

BRBS Commentary on Longshore and Related Matters

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OCSLA Coverage Post-the Supreme Court's decision in *Valladolid*

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Introduction

In 2012, the U.S. Supreme Court addressed for the first time the scope of workers' compensation coverage under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C.S. § 1333(b), an extension of the Longshore and Harbor Workers' Compensation Act (LHWCA or Longshore Act), 33 U.S.C.S. §§ 901–950. *Pacific Operators Offshore, LLP v. Valladolid*.¹ At issue before the Supreme Court was whether an employee who spent 98% of his work time on the Outer Continental Shelf² but who was injured while working at his employer's on-shore facility was entitled to workers' compensation for that injury under OCSLA. The Court adopted a coverage test devised by the Court of Appeals for the Ninth Circuit and rejected tests previously articulated by the Courts of Appeals for the Third and Fifth Circuits. Cases applying the Supreme Court's test for OCSLA coverage are now being litigated. Four have reached the Department of Labor's Benefits Review Board: *Baker v. Gulf Island Marine Fabricators, LLC*, 49 BRBS 45 (2015), 2015 WL 4873133, appeal pending Fifth Cir. No. 15-60634; *Boudreaux v. Owensby & Kritikos, Inc.*, 49 BRBS 83 (2015) 5 WL 9606397; *Grabert v. Besco Tubular Services, Co.*, OALJ Case No. 2015-LHC-0925 (2015), BRB No. 2016-0140; and *Flores v. MMR Constructors, Inc.*, OALJ Case No. 2014-LHC-1453 (2015), BRB No. 2016-0133. In addition, the United States District Court for the Western District of Louisiana has also applied *Valladolid* in a suit for damages against an offshore platform owner and operator. *Mays v. Chevron Pipe Line Co.*, -- F. Supp. 3d --, 2016 U.S. Dist. LEXIS 26801 (W.D. La. 2016), 2016 WL 762615 (Dist Ct. Civil Action No. 14-3098). A summary of the arguments made and the Board and court decisions to date follows.

These cases involve factual scenarios similar to the cases litigated before the Supreme Court's decision. Although the Supreme Court has now spoken, the decisions to date have not yielded consistent results. While litigation is still underway, the decisions have so far demonstrated that the *Valladolid* test and the discretion granted to adjudicators to apply it is not yet clearly understood.

1 **Error! Main Document Only.**181 L. Ed. 2d 675, 132 S. Ct. 680, **Error! Main Document Only.**45 BRBS 87(CRT) (2012).

2 The "Outer Continental Shelf" is defined by OCSLA to mean "all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control." 43 U.S.C.S. § 1331(a). Notably, the definition does not include the waters above the Shelf.

The Statutory Language

OCSLA extends the provisions of the LHWCA to the “disability or death of an employee resulting from any injury occurring as a result of operations conducted on the Outer Continental Shelf... .” 43 U.S.C.S. § 1333(b). In *Valladolid*, the Supreme Court held that the phrase, “injury occurring as a result of,” extractive shelf operations defined the scope of OCSLA coverage and that that statutory requirement was met if the work-related injury bears a “substantial nexus” to those operations. Accordingly, if this causation test is satisfied, OCSLA, and by extension, the LHWCA, provides the workers’ compensation remedy for the injured worker, even if the injury itself did not occur on the Shelf.

OCSLA Coverage Before the Supreme Court’s Decision

Before the Supreme Court decided *Valladolid*, three courts of appeals had addressed the scope of OCSLA coverage resulting in a three-way split. The United States Court of Appeals for the Fifth Circuit had decided the greatest number of cases, given its proximity to the Gulf of Mexico. Some Fifth Circuit cases involved injuries that did not occur either on an OCS drilling platform or on waters above the OCS. See e.g., *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1982); *Stansbury v. Sikorski Aircraft*, 681 F.2d 948 (5th Cir. 1982); and *Herb’s Welding, Inc. v. Gray*, 766 F.2d 898, 17 BRBS 127(CRT) (5th Cir. 1985).³

In these earliest cases, *Barger* and *Stansbury* were killed in helicopter crashes on the high seas over the OCS. Both deaths were covered under OCSLA. *Barger* was a helicopter pilot whose regular work entailed transporting oil field workers and equipment from Louisiana to OCS platforms. While flying eleven passengers in his employer’s helicopter to a fixed platform on the shelf, he crashed forty miles offshore, killing all aboard. The Fifth Circuit had little trouble concluding that *Barger*’s death “clearly” resulted from operations conducted on the OCS for extractive purposes. *Barger v. Petroleum Helicopters, Inc.*, 692 F.2d at 340.

