enable [the crane] to perform its eventual function of hauling fabricated ship sections to the water's edge."); *see also Alford v. Am. Bridge Div. U.S. Steel Corp.*, 642 F.2d 807, 813 (5th Cir. 1981) (collecting additional cases).

Baker's suggestion that he satisfies this test is misplaced. *See* Pet. Br. at 18. Baker was a marine carpenter and he worked at a shipyard, but he did not spend *any* of his time building ships or performing tasks that facilitated the building of ships. *Cf. Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1221-22 (5th Cir. 1980) (finding employee who performed some maritime work covered notwithstanding the fact that the majority of his work was non-maritime). *All* of Baker's working time was spent on a single project: constructing living quarters for the Big Foot oil rig. RE at 44. Due to the singularity of his task, the ALJ properly concluded that

Baker's direct Longshore Act claim hinges on whether the module he worked on would be incorporated into a vessel. *See Alford*, 642 F.2d at 813 (carpenters who fabricated modules to be installed in vessels were shipbuilders covered under the Longshore Act).[10]

B. Big Foot is not, and never will be, a vessel.

"1 U.S.C. § 3 defines the term 'vessel' for purposes of the LHWCA." *Stewart*, 543 U.S. at 490. That statute provides that "[t]he word 'vessel' includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." To qualify as a vessel, a watercraft must be practically – not just theoretically – capable of transporting people, freight, or cargo from place to place. *Stewart*, 543 U.S. at 493, 496. Transportation does not have to be the watercraft's primary purpose, *Stewart*, 543 U.S. at 495, but "not every floating structure is a 'vessel[,]'" *Lozman*, 133 S. Ct. at 740. A reasonable person, looking at the watercraft's physical characteristics and

[10] Unlike shipbuilding, constructing an offshore oil platform is not itself a maritime activity that brings a worker within the Longshore Act's direct coverage. Even workers who repair offshore oil rigs while they are pumping oil from beneath the seabed are not maritime employees covered by the LHWCA. *Herb's Welding v. Gray*, 420 U.S. 414, 425 (1985). Note that the claimant in *Herb's Welding* was injured while repairing an oil rig operating on state waters within three miles of Louisiana's shore, so he was not covered by OCSLA either. *Herb's Welding v. Gray*, 766 F.2d 898, 900 (5th Cir. 1985). Workers injured while repairing oil platforms on the OCS itself are covered by OCSLA. *See Valladolid*, 132 S. Ct. at 691 ("we expect that employees injured while performing tasks on the OCS will regularly satisfy the [OCSLA coverage] test"); *see infra* at 25-31.

activities should consider it designed to a practical degree for carrying people or things over water. *Lozman*, 133 S. Ct. at 741. Thus, in *Lozman*, the Supreme Court held that a floating house was not a vessel, even though it had been towed over 200 miles to four different locations, because it "has no feature which might suggest a design to transport over water anything other than its own furnishings and related personal effects." *Id.* at 741; *see also id. at* 743 (A craft that is "regularly, but not primarily, used (and designed in part to be used) to transport workers and equipment over water" is a vessel; one that "was not designed (to any practical degree) to serve a transportation function and did not do so" is not).

Baker correctly concedes that Big Foot "will not be a vessel for purposes of maritime law once it is attached to the seabed." Pet. Br. at 24.[11] No reasonable person would look at an affixed oil rig and think it "capable of being used for maritime transport in any meaningful sense." *Stewart*, 543 U.S. at 496. Indeed,

[11] Baker's reliance on cases from this circuit finding mobile offshore drilling units (MODUs) to be vessels is therefore misplaced. *See* Pet. Br. at 23. Unlike Big Foot, MODUs are designed to move from place to place as they engage in extraction of natural resources. Thus, the MODU at issue in *BW Offshore USA, LLC v. TVT Offshore AS*, No. CIV-14-1052, 2015 WL 7079082 (E.D. La. Nov. 13, 2015), was built on an old oil tanker, retained its own propulsion system, and could detach from a well and relocate itself within six hours. *Id.* at *3; *see also Demette v. Falcon Drilling Co., Inc.*, 280 F.3d 492, 498 n.18 (5th Cir. 2002) ("This circuit has repeatedly held that special-purpose movable drilling rigs . . . are vessels within the meaning of admiralty law."), *abrogated on other grounds by Grand Isle Shipyard, Inc. v. Seacor Marine, LLC*, 589 F.3d 778 (5th Cir. 2009). These cases are simply inapposite here because Big Foot is not designed to remain mobile once it is in operation.

the parties stipulated that tension leg platforms like Big Foot are *not* designed to regularly transport goods or people over water. RE at 45. This conclusion is supported by decisions of this Court holding that oil production platforms with characteristics similar to Big Foot do not qualify as vessels under 1 U.S.C. § 3. *E.g.*, *Warrior Energy Services Corp. v. ATP Titan*, 551 F. App'x 749 (5th Cir. 2014) (floating oil production facility that is moored to the sea floor by connections to 12 pilings and has no means of self-propulsion is not a vessel); *Mendez v. Anadarko Petrol. Corp.*, 466 F. App'x 316 (5th Cir. 2012) (spar platform that is moored to the sea floor with six anchor moorings is not a vessel).

