No. 19-60610

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OWENSBY & KRITIKOS, INCORPORATED;
LOUISIANA WORKERS' COMPENSATION CORPORATION
Petitioners Cross Respondents,

v.

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

JAMES BOUDREAUX,
Respondent Cross Petitioner.

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

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BRIEF FOR THE FEDERAL RESPONDENT

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STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Rule 34(a) of the Federal Rules of Appellate Procedure and Fifth Circuit Rule 28.2.3, the Director, OWCP, requests oral argument, which she believes would assist the Court.

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DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,
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JAMES BOUDREAUX,

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

BRIEF FOR THE FEDERAL RESPONDENT

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This appeal involves James Boudreaux's claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (Longshore Act), as extended by the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. § 1333(b). The administrative law judge (ALJ) had jurisdiction to hear the claim pursuant to 33 U.S.C. §§ 919(c) and (d). The ALJ's Decision and Order on Remand was issued on January 25, 2019, Petitioners' Excerpts of Record (ER) 44,

and became effective when filed in the office of the District Director on January 30, 2019, *id*. at 62. 33 U.S.C. § 921(a).[1] Boudreaux's employer, Owensby & Kritikos, Inc. (Owensby or Employer), filed a notice of appeal with the Benefits Review Board (Board) on May 13, 2019, within the thirty-day period provided by § 921(a). Amended Certified List (docketed 1/10/2020) at 2. That appeal invoked the Board's review jurisdiction under 33 U.S.C. § 921(b)(3). On June 27, 2019, the Board issued an order granting Employer's motion for summary affirmance. ER 27.[2]

Under 33 U.S.C. § 921(c), any party aggrieved by a final decision of the Board can obtain judicial review in the United States Court of Appeals in which the injury occurred by filing a petition for review within sixty days of the Board's order. Owensby filed its Petition for Review with this Court on August 19, 2019, within the prescribed sixty-day period. ER 5. The Board's order is final pursuant to § 921(c) because it completely resolved all issues presented. *See Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399, 406 (5th Cir. 1984) (en banc). This Court has geographic jurisdiction because Boudreaux was injured in Louisiana.

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[1] Citations to the record excerpts use the page numbers from the PACER header.

[2] In an earlier decision, the Board affirmed the ALJ's finding that Boudreaux was covered by OCSLA, but remanded to the ALJ for an order specifying the amount of compensation due. ER 8. The result was the ALJ's January 25, 2019 decision. ER 44. Because the Employer did not dispute the amount of compensation awarded in that decision, it sought summary affirmance so it could appeal the Board's earlier finding that Boudreaux was covered by OCSLA to this Court.

STATEMENT OF THE ISSUES

The Longshore Act, and by extension OCSLA, covers disability due to injuries "arising out of and in the course of employment." 33 U.S.C. § 902(2). OCSLA provides workers' compensation coverage for injuries that occur "as the result of" natural resource-extraction operations conducted on the outer Continental Shelf (OCS). 43 U.S.C. § 1333(b). The Supreme Court has held that a worker's injury does not have to occur on the OCS to be covered, but must have a substantial nexus with extractive operations on the OCS. *Pacific Operators Offshore, LLP v. Valladolid*, 565 U.S. 207 (2012).

Boudreaux worked for Owensby as a technician, testing the integrity of tanks, pipelines, and other structures. He spent almost 90 percent of his work time on the OCS. To reach a given platform, he was required to report to a dock or heliport with Owensby's testing equipment for transport to the OCS at a specified time. He drove to those docks and heliports from his home, but was paid for that travel based on the time and distance from the Employer's offices. On August 3, 2012, while he was driving to a dock from which a boat would take him to an offshore platform to perform his testing work, Boudreaux was injured when his car was struck by another car that had run a stop sign. The ALJ found that Boudreaux is covered by OCSLA.

The questions presented are:

I. Did Boudreaux's injury arise out of and in the course of his

employment?

II. Did Boudreaux's injury have a substantial nexus with extractive operations on the OCS?

STATEMENT OF THE CASE

I. Statutory Background

The Longshore Act covers injuries "arising out of and in the course of employment." 33 U.S.C. § 902(2). OCSLA extends the provisions of the Longshore and Harbor Workers' Compensation Act to the "disability or death of an employee resulting from any injury occurring as the result of operations conducted on the outer Continental Shelf." 43 U.S.C. § 1333(b). In *Pacific Operators*, the Supreme Court adopted the Ninth Circuit's test for determining if an injury has occurred "as the result of" on-OCS operations. 565 U.S. at 222.