Stansbury was a painting supervisor for Chevron Oil Company who worked out of a land-based office in Louisiana but whose duties included traveling three to four times per week to drilling sites both offshore and on land, to supervise and inspect painting projects. After finishing an inspection on a fixed offshore drilling rig in the Gulf of Mexico, he was killed when the helicopter flying him home crashed into the sea. *Stansbury v. Sikorski Aircraft*, 681 F.2d at 949. The Fifth Circuit found that “his work furthered the rig’s operations and was in the regular course of the extractive operations on the OCS. But for those operations, he would not have been in the helicopter. His death, therefore, occurred ‘as a result of operations’ as required by the OCSLA.” *Id.* at 951.

In comparison, the worker in *Herb’s Welding, Gray*, was a welder injured on an oil drilling rig in Louisiana state territorial waters. He was not covered under OCSLA. *Herb’s Welding, Inc. v. Gray*, 766 F.2d at 899. Although Gray spent 25% of his time working on drilling rigs located on the Shelf, at the time of his injury he was bracing a gas line that ran from

³ This case had previously been heard by the Supreme Court on the question whether the injured worker was covered by the LHWCA. *Herb’s Welding, Inc. v. Gray*, 470 U.S. 414 (1985). The Supreme Court’s holding that Mr. Gray was not entitled to LHWCA compensation necessitated the subsequent OCSLA determination.

one part of a fixed production platform to another part of the same platform. That platform was connected to a second platform within Louisiana state waters which was connected, in turn, to a third OCS platform. *Id.* at 899-900. The Fifth Circuit acknowledged that it had adopted a “but for” causation test in *Barger* and *Stansbury* but distinguished those cases as more directly furthering extractive operations than Gray’s welding on state waters. The Fifth Circuit reasoned that Gray’s accident would have occurred regardless of whether the employer was operating OCS rigs, and contrasted that fact with the coverage found in the helicopter crash cases. There, the Court said, the injured employees’ “work had furthered the operations of a fixed rig on the shelf and was in the regular course of extractive operations on the shelf.” *Herb’s Welding*, 766 F.2d at 900.

Thereafter, the Fifth Circuit was presented with a claim seeking OCSLA workers’ compensation benefits for an injury that occurred on land. A panel held that the land-based welder injured while building an offshore oil production platform destined for use on the Shelf was covered by OCSLA. *Mills v. Director, OWCP*, 846 F.2d 1013, 21 BRBS 83(CRT) (5th Cir. 1988) (*Mills I*). The *Mills* panel also clarified the Fifth Circuit’s causation test. 846 F.2d at 1015. Acknowledging that the earlier cases expressed the test in terms of “but for” causation, it stated, “[t]he ‘but for’ test this Circuit has adopted is not the simple ‘*causa sine qua non*’ test of tort law, but includes the requirement that the claimant show a nexus between the work being done and operations on the shelf similar to the proximate cause test in tort law; it requires that the work ‘further[s] the operation of a fixed rig on the shelf and [is] in the regular course of extractive operations on the shelf.’” *Id.* citing *Herb’s Welding, Inc. v Gray*, 766 F.2d 898.

The Fifth Circuit granted rehearing. Overruling the panel decision, the Court of Appeals for the Fifth Circuit ruled, *en banc*, that only injuries that actually occur on the Shelf or on the waters above it are compensable under OCSLA. *Mills v. Director, OWCP*, 877 F.2d 356, 22 BRBS 97(CRT) (1989) (*Mills II*). The *en banc* decision explicitly adopted the holdings of *Barger* and *Stansbury*, the helicopter crash cases, “to the extent they grant LHWCA benefits to oilfield workers injured on waters above the OCS” or on an OCS platform, who also would not have been injured but for extractive operations being conducted on the Shelf. The Court also cautioned, however, that some dicta in *Barger* and *Stansbury* “may be overly broad.” *Mills II* at 361. In sum, the *en banc* Fifth Circuit adopted a situs-based coverage test that required the injury to take place on or over the waters of the OCS.⁴ In rejecting *Mills*’ OCSLA coverage, it also held that OCSLA’s definition of “development,”⁵ was enacted as part of a comprehensive scheme to regulate OCS drilling and was not intended to have any application to OCSLA’s workers’ compensation provision. 877 F.2d at 360-61. Thus, this definition was not available to establish OCSLA coverage. In sum, the *en banc* Fifth Circuit concluded that OCSLA did not, in any event, extend LHWCA benefits to injuries on land or on state territorial waters; rather, it required the injured worker to satisfy a causation “but for” status test *and* a situs-based test such that the injury occurred either on the Shelf or the waters above it. 877 F.2d at 361.