From its inception, Big Foot was an offshore drilling platform, not a ship. Like the floating home at issue in *Lozman*, "but for the fact that it floats, nothing about [Big Foot] suggests that it was designed to any practical degree to transport persons or things over water." *Lozman*, 133 S. Ct. at 741. Like the floating house, Big Foot has a square bottom, no raked bow (if it has a bow at all), and no means of self-propulsion or steering. RE at 44-45; *see Lozman*, 133 S. Ct. at 741. When it is under tow to its destination on the OCS, the only equipment it will be "carrying" is its own components. *See id*. at 746 (floating house was not a vessel despite the fact that it carried its own furnishings when it was towed). Further, although Big Foot will be manned by a small crew during the tow, that crew will be aboard Big Foot to ensure its safe passage – again, just like the floating home in

Lozman. HT at 80; *see Lozman*, 133 S. Ct. at 746 (floating home not rendered a vessel because it carried "personnel . . . to assure the home's safety."). And, in any event, the Big Foot was not intended to "regularly" transfer that crew and equipment over water. *Lozman*, 133 S. Ct. at 743. Big Foot is simply not a vessel.

C. Baker offers no compelling reason to extend the definition of "vessel" to include Big Foot.

Baker attempts to escape these authorities in three ways: by trying to divide Big Foot's lifespan into vessel and non-vessel phases; by pointing to the fact that the rig is subject to Coast Guard inspections and regulations; and by speculating that the decisions below, if affirmed, will leave injured workers without a remedy. None of these arguments is persuasive.

1. Big Foot's lifespan should not be bifurcated into vessel and non-vessel phases.

Baker's primary argument is that Big Foot's lifespan should be bifurcated. Under this approach, Big Foot will be a vessel during its construction and while it is towed to the drilling location. Once affixed to the seabed, however, it will transform into a non-vessel OCS platform. Pet Br. at 15, 22-30. But the Supreme Court cautioned against this approach in *Stewart*. There, the Court considered an argument that the dredge at issue was not a "vessel" when the injury occurred because it was not "in actual transit" at the time. *Stewart*, 543 U.S. at 496. It rejected that "snapshot test[,]" explaining that "[j]ust as a worker does not

'oscillate back and forth between Jones Act coverage and other remedies depending on the activity in which the worker was engaged while injured,' . . . neither does a watercraft pass in and out of [vessel status] depending on whether it was moving at the time of the accident." *Id.* at 494-95 (quoting *Chandris, Inc. v. Latsis*, 515 U.S. 347, 363 (1995)).

To be sure, it is not impossible for a watercraft to transform from a vessel to a stationary structure that is no longer practically capable of transporting passengers or cargo. But those cases involve ships or other contrivances that, while designed and originally used as a mode of transportation are repurposed and given a second life that is inconsistent with carrying goods or people from place to place. *See generally Lozman*, 133 S. Ct. at 745 ("A craft whose physical characteristics and activities objectively evidence a waterborne transportation purpose or function may still be rendered a nonvessel by later physical alterations. For example, an owner might take a structure that is otherwise a vessel (even the *Queen Mary*) and connect it permanently to the land for use, say, as a hotel."). The reverse is also possible. *Id.* ("It is conceivable that an owner might *actually use* a floating structure not designed to any practical degree for transportation as, say, a ferry boat, regularly transporting goods and persons over water.").

The problem for Baker is that Big Foot is nothing like a steamship transformed into a hotel or a floating dock transformed into an improvised ferry.

Baker has not identified any case in which a watercraft was designed to be a stationary structure yet attained vessel status for the brief period while it was towed to its intended location (much less during its construction). *Cf. Pavone v. Miss. Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995) (barge that was designed to support a floating restaurant and casino was a work platform, not a vessel, notwithstanding the fact that it had been repeatedly towed over navigable waters). Baker's position comes perilously close to the "anything that floats" is a vessel approach rejected in *Lozman*. 133 S. Ct. at 743. Baker has given no justification for such a broad expansion of coverage.

2. The fact that Big Foot is subject to inspection and regulation by the Coast Guard does not make it a vessel.

Baker also argues that Big Foot is a vessel because it is subject to inspection and regulation by the Coast Guard. Pet. Br. 24-28, 35-36. But the Coast Guard is authorized to inspect all Outer Continental Shelf facilities, including fixed oil rigs that are clearly not vessels. *See Warrior Energy Services Corp. v. ATP Titan*, 941 F. Supp. 2d 699, 703 (E.D. La. 2013), *aff'd* 551 F. App'x 749 (5th Cir. 2014); *cf. Herb's Welding*, 470 U.S. at 422 n.7 (rejecting argument that offshore drilling is maritime work because oil platforms are regulated by the Coast Guard).

The fact that Big Foot is characterized by the Coast Guard as a "non self-propelled vessel" as well as a "floating outer continental shelf facility" is simply irrelevant. RE at 70. An oil rig's status as a type of "vessel" for purposes of

certain Coast Guard regulations does not mean that it also satisfies the relevant definition of "vessel" for Longshore Act purposes. *See Mendez*, 466 F. App'x at 317-18 (spar platform held not to be a vessel despite Coast Guard classifying it as an "industrial vessel"). What matters is whether Big Foot is a "vessel" as defined by *Lozman* and its predecessors. It is not. *Supra* at 17-19; *see also* HT at 92-93 (testimony of Chief Warrant Officer Smith, a Coast Guard marine inspector, agreeing that tension leg platforms like Big Foot are neither designed nor regularly used to transport cargo or people over water).

3. Affirming the decisions below will not leave Baker or other injured workers without a remedy.

Baker also suggests that the ALJ's finding that Big Foot is not a vessel must be wrong because it allegedly leaves Baker "without a remedy in maritime law" and might also leave the crew that will ensure Big Foot's safe passage to the drilling site without remedy for injuries suffered during the trip. Pet. Br. at 14, 16, 19. As for Baker himself, his workplace injury is covered by the Louisiana Workers' Compensation Law, La. Rev. Stat. Ann. § 23:1021 *et seq.*, which provides compensation and medical benefits for employees who are injured in Louisiana. *See Bonds v. Byrd*, 765 So.2d 1205 (La. Ct. App. 2000) ("Work-related accidents that occur within Louisiana are governed by Louisiana workers' compensation law."). He is not entitled to a maritime remedy, but the same is true of most American workers.