That test requires a claimant to "establish a substantial nexus between the injury and extractive operations on the shelf ..... To meet the standard, the claimant must show that the work performed directly furthers outer continental shelf operations and is in the regular course of such operations." *Pacific Operators*, 565 U.S. at 214 (quoting *Valladolid v. Pacific Operations Offshore, LLP*, 604 F.3d 1126, 1139 (9th Cir. 2010).[3] The Supreme Court recognized that "the Ninth Circuit's

[3] To help distinguish the two decisions (and to match the order of the caption in each one), this brief refers to the Supreme Court's decision as *Pacific Operators* and the Ninth Circuit's decision as *Valladolid*.

test may not be the easiest to administer," but expressed confidence that ALJs and courts would be able to do so. 565 U.S. at 222. Like the Ninth Circuit, it noted that workers injured on the OCS would regularly satisfy the test, and that the coverage of workers injured performing off-OCS tasks would "depend on the individual circumstances of each case." *Id.*; *see Valladolid*, 604 F.3d at 1139.

II. Statement of the Facts

Boudreaux worked for Owensby as an Advanced/Automated Ultrasonic Testing field supervisor, a job that required him to use specialized equipment to test tanks on offshore platforms for defects. Transcript of the Aug. 14, 2014 Hearing (Tr.) at 21-23). The tanks contained oil, gas, and other fluids extracted from the seabed. Tr. 25. His work involved attaching an ultrasonic magnetic arm to the outside of a tank, and directing its movements with his laptop computer to detect defects. ER 33 (Tr. 23-24). Depending on what defects were found, the inspection could result in the tank being shut down until repairs were made. *Id*. (Tr. 25). Boudreaux typically spent ten to twelve days at a time on a platform, and sometimes as long as two and one-half months. Tr. 30, 32. He spent almost 90% of his time working offshore. Tr. 29 (89.2% of the 52 weeks prior to the injury offshore).

In order to perform his work, Boudreaux regularly drove – in his own car, with his assigned testing equipment – from his home to a specified dock or heliport, at times specified by Owensby, to be transported to the OCS. Tr. 33, 52, 54. He drove

to different docks or heliports based on the location of the platform he would be working on. Tr. 33. Owensby compensated Boudreaux for his travel time and mileage. That compensation was based on the time and distance of his destination from Owensby's offices in Broussard, Louisiana. Tr. 31-34, 49, 58-59, 65-66, 72, 86-87.

Boudreaux was engaged in such travel on August 3, 2012, when his vehicle was struck by another car and he was injured. ER 32, 33; Tr. 38-40, 48-51. The accident occurred in Vermillion Parish, Louisiana, while Mr. Boudreaux was driving, with Owensby's testing equipment, to a dock in Freshwater City, Louisiana, where he was to meet a boat that would take him to an offshore oil rig. ER 33.

As a result of the accident, Boudreaux sustained eight broken ribs; a broken pelvis, hip, femur, and jaw; two fractured eye sockets; a chipped vertebra; and lung and kidney contusions. Tr. 40; CX-4 at 9; CX-10. He underwent seven surgeries, after which he was restricted to sedentary work in a company office at significantly lower pay. ER 34 (Tr. 42-47, 69, 71, 75; CX-7).[4] Owensby voluntarily paid Boudreaux compensation under the Longshore Act for temporary total and temporary partial disability. ER 9. But when Boudreaux filed a claim seeking benefits under OCSLA, Owensby disputed his coverage. *Id*.

[4] In the year before his accident, Boudreaux earned $85,830. Tr. 31. In the eleven months after returning to work following the injury, he earned $35,761. Tr. 46.

III. Decisions Below

The ALJ found that Boudreaux was covered by OCSLA under the substantial-nexus standard for coverage established by *Pacific Operators*. He noted that the Supreme Court adopted the Ninth Circuit's test, which holds that the required nexus exists if "the work performed directly furthers operations on the Outer Continental Shelf (OCS)." ER 35.

The ALJ found that the work Boudreaux performed "directly furthered outer shelf operations," because those operations could not occur unless the tanks that he inspected were in proper working order. ER 35-36. The ALJ also noted the parties' agreement that Boudreaux's transportation of himself and his equipment to the jobsite was an essential element of his job. ER 34 (citing Tr. 91), 35. He also found that Boudreaux's trip on the day of his injury was "in the course and scope of his employment" because he was reimbursed for approximate time and mileage for his drive to the dock. ER 35-36. The Employer appealed to the Benefits Review Board.

