

BRB No. 00-0288

MARCIE A. PICKETT)
(Widow of JOSEPH PICKETT))
)
 Claimant-Petitioner)
)
 v.)
)
 PETROLEUM HELICOPTERS,) DATE ISSUED: Oct. 31, 2000
 INCORPORATED)
)
 and)
)
 EMPLOYERS INSURANCE OF)
 WAUSAU, A MUTUAL COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

J. B. Jones, Jr. (Jones Law Firm), Cameron, Louisiana, and Warren B. Bosch (Breit, Best, Richman & Bosch), Denver, Colorado, for claimant.

Kenneth H. Laborde and Leo R. McAloon III (Pulaski, Gieger & Laborde), New Orleans, Louisiana, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-LHC-1301) of Administrative Law Judge Clement J. Kennington denying benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.*, as extended by the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §1331 *et seq.* (the Act). We must affirm the findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C.

§921(b)(3).

Claimant's husband (decedent) was a helicopter pilot for employer. Employer provides helicopter transportation to offshore oil rigs on the outer continental shelf (OCS). Decedent was performing an operational flight check when his helicopter crashed into the employee parking lot from an altitude of 30 feet. Decedent sustained fatal injuries as he was ejected from the helicopter and struck by the blades. Claimant is receiving death benefits under the Louisiana workers' compensation statute, and sought death benefits under the Act, 33 U. S.C. §909.

Following the *en banc* decision of the United States Court of Appeals for the Fifth Circuit in *Mills v. Director, OWCP*, 877 F.2d 356, 22 BRBS 97(CRT) (5th Cir. 1989), the administrative law judge found that decedent's death is not covered under the OCSLA as the situs of the death was not on the OCS itself. Claimant appeals this finding, and employer responds, urging affirmance.¹

In *Mills*, the court held that the OCSLA applies to those who "suffer injury or death on an OCS platform or the waters above the OCS" and who "satisfy the 'but for' status test this court described in *Herb's Welding, Inc. v. Gray*, 766 F.2d 898, 900 (5th Cir. 1985)," *Mills*, 877 F.2d at 362, 22 BRBS at 102(CRT), *i.e.*, the injury or death would not have occurred "but for" the extractive operations on the shelf. The claimant in *Mills* suffered an injury during construction of an oil production platform destined for the OCS. The injury occurred in the employer's yard in Amelia, Louisiana. The court held that the claimant could not recover under the OCS, as the "situs" requirement of the OCSLA was not met. The court distinguished its decisions in *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982), *cert. denied*, 461 U.S. 958 (1983), and *Stansbury v. Sikorski Aircraft*, 681 F.2d 948 (5th Cir.), *cert. denied*, 459 U.S. 1089 (1982), as in those cases the employees died in helicopter crashes on the high seas over the OCS. As the deaths did not occur on land, and thus were not subject to state workers' compensation laws, the Fifth Circuit held that the decisions did not preclude the result it announced in *Mills*.² The *Mills* court reviewed

¹The administrative law judge also found that there is no coverage under the Longshore Act. *See* 33 U.S.C. §§902(3), 903(a). This finding is not appealed.

²The court did state that *Barger* and *Stansbury* contained "overly broad" *dicta*. *See* discussion, *infra*.

legislative history and case law decided on other issues involving the OCS, and determined that the federal remedy of the OCSLA is not available to those who have a state workers' compensation remedy. *Mills*, 877 F.2d at 362, 22 BRBS at 102(CRT).

The Fifth Circuit more recently addressed its *Mills* decision in *Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31 BRBS 199(CRT) (5th Cir. 1998). The claimant in *Sisson* was injured while constructing a guard rail around an employee parking lot at a heliport. The heliport was used for transporting workers and equipment to rigs on the OCS. The court first affirmed the administrative law judge's finding that claimant's injury did not occur on a situs covered under the Longshore Act, 33 U.S.C. §903(a). The court then summarily rejected the contention that claimant was covered under the OCSLA. The court stated:

Sisson also claims coverage under the OCSLA, 43 U.S.C. § 1333(b). *Mills v. Director, OWCP*, 877 F.2d 356 (5th Cir. 1989) held that an employee had to be injured on the Outer Continental Shelf to obtain LHWCA benefits through the OCSLA. Sisson concedes that he was not so injured. *Mills* forecloses OCSLA relief for Sisson.