The question of what remedies are available to those workers who will accompany Big Foot to its drilling location is not before this Court. But it is likely that any workers injured on Big Foot while it is under tow will qualify for relief under any number of laws, including the Longshore Act[12], OCSLA[13], or the Jones Act.[14] Nor are those the only possible remedies. *See generally Chandris*, 515 U.S. at 356 ("Workers not covered by the LHWCA or the Jones Act may also recover under general maritime tort principles. Injured workers who fall under neither category may still recover under an applicable state workers' compensation

[12] Even if the workers do not qualify as maritime employees for the purpose of 33 U.S.C. § 902(3)'s status test, they may be covered if injured on the actual navigable waters of the United States. *See Perini*, 459 U.S. at 324 (employee injured while building a sewage treatment plant covered because injury occurred on actual navigable waters); *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 907 (5th Cir. 1999) ("[A]ll *Perini* requires is that the claimant show that he was injured on navigable waters while in the course of his employment."); *see supra at* n. 1. Baker suggests that *Perini* leads to an "inconsistency" by treating Big Foot as a vessel when it is on actual navigable waters and a non-vessel when being constructed adjacent to those waters. Pet. Br. at 20. That is based on a misreading of *Perini*. *Perini* does not imbue every structure located in actual navigable waters with status as a vessel. Instead, it makes the status test irrelevant for injuries occurring on actual navigable waters. Thus, workers injured on Big Foot while it is on those waters may be covered by *Perini* despite the fact that the rig is not a vessel.

[13] OCSLA covers injuries bearing a "substantial nexus" to operations on the OCS for the purpose of extracting the Shelf's natural resources. *See infra* at 25-31.

[14] Big Foot itself is not a vessel in navigation, but the towboats that will pull it to the OCS undoubtedly are. If the crew that Baker alludes to can demonstrate a significant connection to those vessels, they may have a colorable claim under the Jones Act. *See Chandris*, 515 U.S. at 368 (to qualify under Jones Act, 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.").

scheme or, in admiralty, under general maritime tort principles . . . ."). There is no reason to suspect that affirming the decisions below will leave any future injured workers without a remedy.

In sum, Baker has failed to identify any justification for extending the definition of "vessel" to include Big Foot. The ALJ's ruling that he is not a shipbuilder directly covered by the Longshore Act should be affirmed.

III. The ALJ properly concluded that Baker is not covered by OCSLA.

The OCSLA extends the Longshore Act to disabilities caused by workplace injuries "occurring as a result of operations conducted on the [OCS]" for the purpose of extracting the Shelf's natural resources. 43 U.S.C. § 1333(b). The Supreme Court interpreted the "as a result of OCS operations" requirement in *Valladolid*, concluding that it only covers injuries with a "substantial nexus" to resource-extraction operations on the Shelf. 132 S. Ct. at 691.

Baker alleges that he was injured "as a result of operations" on the OCS because he was injured while constructing a housing module that would eventually be integrated into Big Foot.[15] Pet. Br. at 36. The ALJ correctly ruled otherwise. The link between Baker's work – which took place on land years before Big Foot extracted anything and was essentially identical to work performed on non-OCS projects – is too attenuated to bring him within OCSLA's ambit.

[15] Big Foot was unquestionably designed to extract natural resources on the OCS.

This is the first OCSLA coverage case to reach the courts of appeals since *Valladolid* was decided in 2012. Before *Valladolid*, there was a split in the circuits regarding the compensability of off-OCS injuries. This Court ruled that OCSLA only covers injuries that occurred on the Shelf itself. *Mills v. Dir., OWCP*, 877 F.2d 356, 362 (5th Cir. 1989) (*en banc*). The Third Circuit adopted a broader test, concluding that injuries on land are covered by OCSLA if they would not have occurred but-for operations on the OCS. *Curtis v. Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 811 (3d Cir. 1988).

The Supreme Court addressed each of these OCSLA coverage tests in reviewing the case of Juan Valladolid, a roustabout (general laborer) who spent 98 percent of his time working on the OCS, but who was killed in a forklift accident at his employer's onshore facility. *Valladolid*, 132 S. Ct. at 680. The ALJ and Board adopted this Court's test, holding that the injury was not covered because it did not occur on the OCS itself. *Valladolid v. Pacific Operations Offshore, LLP*, 604 F.3d 1126, 1130 (9th Cir. 2010) The Ninth Circuit reversed, holding that while the "operations" that caused a worker's injury must have been on the OCS, the injury itself could occur elsewhere so long as it had a "substantial nexus" to operations on the Shelf. *Id.* at 1134, 1139. The employer petitioned for certiorari and the Supreme Court accepted the case to resolve the split among the Third, Fifth and Ninth Circuits.

The Supreme Court agreed with the Ninth and Third Circuits that OCSLA does not restrict coverage only to injuries suffered on the Shelf. *Valladolid*, 132 S. Ct. at 687. Thus, it rejected the *Mills* test as inconsistent with OCSLA's language, which "plainly suggests causation." *Id.* at 690. The Court also considered the Third Circuit's more inclusive but-for causation test and concluded that it was too broad. *Id.* at 690-91. Determining that the Ninth Circuit's test most closely adhered to the statutory text, the Court adopted the "substantial nexus" test. *Id.* at 691.[16]

The Court explicitly recognized that the substantial nexus test might not be easy to administer, but nevertheless expressed confidence that ALJs and the courts "will be able to determine whether an injured employee has established a significant causal link between the injury he suffered and his employer's on-OCS extractive operations." *Id.* It noted that employees injured on the OCS will regularly satisfy the test, but "whether an employee injured while performing an off-OCS task qualifies . . . is a question that will depend on the individual circumstances of each case." *Id.*

[16] *Valladolid* was remanded for the ALJ to determine whether a substantial nexus existed between Valladolid's injury on land and operations on the OCS. *Valladolid*, 132 S. Ct. at 691. No such determination was made because the case was settled on remand.