The Board affirmed the ALJ's decision. It rejected the Employer's assertion that Boudreaux's injury did not occur in the course and scope of his employment. ER 16. The Board recognized that, under the "coming and going" rule, workers are generally not within the course of employment while traveling to and from work. But it noted that there are exceptions to the rule where "the hazards of the journey may be fairly regarded as the hazards of the service." *Id*. (quoting *Cardillo v. Liberty*

Mut. Ins. Co., 330 U.S. 469, 479 (1947)). Among them is the "trip payment" exception, under which travel is considered in the course of employment where "the employer pays the employee's travel expenses, [or] wages for travel time." *Id*. (citing *Cardillo*, 330 U.S. at 480; *Perkins v. Marine Terminal Group*, 673 F.2d 1097, 1103 (9th Cir. 1982); *Broderick v. Electric Boat Corp.*, 35 BRBS 33, 34-35 (2001)). The Board found substantial evidence for the ALJ's finding that Boudreaux was being paid for both his time and mileage for the trip during which he was injured. *Id*. (citing Tr. at 32-34, 38, 58-59, 66, 72-74, 86). It thus concluded that the trip payment exception applied, and that Boudreaux's trip was in the course of his employment. *Id*. at 16-17.

The Board also affirmed the ALJ's finding that Boudreaux's injury is covered by OCSLA. It rejected the Employer's argument that an injury could be covered only if it was directly "caused by" operations on the OCS. ER 10. It found that, under *Pacific Operators*, the injury merely had to have a substantial nexus with those operations. And it noted that "the Supreme Court left adjudicators considerable discretion to give meaning to the substantial nexus standard." ER 14 (citing *Pacific Operators*, 565 U.S. at 222).[5] The Board held that the ALJ's finding of a substantial

[5] Indeed, Valladolid was injured when he fell off his forklift while attempting to pick plantains. *L.V. v. Pacific Operations Offshore, LLP*, 42 BRBS 67, 68 (2008). As that injury was clearly not directly caused by on-OCS operations, the Ninth Circuit or Supreme Court could simply have denied coverage if direct causation were required. That they did not – instead remanding the case – indicates that the courts believed the

nexus between Boudreaux's injury and OCS operations was supported by the evidence and reasonable. Specifically, it noted the ALJ's findings that, at the time of his injury, Boudreaux was on his way to the OCS to test tanks on an offshore platform, and that his testing work was directly related to OCS operations, which would be curtailed if the tanks were deemed unsafe to contain the oil extracted from the OCS. ER 14-15.

The Board rejected the Employer's argument that the ALJ's decision erroneously applied the "but-for" causation test from *Curtis v. Schlumberger Offshore Serv., Inc.*, 849 F.2d 805, 809 (3d Cir. 1988), *abrogated by Pacific Operators*, 565 U.S. at 221-22. In *Curtis*, the Third Circuit applied that test to find that a worker who was injured while driving to a helicopter pad where he was to be transported to an OCS platform was covered by OCSLA. *Id.* at 811. The Supreme Court rejected the "but for" test as overly broad, explaining that it "could reasonably be interpreted to cover land-based office employees whose jobs have virtually nothing to do with extractive operations on the OCS." *Pacific Operators*, 565 U.S. at 221. The Board noted that the facts of *Curtis* were similar to this case. ER 17. But it also noted that "the Supreme Court said nothing about whether Curtis would have

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test allowed for broader coverage. *See infra* at 18 and n.11. Unfortunately, the parameters of the substantial-nexus test were not further defined on remand because the parties settled the case.

prevailed under the substantial nexus test" and that "the Supreme Court criticized the 'but for' test, not because Curtis prevailed, but because it 'could reasonably be interpreted to cover land-based *office* employees whose jobs have virtually nothing to do with extractive operations.'" *Id*. at 17 (quoting *Pacific Operators*, 565 U.S. at 221) (emphasis in original).

The Board also rejected Owensby's argument that injuries sustained during transit by car should be treated differently than those during transit by boat or helicopter, with the latter being covered because they are inherently more risky. The Board found "nothing in the substantial nexus test which requires the fact-finder to use a risk-based assessment of the circumstances surrounding a claimant's injury in order to find coverage" which would "add unnecessary and unwarranted complexity to the substantial nexus test, and could negate the Act's no-fault scheme." *Id*. at 17.