4 See also *Pickett v. Petroleum Helicopters, Inc.*, 266 F.3d 366, **Error! Main Document Only.**35 BRBS 101(CRT) (5th Cir. 2001) (OCSLA compensation claim denied to victim of helicopter crash on land because *Mills II*’s situs-based test not satisfied).

5 In relevant part, OCSLA defines “development” as “those activities which take place following discovery of minerals in paying quantities, including geophysical activity, drilling, platform construction, and operation of all onshore support facilities, and which are for the purpose of ultimately producing the minerals discovered.” 43 U.S.C.S. § 1331(I).

By contrast, the Court of Appeals for the Third Circuit held that OCSLA provided workers' compensation coverage if an injury would not have occurred "but for" operations on the OCS. *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805, 811, 21 BRBS 61(CRT) (3d Cir. 1988). And, it applied this "but for" test so that it covered an OCS worker injured on land. In *Curtis*, the court awarded benefits to a worker injured in a car accident on New Jersey's Garden State Parkway while driving to meet a helicopter that was to fly him to an offshore oil rig in order to work a week-long shift on the Shelf. Although he had just completed his regular shift, the employer had called Mr. Curtis back to work in order to fill in for an absent co-worker.

In addition, prior to *Valladolid*, the Court of Appeals for the Ninth Circuit had found a pipefitter/welder injured while working on an OCS platform to be an "employee" within the meaning of the OCSLA even though his work was primarily land-based. Although holding the employee covered by OCSLA given the facts, the court did not decide whether an injury had to occur on the Shelf in order to be covered. *Kaiser Steel Corp. v. Director, OWCP [Roberge]*, 812 F.2d 518 (9th Cir. 1987).

Background to the Supreme Court's Decision

Valladolid was a roustabout for an oil exploration and extraction company which operated drilling platforms on the OCS as well as an onshore crude oil facility. Valladolid spent 98% of his time working on one of his employer's OCS oil drilling platforms. He spent the remainder of his time working on land at his employer's crude oil plant. His job at the land-based plant involved using a forklift to clean up scrap metal debris that had been delivered to the plant from the employer's OCS platforms. Valladolid was crushed to death by the forklift when it tipped over on top of him.

The ALJ denied benefits and the Benefits Review Board—adopting the Fifth Circuit's situs-of-injury test—affirmed. On appeal, however, the Ninth Circuit concluded that there was no textual support for the Fifth Circuit's situs-of-injury test. See *Valladolid v. Pacific Operations Offshore, LLP*, 604 F.3d 1126, 1129, 1133 (9th Cir. 2010). Instead, the court held that while the "operations" that caused a worker's injury must have been on the Shelf, the injury itself could occur elsewhere, provided it bore a "substantial nexus" to shelf operations. *Id.* at 1134, 1139. The Ninth Circuit held that its new test was consistent with the Fifth Circuit precedent decided prior to that circuit's *en banc* decision. *Id.* at 1139. The Ninth Circuit stated that to meet the "substantial nexus" test, "the claimant must show that the work performed directly furthers outer continental shelf operations and is in the regular course of such operations." *Id.* Thus, the Ninth Circuit focused on whether the injured worker's *labor* furthered shelf operations rather than whether the *injury* itself was caused by those operations. By way of illustration the Court stated, "... an accountant's workplace injury would not be covered even if it related to outer continental shelf operations, while a roustabout's injury in a helicopter en route to the outer continental shelf likely would be." 604 F.3d at 1139. The Ninth Circuit remanded the case for the ALJ to apply the "substantial nexus" test in the first instance.⁶

⁶ The Supreme Court granted certiorari directly from the Ninth Circuit's decision ordering remand. 562 U.S. 1215, 131 S. Ct. 1472 (2011).