The ALJ in this case carefully discussed *Valladolid* and the cases preceding it, and permissibly concluded that Baker had not established a substantial nexus between his work and OCS operations. RE at 30-32. First, the ALJ correctly observed that Big Foot was under construction at the time of the injury and therefore there was no rig extracting the Shelf's natural resources "operating, installed, or even in transit." RE at 32. Although a completed rig is not an absolute prerequisite to OCSLA coverage, it is surely relevant that Baker's work was to be completed long before Big Foot was expected to begin actual operations on the OCS. RE at 44-45.

Second, the ALJ accurately noted that Gulf Island – and thus Baker himself – would have no role in installing or operating Big Foot on the OCS. RE at 32. Baker's job did not require him to travel to the OCS, and he therefore was not exposed to the particular risks inherent in working offshore. Baker was, of course, not automatically precluded from OCSLA coverage by virtue of having been injured on land. But the fact that all of his work was geographically distant from any operations on the Shelf is relevant to whether a significant causal link existed between his injury and OCS operations. *See Valladolid*, 132 S. Ct. at 691 (predicting that workers injured on the OCS will "regularly satisfy" the substantial nexus test).

Finally, the ALJ properly considered the nature of Baker's work and recognized that the quarters he fabricated "were typical of living modules used for other purposes." RE at 32. Although the specific living quarters Baker constructed were destined for the OCS, the evidence suggests that they could be used for many structures with no relationship to resource-extraction on the OCS, including Navy ships and oil platforms in territorial waters. Baker testified that the building processes and skills required for these quarters were the same as those he used to construct the Big Foot housing module. RE at 35-37.

Baker is a marine carpenter. There is no evidence that he has some specialized training or expertise that suited him to work on OCS platforms specifically. The fact that these specific living quarters would end up on the OCS was largely fortuitous. This fact, like the others cited by the ALJ, is not determinative standing alone. But, again like the others, it supports the ALJ's conclusion that there is no substantial nexus between Baker's injury and resource extraction on the OCS. The Supreme Court employed similar reasoning in determining that a welder who repaired offshore platforms was not a maritime employee. *Herb's Welding*, 470 U.S. at 425 (The claimant "built and maintained pipelines and the platforms themselves. There is nothing inherently maritime about those tasks. They are also performed on land, and their nature is not

significantly altered by the marine environment[.]"). That logic is equally relevant here.

It is true, of course, that some connection exists between Baker's workplace injury and operations on the OCS. If offshore drilling did not exist, Big Foot would never have been designed and Baker would not have been working on a housing module for it. But the Supreme Court rejected this broad, but-for causation test in *Valladolid.* 132 S. Ct. at 690-91.

Baker worked constructing a crew housing module that would be towed to a separate location for incorporation into a drilling rig. The integration process was still incomplete when the hearing was held, 17 months after Baker's injury. RE at 45; *see also* EX-6 at 10. Big Foot was to be towed 200 miles to the drilling site and attached to the sea floor. Only then would the process of extracting natural resources begin. These facts, considered as a whole, demonstrate too tenuous a connection to support a finding that Baker's injury "occurred as a result of operations conducted on the outer Continental Shelf," 43 U.S.C. § 1333(b). Though his discussion is brief, the ALJ gave due consideration to the relevant circumstances of the case, finding Baker's work to be temporally, geographically, and functionally distant from operations on the OCS. His ruling should be affirmed. *See Lane Hollow Coal Co. v. Dir., OWCP*, 137 F.3d 799, 803 (4th Cir. 1998) ("An adequate explanation can be a succinct one; the APA neither burdens

ALJs with a duty of long-windedness nor requires them to assume that we cannot grasp the obvious connotations of everyday language.").[17]

Baker is not covered by the Longshore Act, either directly or as extended by OCSLA. He is not directly covered as a "shipbuilder" because the oil rig he helped to construct is not a vessel. And he is not covered by OCSLA because the link between his work on land constructing a housing module that would eventually be incorporated into Big Foot is too attenuated to satisfy the Supreme Court's "substantial nexus" test. The ALJ's rulings on these subjects were rational, supported by substantial evidence, and consistent with governing law. They should be affirmed.

[17] *Lane Hollow* arose under the Black Lung Benefits Act (BLBA), but it is instructive here because the BLBA incorporates the Longshore Act's procedural provisions, including 33 U.S.C. § 919(d), which provides that formal hearings in Longshore Act cases will be conducted in accordance with § 554 of the Administrative Procedure Act. *See* 30 U.S.C. § 932(a) (BLBA provision incorporating 33 U.S.C. § 919).

CONCLUSION

The petition for review should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 29, 2016, the Director's brief was served electronically using the Court's CM/ECF system on the Court and the following:

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ADDENDUM: JUNE 9, 2014 ALJ DECISION AND ORDER

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Issue Date: 09 June 2014

CASE NO.: **2013-LHC-1807**

OWCP NO.: **07-196286**

IN THE MATTER OF

JAMES BAKER, JR.,
Claimant

v.

GULF ISLAND MARINE FABRICATORS, LLC.,
Self Insured Employer

APPEARANCES:

WILLIAM S. VINCENT, JR., ESQ.
On Behalf of the Claimant

WILLIAM S. BORDELON, ESQ.
On Behalf of the Employer/Carrier

BEFORE: **PATRICK M. ROSENOW**
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This case arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA),[1] as extended by the Outer Continental Shelf Lands Act (OCSLA),[2] brought by Claimant against Employer.