The Board concluded that, "[i]n light of the broad discretion afforded the administrative law judge in applying the substantial nexus test, and as the administrative law judge's finding that the evidence establishes a significant causal link between claimant's injuries and employer's on-OCS extractive operations is supported by substantial evidence, we affirm the administrative law judge's conclusion that claimant's claim falls under the coverage of the OCSLA." *Id*. at 18.

SUMMARY OF THE ARGUMENT

Boudreaux's injury arose out of and in the course of his employment, under the trip-payment exception to the coming-and-going rule, because he was being paid both wages and mileage for his trip to the dock. Moreover, the ALJ reasonably found that there was a substantial nexus between Boudreaux's injury and Owensby's operations on the OCS. The work Boudreaux performed involved the ultrasonic testing of tanks that were used to hold oil extracted from the OCS, and his travel to the OCS was essential to the completion of that testing. The award of OCSLA benefits to Boudreaux should therefore be affirmed.

STANDARD OF REVIEW

This Court's review of Benefits Review Board decisions "is limited to considering errors of law, and making certain that the BRB adhered to its statutory standard of review of factual determinations, that is, whether the ALJ's findings of fact are supported by substantial evidence and consistent with the law." *Miller v. Central Dispatch, Inc*. 673 F.2d 773, 778 (5th Cir. 1982).

Because questions of coverage require "the application of a statutory standard to case-specific facts," they are "ordinarily [] mixed question[s] of law and fact." *New Orleans Depot Servs., Inc. v. Director, OWCP*, 718 F.3d 384, 387 (5th Cir. 2013). Where the ALJ has "resolved the factual disputes presented by the parties," coverage under the Longshore Act is a question of law, subject to *de novo*

review. *Id*. at 387, 388.

ARGUMENT

I. The ALJ correctly found Boudreaux covered by OCSLA.

For OCSLA coverage to apply here, two requirements must be met. First, as required by the Longshore Act, Boudreaux's injury must have arisen out of and in the course of his employment. 33 U.S.C. § 902(2). Second, under OCSLA, it must be the result of operations on the OCS. 43 U.S.C. § 1333(b). The ALJ and Board correctly found both requirements met.

A. Boudreaux's injury arose out of and in the course of his employment.

The Longshore Act applies to injuries that arise out of and in the course of employment. 33 U.S.C. § 902(2). This generally excludes injuries suffered while simply commuting between home and work from coverage. But there are several exceptions to this general rule and the ALJ and Board correctly ruled that one of them – the "trip-payment exception" – applies to Boudreaux's injury. ER 16, 35-36. Under this exception, workers traveling to and from work are generally considered to be in the course of their employment if the employer pays travel expenses and/or wages for the trip. ER 16 (citing *Cardillo*, 330 U.S. 469; *Perkins*, 673 F.2d 1097; *Sawyer v. Tideland Welding Serv*., 16 BRBS 344, 345 (1984)).

There is no dispute that Boudreaux was paid for both time and mileage. *Supra* at 6. While the Employer makes much of the fact that that Boudreaux was paid based

on the time and mileage to the dock from the Employer's workplace, rather than from his home, OB 17-18, 21, this is a distinction without a difference. The fact remains that Boudreaux was being paid both wages and travel expenses, and that the trip was, therefore, in the course of his employment.

Indeed, the Supreme Court has rejected the notion that workers must be paid on a strict mileage basis to qualify for the trip-payment exception. *Cardillo*, 330 U.S. at 472, 485.[6] The worker in *Cardillo* was injured while traveling from his home to a construction site at Quantico Marine base. The Court affirmed the worker's award of benefits despite the fact that his travel pay was a flat contractual payment of two dollars per day, which was based on the approximate cost of travel between the employer's home base of the District of Columbia and the construction site. *Id.* at 484. The Ninth Circuit similarly found coverage where a worker injured during a trip was paid a set rate equal to a half-hour of wages at straight pay. *Perkins*, 673 F.2d at 1102-04 and n.2. It held that an injury arises out of and in the course of employment "(w)hen the employee is paid *an identifiable amount* as compensation for time spent in a going or coming trip." *Id*. at 1102 (emphasis added) (quoting 1 Larson,

[6] *Cardillo* was decided under the District of Columbia Workmen's Compensation Act, which, like OCSLA, adopted the provisions of the Longshore Act, including the "arising out of and in the course of employment" requirement of 33 U.S.C. § 902(2). 330 U.S. at 471.