131 F.3d at 557, 31 BRBS at 201(CRT).

In contrast, in a decision issued before the *en banc* decision in *Mills*, the United States Court of Appeals for the Third Circuit held that a claimant, injured on a highway in New Jersey on his way to a heliport to be transported to the OCS, was covered under the OCSLA. The court rejected a situs requirement for OCSLA coverage, and imposed only a "but for" test: would the claimant have sustained injuries "but for" the operations on the shelf. Holding that he would not have, the claimant was found covered. *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805, 21 BRBS 61(CRT) (3^d Cir. 1988).

Claimant contends that the reasoning of *Curtis* should be applied to find coverage in this case, inasmuch as the facts of *Mills* and *Sisson* are distinguishable, and therefore the holdings therein are inapplicable. Claimant states that the claimants in *Mills* and *Sisson* never left their land-based employment, whereas her husband regularly flew over the OCS and landed on rigs on the OCS like the claimant in *Curtis*. Claimant hinges her argument on this language from *Mills*:

Barger and *Stansbury* held that §1333(b) extended the LHWCA as the sole remedy for survivors suing the employers of individuals who (1) satisfied the "but for" status test; and (2) died in helicopter crashes on the high seas above the OCS. Although some of the dicta in those opinions may be overly broad, we have no quarrel with those holdings to the extent they grant LHWCA benefits to oilfield workers injured on waters above the OCS. We do not interpret those cases to read §1333(b) as extending LHWCA benefits to

oilfield workers injured on land or state territorial waters. *But cf. Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (3d Cir.1988) (Section 1333(b) covers OCS platform worker injured in car accident on New Jersey Garden State Parkway while driving to meet helicopter that would have flown him to rig).

Mills, 877 F.2d at 361-362, 22 BRBS at 102(CRT). Claimant thus contends that the Fifth Circuit did not disagree with *Curtis* on the issue of OCSLA coverage for one who regularly uses helicopter transportation to the OCS, and that the administrative law judge's decision therefore should be reversed.

We reject claimant's argument and affirm the administrative law judge's denial of benefits, as his finding that decedent's death is not covered under the OCSLA is supported by the law of the Fifth Circuit, which is controlling in the instant case. In *Stansbury*, the Fifth Circuit addressed a widow's entitlement to benefits under the OCSLA for the death of her husband in a helicopter crash into the waters over the OCS.³ The court stated, "We have construed [the OCSLA] to apply to injuries occurring as a result of the operations described without regard to the physical situs of the injury." *Stansbury*, 681 F.2d at 950 (citations omitted). In both *Stansbury* and *Barger*, the court focused solely on the "but for" test, and found it satisfied in that the employees' deaths in helicopter crashes in the waters over the OCS would not have occurred but for the extractive operations on the OCS. The language quoted above from *Stansbury* concerning the absence of a situs test is clearly the *dicta* the *Mills* court referred to as being overbroad; the employees in both *Stansbury* and *Barger* were killed in the waters over the shelf, so there was no need to state that the physical situs of the injury is not relevant. Although the *Mills* court did not expressly state its disagreement with *Curtis*, and merely noted its opposite holding, claimant herein reads too much into this method of citation. With regard to the "situs" requirement of the OCSLA, *Mills* specifically states that the holdings in *Barger* and *Stansbury* are limited to finding OCSLA coverage for "those oilfield workers injured on waters above the OCS." *Mills*, 877 F.2d at 361, 22 BRBS at 102(CRT). The court definitively held that the Act does not extend to those oilfield workers injured on land or in state territorial waters. *Id.*, 877 F.2d at 362, 22 BRBS at 102(CRT). As it is undisputed that decedent's death occurred on land, *Mills* forecloses

³In both *Stansbury* and *Barger*, the claimants also attempted to recover under the Jones Act, but the helicopters were held not to be "vessels."

claimant's recovery under the Act irrespective of the fact that decedent regularly flew over the OCS and landed on rigs on the OCS.⁴ See *Sisson*, 131 F.3d at 557, 31 BRBS at 201(CRT).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

⁴Claimant apparently has a remedy under state law, and the court in *Mills* stated that "As the legislative history makes plain, Congress enacted OCSLA only as a vehicle to fill voids in the rules governing the federally managed territory of the OCS. No such void exists for disputes encompassing areas already governed by state law." 877 F.2d at 359, 22 BRBS at 99(CRT).