The matter was referred to the Office of Administrative Law Judges for a formal hearing on 1 Aug 13. All parties are represented by counsel and agreed that the case should be bifurcated for an initial consideration of whether the alleged injuries fell within the coverage of either the LHWCA standing alone or as extended by the OCSLA. They also agreed that the fundamental

[1] 33 U.S.C. §§901 *et seq*.
[2] 43 U.S.C. § 1331 *et seq*.

facts relating to that question were not in dispute. On 12 Mar 14, a hearing was held at which the parties were afforded a full opportunity to call and cross-examine witnesses, offer exhibits, make arguments, and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:[3]

Witness Testimony of
Claimant
Joel Smith

Exhibits

Claimant's Exhibits (CX) 1-3
Employer's Exhibits (EX) 1-6

My findings and conclusions are based upon the stipulations of counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

FACTUAL BACKGROUND[4]

Employer's facility in Houma, Louisiana straddles the Houma Navigation Canal, a navigable water with a 15 foot depth and direct access to the Gulf of Mexico. At its facility, Employer is in the business of constructing and repairing vessels and specialized maritime oil and gas structures, including jack barges and large tug boats. One of Employer's projects was to fabricate the topside living quarters for the tension leg platform, *Big Foot.*

Employer hired Claimant to work as a marine carpenter in the fabrication of those living quarters. His entire employment was spent on that project. His work was within 100 yards of the canal, but he always worked on dry land. In his eight months of employment, there were two or three occasions on which he was required to take a boat for a 10-15 minute ride across the canal to attend a meeting or function at Employer's facility on that side. The work Claimant did as a carpenter was essentially the same that he would do in fabricating living quarters for a naval or private vessel or an oil rig installed on state waters. Claimant's alleged injury occurred before the fabrication of the quarters was finished. If Claimant was injured as he alleges, it was in the course and scope of his work fabricating the living quarters.

Big Foot is a tension leg platform which remains under construction. The floating (hull) portion of the structure was built in Korea and transported to Ingleside, Texas by a heavy lift ship. The topside operations modules for *Big Foot* were fabricated in Port Aransas, Texas. The living quarters were transported to Ingleside by barge to be integrated with the floating hull

[3] I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.
[4] EX-1 contains the stipulations of the parties, which I hereby incorporate by reference as part of my factual findings.

structure from Korea. The operations modules were similarly transported 7 miles on inland waterways to Ingleside for integration.

Integration can take a couple of years. For its purposes, the Coast Guard defines *Big Foot* as a non-self-propelled vessel. Before personnel may be housed on *Big Foot* and before it can move offshore, the Coast Guard must inspect and test it for seaworthiness and safety and issue a temporary certificate of inspection. The temporary certificate of inspection also limits the number of people that can safely be aboard and specifies who must have a license. Once *Big Foot* leaves, it is required to be continuously manned by an offshore installation manager (OIM). The OIM is a Coast Guard licensed individual whose responsibilities and duties are exactly the same as a captain on a ship. *Big Foot* will have a required compliment of crew on board. That includes a Coast Guard licensed Ballast Control Officer and bar supervisors along with Coast Guard certified crew members who must be up-to-date on how to launch lifeboats.

Once integration and inspections are complete, *Big Foot*, under independent buoyancy—but with no raked bow or means of self-propulsion, positioning, or steering—will be towed to Walker Ridge Block 29, which is more than 200 miles off the coast of Louisiana. Employer will have no role in moving or installing *Big Foot*.

It will be anchored to the sea floor approximately 5,000 feet below by 16 miles of tendons. *Big Foot* will remain stable because the tendons will be pulled taut by its buoyancy. The installation onto the ocean floor and initiation of production is a highly complex, difficult and lengthy process that can cost in excess of 40 million dollars. Once fixed, it will serve as a work platform in that location for an estimated 20 years.

Tension leg platforms are used in extracting and transporting oil from the outer continental shelf and are not designed to be used to regularly transport goods or people. The equipment and other items that *Big Foot* will carry with it when it is towed to its location will be for its own use in attaching to the sea floor and beginning operations.

ISSUES & POSITIONS OF THE PARTIES

The only issue for adjudication is whether Claimant's alleged injury would come within the coverage of the LHWCA/OCSLA. Claimant argues first that, at least until it is installed at its destination in the Gulf, *Big Foot* is a vessel. Since he was employed within yards of a navigable water to help construct that vessel at the time of his injury, he was engaged in maritime employment and comes within the LHWCA. In the alternative, Claimant submits that even if *Big Foot* is not a vessel, his injury occurred in the construction of a rig that would be used for extracting natural resources from the outer continental shelf. Therefore, Claimant argues, he would be covered by the OCSLA.

Employer responds that Claimant was not engaged in maritime employment. It argues that his activity in building living quarters that could be used in a variety of ways was not maritime, even if the quarters were to be installed on a vessel. However, Employer also maintains that *Big Foot* is not a vessel. Finally, Employer maintains that given the facts,

Claimant's employment was far too attenuated from actual outer continental shelf operations to be covered by the OCLSA.