Workmen's Compensation Law, § 16.00 at 4-153 (1978)).[7]

There is no dispute that Boudreaux was paid an identifiable amount, as he was paid for his travel from a set starting point (his Employer's offices) to a set destination (the dock), for which he received both his wages for the estimated time of the trip, and pay for the mileage between the two points. The mere fact that the starting point was his Employer's office rather than his home does not make the amount he was paid any less identifiable, and thus does not change the fact that his injury arose out of and in the course of his employment.[8]

It is also irrelevant that Boudreaux was able to choose his route and make stops

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[7] *See Callihan v. Fireman's Fund Indem. Co.,* 110 So.2d 758 (La. App. Orl. 1959) (worker injured driving personal vehicle home from worksite entitled to compensation where he was paid mileage and his regular hourly rate for the trip); *Phillips v. EPCO Carbon Dioxide Products, Inc.*, 810 So.2d 1171, 1172, 1175 (La. App. 2d Cir. 2002) (worker who was paid a monthly travel allowance entitled to compensation for accident in his personal vehicle on the way to work); *McLin v. Indus. Spec. Contractors, Inc.,* 851 So.2d 1135,1142 n.1 (La. 2003) (recognizing that injury during travel is compensable if the employer reimburses travel expenses to the employee).

[8] It would be particularly absurd to rely on this distinction in this case, because the mileage and time to the Freshwater City boat launch (where Boudreaux was to depart for the OCS by boat) from either Church Point, where Boudreaux lived (68 miles, 1 hour 25 minutes), or Broussard, where the Employer's offices were (68.1 miles, 1 hour 25 minutes) is virtually identical. (Information from Google Maps on May 8, 2020.) In any event, as this Court has recognized, the Supreme Court made clear in *Cardillo* that "questions as to whether an injury arose out of and in the course of employment necessarily fall within the scope of [the administrative tribunal's] authority." *Temporary Employment Services v. Trinity Marine Group, Inc*., 261 F.3d 456, 462 (5th Cir. 2001) (quoting *Cardillo*, 330 U.S. at 477) (alteration in original).

if he wished, *see* OB 19, 22, as "the element of employer control is not relevant to the payment-for-travel exception." *Perkins*, 673 F.2d at 1104; *see Cardillo*, 330 U.S. at 481 ("[I]t was error for the Court of Appeals in this case to emphasize that the employer must have control over the acts and movements of the employee during the transportation before it can be said that an injury arose out of and in the course of employment.").

B. There was a substantial nexus between Boudreaux's injury and extractive operations on the Outer Continental Shelf.

The second question is whether Boudreaux's injury occurred "as the result of" operations conducted on the OCS to explore for or extract natural resources. 43 U.S.C. § 1333(b). A close look at the Supreme Court's *Pacific Operators v. Valladolid* decision and its application to the facts found by the ALJ below demonstrate that Boudreaux's award of benefits should be affirmed.

1. Pacific Operators v. Valladolid

Juan Valladolid was a roustabout who spent roughly 98% of his working time on an OCS oil platform. *Valladolid*, 604 F.3d at 1129. When he was not on the OCS, he performed maintenance at his employer's on-shore oil processing facility. Among his on-shore duties was using a forklift to pick up and consolidate scrap metal that had been returned to various parts of the on-shore facility from OCS platforms. *Id*. He was assigned this duty on the day he was killed, when he was crushed by a forklift. *Id*. Valladolid was standing on the tines of his forklift attempting to pick

plantains from a tree when the forklift moved forward, he fell, and the forklift rolled on top of him. *L.V.*, 42 BRBS at 68.

The ALJ and Board applied this Court's decision in *Mills v. Director, OWCP [Mills II]*, 877 F.2d 356 (5th Cir. 1989) (en banc), which found that the OCSLA covers only injuries sustained on the OCS. Because Valladolid was not injured on the OCS, the ALJ and Board denied coverage. *Valladolid*, 604 F.3d at 1130, 1131.