LAW

A claim is presumed covered by the Act in the absence of substantial evidence to the contrary.[5] The presumption is rebuttable, but the initial burden of establishing jurisdiction does not rest with the claimant.[6]

LHWCA

The LHWCA applies to "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…"[7] whose "disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)."[8] The maritime employment provision is commonly referred to as the status requirement and the navigable waters provision is commonly referred to as the situs requirement.[9] "In order to demonstrate coverage under the Act, a worker must satisfy both a situs and a status test; in the words of the statute, he must show that, at the approximate time of his injury, he was 'engaged in maritime employment,' and that his injury 'occurr[ed] upon the navigable waters of the United States[.]'"[10]

Status

To establish status, a longshore claimant must show that his injury occurred in the course of his employment within Section 902(2) and that he was not a member of a crew of a vessel or within the other exceptions of Sections 902(3) and 903(a).[11]

To come within the statutory definition of a shipbuilder, an employee need not be involved in the actual and final fabrication of a ship as long as he is engaged in or directly involved with an ongoing shipbuilding operation.[12] That the work being done by the employee might also be similar to work done in a context with no maritime nexus is not fatal to the shipbuilding claim. The question is whether his activities "directly furthered the shipbuilding goals of his employer[,]" since "it is difficult to conceive of an activity more fundamental to

[5] *See New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 810 (5th Cir. 1993); *Travelers Ins. Co. v. Shea*, 382 F.2d 344 (5th Cir. 1967).
[6] *Munguia*, 999 F.2d at 810 n. 2.
[7] 33 U.S.C. § 902(3).
[8] 33 U.S.C. § 903(a).
[9] *See e.g., Gonzales v. Tutor Saliba*, 38 BRBS 794, 797-99 (2005).
[10] *Munguia* 999 F.2d at 810 (internal citations omitted). There is no dispute in this case as to the situs requirement.
[11] *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334, 339-40 (1953).
[12] *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533 (5th Cir. 1976); *Smart v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 995 (1978).

maritime employment than the building and repair of navigable vessels."[13] However, shipbuilding activity must involve a vessel.

Definition of a "Vessel"

The LHWCA itself does not define the term vessel and that has led to confusion over whether it covers an employee who is injured while building or repairing a "ship" or a "vessel."[14] The same problem creates similar confusion in determining if an employee is actually a member of a crew of a vessel and covered by the Jones Act.[15]

However, the statutory language starting point is now clear and under both Acts, "[t]he word 'vessel' includes every description of water-craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."[16] Nonetheless, even that language is amenable to varied interpretations, as disputes arise over the status of structures that float and may infrequently move but are normally attached to the sea bed or shore, such as dredges,[17] wharfboats,[18] barges,[19] offshore oil rigs,[20] casinos,[21] and houseboats.[22] They primarily exist for their capacity to dig, lift, house, pump, or even house and entertain, rather than transport. However, they nonetheless retain to varying degrees the capacity to move.

The most recent Supreme Court case addressing this ambiguity in the context of the LHWCA did so in the instance of a dredge that was used to dig a tunnel. It had only limited means of self-propulsion and had to be towed over long distances. However once in position, could move itself 15 to 25 feet per hour in order to accomplish its digging task. It had navigation lights and a captain and a crew. When it finished one job it would be towed to another. The dredge was found to be within the definition of a vessel, because in performing its work it "carried machinery, equipment and crew over water."[23] The dredge was "*practically* capable of being used to transport people, freight, or cargo from place to place."[24] It was not like a drydock, which although it was floating, was also moored in one location for 20 years, thereby becoming permanently moored, rather than temporarily anchored.[25]

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[13] *Mississippi Coast Marine, Inc. v. Bosarge*, 637 F.2d 994 (5th Cir. 1981).
[14] "[T]three men in a tub fit within our definition, and one probably could make a convincing case for Jonah inside the whale." *Lozman v. City of Riviera Beach, Fla.*, 133 S.Ct. 735, 740 (2013) (internal quotations omitted).
[15] 46 U.S.C. § 801.
[16] *Stewart v. Dutra Constr. Co.*, 543 U.S. 481, 489 (2005) (applying 1 U.S.C. §3).
[17] *Id*.
[18] *Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co.*, 217 U.S. 19 (1926).
[19] *Holmes v. Atlantic Sounding Co., Inc.*, 437 F.3d 441 (5th Circuit 2006).
[20] *Cain v. Transocean Offshore USA, Inc.*, 518 F.3d 295, (5th Cir. 2008), *cert. denied*, 129 S.Ct. 193 (2008).
[21] *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995).
[22] *Lozman*, 133 S.Ct. 735.
[23] *Dutra*, 543 U.S.at 492.
[24] *Id*. at 493.
[25] *Id*.

"Simply put, a watercraft is not "capable of being used" for maritime transport in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement."[26] While the statutory language does not require that a structure be used *primarily* as a means of transportation over water,[27] structures may lose their character as vessels if they have been withdrawn from the water for extended periods of time.[28] "The question remains in all cases whether the watercraft's use "as a means of transportation on water" is a practical possibility or merely a theoretical one."[29]

The Fifth Circuit applied *Dutra* to the case of a worker dormitory barge which had no means of self-propulsion but was towed from location to location where it would be temporarily moored.[30] It had a ranked bow and gangways, contained housing and messing facilities, and generated its own power, but had no navigational equipment and was not subject to Coast Guard inspection. It was not used to transport workers from one work place to another. Finding the absence of any means of self-propulsion was not fatal, the Circuit had "no trouble" determining that the barge was a vessel.[31]

The Circuit had an equally easy time with the case of a floating casino. The structure had not been used as a seagoing vessel since 2001, when it was moored at its present location, with the intent to use it solely as an indefinitely moored floating casino. Though the structure was physically capable of sailing, any such use would be theoretical rather than practical. Accordingly, the Circuit found that even the more expansive holding of *Dutra* did not serve to make it a vessel.[32]

The Circuit also considered whether a semi-submersible mobile offshore oil rig that was still under construction would be a vessel for Jones act purposes. After initial construction in Singapore, it underwent sea trials to check seaworthiness and was then towed with men and equipment to Louisiana. During that journey, workers continued to build the rig. Upon arrival in the Gulf of Mexico, it was moored in a "floating shipyard" for completion of construction. Before it was ready for deployment, an employee was injured and sued claiming the rig was a vessel and he was a Jones Act seaman.[33]