Valladolid's widow appealed to the Ninth Circuit, arguing that OCSLA required only that an injury occur "as the result of" OCS operations to be covered, not that it occur on the OCS. *Id*. at 1130. The court agreed. It held that, while § 1333(b) requires that *operations* be conducted on the OCS, "the only limitation on the *injury* is that it be 'the result of'" those operations. *Id*. at 1134 (emphasis in original). It thus rejected the *Mills II* requirement that an injury occur on the OCS. The court also rejected the Third Circuit's test, which required only that the injury would not have occurred "but for" such operations. It found that test did not comport with the statute's requirement that the injury result from OCS operations. *Id*. at 1139 (citing *Curtis*, 849 F.2d 805).

After rejecting the situs-of-injury and but-for tests, the Ninth Circuit endorsed this Court's pre-*Mills II* interpretation of § 1333(b), which held that an injury did not have to occur on the shelf to be covered, but did require "a more direct connection than simple 'but-for' causation." *Id*. (citing *Mills v. Director, OWCP [Mills I]*, 846

F.2d 1013, 1015 (5th Cir. 1988), and *Herb's Welding v. Gray*, 766 F.2d 898, 900 (5th Cir. 1985)).

The Ninth Circuit thus adopted the following test:

> [T]he claimant must establish a substantial nexus between the injury and extractive operations on the shelf. To meet the standard, the claimant must show that the work performed directly furthers outer continental shelf operations and is in the regular course of such operations. An injury sustained on the outer continental shelf itself would, by definition, meet this standard. However, an accountant's workplace injury would not be covered even if related to outer continental shelf operations, while a roustabout's injury in a helicopter en route to the outer continental shelf likely would be. We leave more precise line-drawing to the specific factual circumstances of later cases.

604 F.3d at 1139.[9]

The Supreme Court adopted this substantial-nexus test, explaining that, "[a]lthough the Ninth Circuit's test may not be the easiest to administer, it best reflects the text of § 1333(b), which establishes neither a situs-of-injury test nor a 'but for' test." *Pacific Operators*, 565 U.S. at 222. Like the Ninth Circuit, the Court held that, "whether an employee injured while performing an off-OCS task qualifies – like Valladolid, who died while tasked with onshore scrap metal consolidation – is a question that will depend on the individual circumstances of each case." *Id.* at

[9] The Ninth Circuit noted that its test is consistent with the test employed by the three-judge panel in *Mills I,* 846 F.2d 1013. *Valladolid*, 604 F.3d at 1140.

222.[10] The Court remanded the case, and it was settled before the ALJ, Board, or Ninth Circuit had the opportunity to apply the substantial-nexus test to the facts of *Pacific Operators*.

2. Applying *Pacific Operators v. Valladolid*

The Court gave little direction on what specific "individual circumstances" ALJs should focus on in determining the coverage of an off-OCS injury, saying only that it was confident that adjudicators would be able to determine if a substantial nexus existed. *Id*. Fortunately, the Ninth Circuit – which devised the test to begin with – did provide some guidance on its application. First, it made clear that, in determining if there is a substantial nexus between the injury and OCS operations, it is "the work performed" that must further, and be in the regular course of, OCS operations. 604 F.3d at 1139.[11]

[10] In focusing on the work the employee was tasked with at the time of his injury, the Court also rejected a test suggested by the Solicitor General – which would have focused on a worker's employment duties more broadly – because it did not address whether the injury resulted from OCS operations. *Id*. at 220-21.

[11] The Ninth Circuit and the Supreme Court focused on the work Valladolid was assigned to do (collecting scrap metal) rather than what he was actually doing at the moment he was injured (attempting to pick plantains). *L.V.,* 42 BRBS 67, 68. This establishes not only that those courts were focused on the worker's duties, but also that they did not intend to require that the injury be caused directly by OCS operations. If that were required, the courts could simply have denied OCSLA coverage, as Valladolid's fall from a forklift was caused by his attempt to pick plantains, not OCS operations. Of course, that distinction is not directly relevant here: there is no suggestion that Boudreaux was doing anything other than driving to the dock to be transported to an OCS platform when he was injured.

The ALJ, following this guidance, found that the work Boudreaux performed, including his travel to the dock, met these requirements.

> In this case, Claimant showed that the work he performed in testing the tanks in question was directly related to outer continental shelf operations in safely removing various chemicals, including oil and gas and other fluid, from the OCS. Further, *the work performed by Claimant was in the course and scope of such operations, which included the transport of himself and his equipment from his home to the customer's boat dock* or heliport for which he was paid both mileage and time expended according to a chart developed by Employer and the customer being serviced.

ER 36 (emphasis added).