In deciding whether the rig was a vessel, the Circuit noted that *Dutra* did not address ships and other structures under construction. It then reasoned that if a structure loses its vessel status by being taken out of navigation, it must be equally true that a structure may not attain vessel status before it is ever put into "navigation."[34] The Circuit recognized that shipbuilders frequently begin the construction process in a shipyard at one location and then transport the partially completed craft to another location to finish the construction process[35] and conceded

[26] *Id*. at 494.
[27] *Id*. at 495.
[28] *Id*. at 496.
[29] *Id*.
[30] *Holmes*, 437 F.3d 441.
[31] *Id.* at 448.
[32] *De La Rosa v. St. Charles Gaming Co. Inc.*, 474 F.3d 185(5th Cir. 2006).
[33] *Cain v. Transocean Offshore USA, Inc.*, 518 F.3d 295 (5th Cir. 2008), *cert. denied*, 129 S.Ct. 193 (2008).
[34] *Id*. at 301.
[35] *Id*. at 302.

that "there will be many points along the continuum of a ship's construction at which one could rationally argue it is "practically capable" of transportation and therefore a vessel."[36]

Nonetheless, it noted that the rig lacked vital equipment for its operations and was not ready to operate as designed. It also cited the fact that the structure was not yet certified as operational and in compliance with all safety requirements. It concluded that the rig was, at least not yet, a vessel, observing that "[i]t strains reason to say that a craft upon the water that is under construction and is not fit for service is practically capable of transportation."[37]

The Circuit then turned to the question of an offshore oil rig that was completed and moored to the sea bed. It quickly disposed of the claim that the rig qualified as a vessel, noting that it was intended to remain in place for the productive life of the field. Even though production had ceased there were no plans to move it, as it was economically and logistically unfeasible to do so.[38] It observed that "a watercraft is not 'capable of being used for maritime transport' in any meaningful sense if it has been permanently moored or otherwise rendered practically incapable of transportation or movement. … and that ships ... do not remain vessels merely because of the remote possibility that they may one day sail again."[39]

The Supreme Court again applied the 1 U.S.C. §3 definition of a vessel, albeit in the context of the application of maritime trespass and liens, to a houseboat.[40] The houseboat consisted of a house-like plywood structure with French doors on three sides and an empty bilge space underneath the main floor for buoyancy, but no means of propulsion. The houseboat was initially towed about 200 miles, moored, and then twice more towed between nearby marinas. It was later towed a further 70 miles to a marina where it was kept docked.

Interpreting the statutory language and applying *Dutra*, the Court noted that "[T]ransportation" involves the "conveyance (of things or persons) from one place to another."[41] It emphasized that the definition must be applied in a practice rather than theory and concluded that "a structure does not fall within the scope of this statutory phrase unless a reasonable observer, looking to the home's physical characteristics and activities, would consider it designed to a practical degree for carrying people or things over water."[42]

The Court observed that, but for the fact that it floats, nothing about the houseboat suggested that it was designed to any practical degree to transport persons or things over water. It had no rudder or other steering mechanism, an unraked hull, a rectangular bottom 10 inches below the water and no special capacity to generate or store electricity.[43]

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[36] *Id*.
[37] *Id*.
[38] *Mendez v.AnadarkoPetroleum Corp.*, 466 Fed. Appx. 316 (5th Cir. 2012) (unpublished).
[39] *Id*. at 319 (internal citations omitted).
[40] *Lozman*, 133 S.Ct..
[41] *Id*. at 741 (internal citation omitted).
[42] *Id*.
[43] *Id*.

Moreover, it noted that while lack of self-propulsion is not dispositive, it may be a relevant physical characteristic and cited the fact that the houseboat had been towed only four times over a period of seven years. When moved, it carried no passengers or cargo, but only its own furnishings, the effects of its owner, and personnel present to assure the houseboat's safety.[44] It concluded that the houseboat "has no other feature that might suggest a design to transport over water anything other than its own furnishings and related personal effects"[45] and found nothing about it that "could lead a reasonable observer to consider it designed to a practical degree for "transportation on water."

In a recent interpretation of the definition of a vessel,[46] the Fifth Circuit considered the case of another offshore rig.[47] The Circuit applied *Stewart*, *Mendez*, and *Lozman* in weighing four factors: (1) the rig was moored to the sea floor and rendered practically incapable of transportation or movement; (2) it had not been moved since it was constructed and installed at its current location in 2010; (3) It had no means of self-propulsion; and (4) moving it would require approximately twelve months of preparation, at least fifteen weeks for its execution, and would cost between $70 and $80 million. In light of those factors, it concluded that the rig was not practically capable of transportation on water and was, as a matter of law, not a vessel.

OCSLA

The OCSLA extends the LHWCA to provide workers' compensation coverage for the death or disability of an employee resulting from any injury occurring as the result of operations connected with the exploration, development, removal, and transportation of natural resources from the seabed and subsoil of the Outer Continental Shelf.[48] It applies to all submerged lands (and artificial islands and fixed structures located thereon) which lie beneath navigable waters seaward of state jurisdictional boundaries, and which are subject to the jurisdiction and control of the United States.[49]

The statutory language leaves open to some interpretation just how "connected" the injury and employment must be with the exploration, development, removal, and transportation of natural resources from the seabed and subsoil. The Fifth Circuit initially applied a "but for" test.[50] The Circuit then applied a much more restrictive requirement that the injury must also occur on the outer continental shelf or the waters above it, finding that an injury suffered during

[44] *Id*. at 744.
[45] *Id*. at 741.
[46] 1 U.S.C. §3.
[47] *Warrior Energy Services Corp. v. ATP Titan M/V* 551 Fed.Appx. 749 (5th Cir. 2014)(unpublished).
[48] 43 U.S.C. §1333(c).
[49] 43 U.S.C. §§1331(a), 1301(a).
[50] *Herb's Welding v. Gray*, 766 F.2d 898 (5th Cir. 1985). Gray was injured on a fixed rig in Louisiana waters while bracing a gas line that ran from one part of the production platform to another. The oil field to which he was assigned was located partly over the shelf and partly in Louisiana territorial waters and he spent 25% of his time working on rigs located on the shelf. The platform on which he was injured was connected by a gas flow line to a second platform also within state waters, but which in turn was connected by a flow line to a third platform located on the shelf. The circuit held Gray was not covered, reasoning that even if Herb's Welding had confined its operations solely to the Louisiana part of the oil field, the accident still would have happened. The fact that the platform where Gray was injured might have been indirectly connected to a platform on the shelf by a network of pipelines was unrelated to the accident's causation.

construction of an oil production platform destined for the outer Continental Shelf was not covered by the OCSLA.[51]

The Supreme Court considered the Fifth Circuit's interpretation when a worker who spent 98 percent of his time working on an operating offshore platform over waters covered by the OCSLA nonetheless had the misfortune to be injured while briefly working at an onshore facility.[52] The Court interpreted the language to require the injured employee to establish a significant causal link between the injury that he suffered and his employer's on-OCS operations conducted for the purpose of extracting natural resources from the OCS.[53] It recognized that test will depend on the individual circumstances of each case and may not be the easiest to administer, but found it best reflects the statute and was confident that ALJs will be able to determine whether an injured employee has established a significant causal link between the injury he suffered and his employer's on-OCS extractive operations.[54]

DISCUSSION

LHWCA

Employer's initial argument is that does not matter if *Big Foot* is a vessel under the LHWCA. It notes that the modules on which Claimant was working could have just as easily been installed on a fixed rig in state waters or in any number of structures that would not be classified as a vessel. It concludes, therefore, that Claimant was not involved in maritime work. However, Employer applies the language of the status requirement much too narrowly. Whether or not the modules could have been used somewhere other than *Big Foot*, they were in fact being used for that structure. If *Big Foot* is a vessel, Claimant's activities directly furthered its construction and he was involved in maritime employment.

Employer next turns to the question of whether *Big Foot* is a vessel and cites *Cain* to argue that it is not. However, its reliance on *Cain* is misplaced. It is true that in *Cain*, the structure in question was also an offshore rig under construction prior to transport and installation in the Gulf of Mexico. It is also true that the Fifth Circuit in *Cain* cited *Dutra*. However, the Circuit was not addressing the coverage under the LHWCA, but rather the Jones Act. Thus, it focused on whether the rig was a vessel "in navigation" and found that it was not, specifically noting that structures could be placed into and taken out of navigation. The Court observed that an incomplete vessel incapable of navigation could not yet be within the Jones Act. To extrapolate that holding to a status question under the LHWCA would render the clear statutory language including shipbuilders meaningless.

[51] *Mills v. Director, OWCP*, 877 F.2d 356 (5th Cir. 1989) (*en banc*).
[52] *Pacific Operators Offshore, LLP v. Valladolid*, 132 S.Ct. 680 (2012).
[53] *Id.* at 691.
[54] *Id.*

That requires a determination of whether *Big Foot* is a vessel under *Dutra*. As demonstrated by the stipulations and the record, the facts are relatively straightforward. *Big Foot* was conceived and designed to be assembled from parts fabricated and shipped in from around the world. Once assembled, *Big Foot* will be towed by a third party to a location on the OCS, attached to the sea floor, and engage in the extraction of natural resources for the next 20 years. Employer has no role in transporting *Big Foot* to the OCS, installing there, or operating it.

Before being transported to the installation site, *Big Foot* will be certified by the Coast Guard and manned by Coast Guard certified and licensed personnel. However, unlike the *Super Scoop* in *Dutra*, *Big Foot* has no means of self-propulsion or movement. *Super Scoop* was towed from job to job, but once in place was designed to and did move regularly (albeit slowly) as part of its designed operation. Conversely, once constructed, *Big Foot* will be mobile only to the extent required to tow it to the proper location, at which time it will become (for all practical and design purposes) totally immobile for the next 20 years. Indeed, like the houseboat in *Lozman*, the only things *Big Foot* will transport are those items that are essentially part and parcel of the rig and will go no further than *Big Foot* itself.

Accordingly, I find that *Big Foot* is not a vessel as interpreted by *Dutra* and that therefore, Claimant was not in maritime status.

OCSLA

That leaves Claimant's argument that his injury comes within the OCSLA and presents the question of whether there was a significant causal link between the injury Claimant suffered and on-OCS extractive operations. In *Valladolid*, the employer was operating two drilling platforms on the Outer Continental Shelf off the coast of California and an onshore oil and gas processing facility in Ventura County, California. It hired the claimant to work as a roustabout and he spent about 98 percent offshore on the drilling platforms performing maintenance duties. He spent the remainder of his time working at the employer's onshore processing facility, where he also performed maintenance duties and suffered his injury.

In this case, at the time of the injury there was no completed rig, much less a rig operating, installed or even in transit. Employer has no role in the installation or operation of the rig. While Claimant was fabricating living quarters for eventual use on the OCS, they were not unique and were typical of living modules used for other purposes.

Based on these facts, I do not find that there was a significant causal link between the injury Claimant suffered and on-OCS extractive operations.

ORDER

The claim is dismissed.

ORDERED this 9th day of June, 2014 at Covington, Louisiana.

PATRICK M. ROSENOW
Administrative Law Judge