This focus on the relationship between an employee's work and OCS operations was also evident in the Ninth Circuit's example, in which it stated that "an accountant's [off-OCS] workplace injury would not be covered even if related to outer continental shelf operations, while a roustabout's injury in a helicopter en route to the outer continental shelf likely would be." ER 37 (citing 604 F.3d at 1139). The ALJ found that Boudreaux was more like the roustabout than the accountant. ER 37. For several reasons, he is correct.

First, like the roustabout in the court's example, Boudreaux was on his way to the OCS at the time of his injury. While he was in an earlier stage of that trip than the hypothetical roustabout (who was on a helicopter), that should make no difference. Both employees were traveling to the OCS – as required by and paid for by their employer – to perform their usual work there. Indeed, before *Mills II*, this

Court held that workers commuting to and from the OCS were covered if injured during the commute. *Stansbury v. Sikorsky Aircraft*, 681 F.2d 948, 951 (5th Cir. 1982) (foreman killed in a helicopter crash on his way home from inspecting an OCS platform covered because his "work furthered the rig's operations and was in the regular course of extractive operations on the OCS"); *Beard v. Shell Oil Co.*, 606 F.2d 515, 517 (5th Cir. 1979) (roustabout killed in a boat fire in transit back to the shore was covered); *see Barger v. Petroleum Helicopters, Inc*., 692 F.2d 337 (5th Cir. 1982) (helicopter pilot transporting passengers to work on the OCS covered by OCSLA).

Boudreaux is also more like the roustabout than the accountant because the vast majority of his working time was spent on the OCS, not in an office. While OCSLA coverage is not limited to injuries suffered on the OCS, the fact that an employee primarily works on the OCS is relevant to the question of coverage. In *Valladolid*, for example, the worker "spent roughly 98% of his working time" on an offshore platform. 604 F.3d at 1129. By contrast, the work of the carpenter in *Baker v. Director, OWCP*, 834 F.3d 542, 549 (5th Cir. 2016) – who was building a housing module that would eventually become part of an offshore oil platform – was found not to have a substantial nexus to OCS operations because his "employment was located solely on land," his "particular job did not require him to travel to the OCS *at all*, making his work geographically distant from the OCS," and his employer had no

role in getting the platform to the OCS or operating it once it got there. *Id*. (emphasis in original).[12]

That is a far cry from the situation here. Boudreaux's employment was not located solely, or even primarily, on land. His job required him to travel to OCS platforms – where he spent almost 90% of his time – to ensure that the platforms' tanks could remain in service in order to facilitate the extraction of the OCS's natural resources. ER 14-15, 35-36; Tr. 21-25, 29. This is similar to the situation in *Valladolid* (where the claimant spent the vast majority of his time working offshore but was injured while working on shore) or the Ninth Circuit's hypothetical roustabout (who primarily worked offshore and was injured in transit). 604 F.3d at 1129. But it is not at all similar to *Baker*.

That Boudreaux worked primarily on the OCS is also significant in light of the reason the Supreme Court rejected the Third Circuit's but-for test: because that test could allow coverage of "land-based office employees whose jobs have virtually nothing to do with extractive operations on the OCS," *Pacific Operators*, 565 U.S. at 221, a description that clearly does not fit Boudreaux. And while the Employer makes much of the similarity between the factual situations presented here and in the Third Circuit's *Curtis* case, 849 F.2d 805, *see* OB 36, that similarity does not

[12] Notably, this Court, like the Ninth Circuit and Supreme Court, recognized that the substantial-nexus test is "fact-specific," and focused on the work being performed by the claimant. *Id*. at 548.

mandate any particular outcome here, as the Supreme Court simply found that the but-for test was inconsistent with the text of § 1333(b). As the Board correctly observed below, the *Curtis* Court did not apply the substantial-nexus test. *Pacific Operators* therefore does not hold – or even imply – that workers like Boudreaux or Curtis who suffer injuries on their way to the OCS could not be covered under the substantial-nexus test. *See* ER 17.

Owensby suggests that Boudreaux should be treated differently than workers injured traveling to the OCS by helicopter or boat because those forms of transportation are riskier than travel by car. OB 35. For several reasons, the Court should reject that argument, just as the Board did. ER 17. First, the Employer's assertion about the relative risks of various modes of transport is unsupported by any evidence in the record. Second, the question posed by the substantial-nexus test is not whether the work being performed is risky, but whether it bears a substantial connection to OCS operations. Third, workers' compensation does not cover employees only when they are engaged in risky activities, but whenever their injuries arise out of and in the course of their employment. And finally, a risk-based assessment is inconsistent with the no-fault nature of workers' compensation. *See* 33 U.S.C. § 904(b) ("compensation shall be irrespective of fault as a cause for injury"); *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268, 281 (1980) (noting that the Longshore Act "imposes liability without fault and precludes the

assertion of various common-law defenses"); *Jackson v. Strachan Shipping Co*., 32 BRBS 71 (1998) (disregard of doctor's advice against driving by worker with seizure disorder was irrelevant where § 904(b) excludes the consideration of fault in determining the cause of the injury).

As the Supreme Court held in *Pacific Operators*, OCSLA does not adopt a situs-of-injury test. Owensby's suggestion that coverage for workers injured in transit should be limited to injuries in boats and helicopters effectively creates a situs-of-injury requirement that begins at the water's edge. That is not only inconsistent with the Court's holding, it is not supported by common sense. Since the work being performed is essentially the same – paid travel to the OCS, whether by car, boat, or helicopter – the result should be the same: coverage by OCSLA.[13]

Finally, the Employer's focus on Boudreaux's distance from the dock at the time of his accident is irrelevant. OB 18, 19. The statute – and the substantial-nexus test devised to apply it – are concerned only with whether the work being performed

[13] Owensby's suggestion that the Court should instead rely on *Herb's Welding* makes no sense. OB 27-28. The worker there was not covered by OCSLA because he was injured while working on pipelines connected to a platform that was not located on the OCS, but in state territorial waters, which "produced oil from the territorial seabed, not the shelf." 766 F.2d at 900. As the Court reasoned, the circumstances which caused the worker in Herb's Welding to be injured would have occurred even if his employer had no operations on the OCS at all. *Id.* Boudreaux, of course, would not have been traveling to the OCS if Owensby did not have operations on the OCS.

is related to OCS operations, not where it is performed. Were this not the case, the Supreme Court would not have rejected the situs requirement of *Mills II*, and recognized that off-OCS injuries can be covered.

Indeed, if distance were a determining factor, it could lead to logically inconsistent results. For example, the roustabout in the Ninth Circuit's example could be found covered if his helicopter crashed 10 miles from its OCS-platform destination, but not if it crashed 50 miles from that same destination, on the same trip.[14] Given that the work being performed at the time of either crash would be the same, the worker's distance from his destination is irrelevant under the substantial-nexus test.

What is relevant is whether "the work performed directly furthers outer continental shelf operations and is in the regular course of such operations." 604 F.3d at 1139. And as the Board noted, "the Supreme Court left adjudicators considerable discretion to give meaning to the substantial nexus standard." ER 14 (citing *Pacific Operators*, 565 U.S. at 222) ("We are confident that ALJs and courts will be able to determine whether an injured employee has established a significant causal link

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[14] Boudreaux testified that the platforms he worked on were usually 50 or more miles offshore, and would take 1.5 to 2 hours to reach by helicopter, and up to 6 hours by boat. Tr. 27-28; CX-4 at 15. As a point of reference, the Big Foot oil platform discussed in *Baker*, 834 F.3d 542, and *MMR Constructors, Inc. v. Director, OWCP [Flores]*, 954 F.3d 259 (5th Cir. 2020), is now situated 225 miles south of New Orleans. *Flores*, 954 F.3d at 261 n.2.

between the injury he suffered and his employer's on-OCS extractive operations."). Here, the ALJ exercised that discretion reasonably, finding that Boudreaux's work, including transporting himself and his equipment to the OCS, furthered, and was in the regular course of, extractive operations on the OCS. ER 36.

CONCLUSION

For the reasons stated above, the Court should affirm the award of benefits to Boudreaux.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2020, I electronically filed the foregoing Response through the appellate CM/ECF system, and that all participants in the case are registered users of, and will be served through, the CM/ECF system.

/s/ Matthew W. Boyle
MATTHEW W. BOYLE

CERTIFICATE OF COMPLIANCE

I certify that:

1. Pursuant to Fed. R. App. Proc. 32(a)(5), (6) and (7)(B), (C), this brief has been prepared using Microsoft Word, fourteen-point proportionally spaced typeface (Times New Roman), and that, exclusive of the certificates of compliance and service, the brief contains 6,308 words;

2. Pursuant to Fifth Circuit Rule 25.2.1, the text of the electronic brief filed with the Court is identical to the text in the paper copies;and

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