The Supreme Court's Decision in *Valladolid*

The Supreme Court agreed with the Court of Appeals for the Ninth Circuit that OCSLA's text does not require that injuries actually occur on the Shelf. *Pacific Operators Offshore, LLP v. Valladolid*, 132 S. Ct. 680, 687 (2012). Thus, the Court rejected the Fifth Circuit's situs-based formulation as unduly restrictive. *Id.* at 690. The Court considered the Third Circuit's broad "but for" test but concluded it was too all-encompassing. *Id.* at 690-91. While recognizing that it was properly founded on causation, the Court criticized that test because "[t]aken to its logical conclusion, the 'but for' test ... could reasonably be interpreted to cover land-based office employees whose jobs have virtually nothing to do with extractive operations on the OCS." *Id.* at 690. The Court adopted the Ninth Circuit's "substantial nexus" test as "most faithful to the text of § 1333(b)." *Id.* at 691. In doing so, it did not modify the test—rather, it adopted the test in the same terms as stated by the Ninth Circuit. That test required the injured employee to establish a significant causal link between the injury and the employer's on-OCS extractive operations.

The Court recognized that "whether an employee injured while performing an off-OCS task qualifies ... is a question that will depend on the individual circumstances of each case." Thus, the Supreme Court affirmed the Ninth Circuit decision and remanded the case for application of the nexus test.⁷ In doing so, the Supreme Court left considerable discretion to adjudicators to apply the substantial nexus standard, expressing confidence that notwithstanding the imprecision of the test, "ALJs and 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." *Valladolid*, 132 S. Ct. at 691.

In a separate concurring opinion, Justice Scalia criticized the indeterminate nature of the "substantial nexus" test and suggested that section 1333(b)'s causation standard should be the more familiar "proximate cause" test utilized in tort law. *Id.* at 691-92.

Post-*Valladolid* Litigation

Since the Supreme Court decided *Valladolid*, several cases involving on-shore injuries to workers with some connection to OCS extraction activities have arisen. Most involve compensation claims seeking benefits under OCSLA. The OALJ and Benefits Review Board decisions, as well as the United States District Court ruling, demonstrate how various adjudicators have applied the Supreme Court's "substantial nexus" test. The following cases all remain in litigation but have resolved, at least for the time being, certain questions. In particular, the BRB has held, consistent with the Ninth Circuit's rule and the pre-*Mills II* Fifth Circuit's interpretation of 43 U.S.C.S. § 1333(b), that *Valladolid*'s "substantial nexus" test looks not only to the causal relationship between the worker's injury and the employer's OCS extraction operations but also to the connection between the injured employee's regular work and extractive operations.

⁷ On remand, no decision was rendered on the merits because the parties settled the case pursuant to LHWCA section 8(i), 33 U.S.C.S. § 908(i).

Baker v. Gulf Island Marine Fabricators, LLC

49 BRBS 45 (2015), 2015 WL 4873133, appeal pending Fifth Cir. No. 15-60634

James Baker was employed as a marine carpenter by Gulf Island Marine Fabricators LLC at its waterside marine fabrication yard in Houma, Louisiana. He spent 100 percent of his time working on land. Baker built living quarters destined to be installed on a tension leg offshore oil platform (TLP) referred to as “Big Foot.”⁸

While installing sheet metal during the construction of the living quarters, Baker injured his neck and back. At the time of the injury, he was approximately 100 yards from a navigable canal. Baker claimed entitlement to compensation for his injury under the LHWCA directly, or, alternatively, under OCSLA. The ALJ denied Baker’s LHWCA claim because he found Big Foot was not a vessel and therefore, Baker was not involved in building a vessel. The ALJ also denied Baker’s OCSLA claim because he found the necessary “substantial nexus” lacking between Baker’s work and operations on the Shelf. In concluding that Baker was not covered by OCSLA, the ALJ found that: (1) Baker never worked on the OCS but always on land; (2) his work was to construct 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; (3) at the time of Baker’s injury, the platform had not been completed and thus was not conducting extractive operations; and (4) Baker’s employer had no role in the installation or extractive operations of the platform. 48 BRBS 623 (ALJ).

On appeal, the Board affirmed the ALJ’s determination that OCSLA’s “substantial nexus” test was not satisfied. *Baker v. Gulf Island Marine Fabricators, LLC*, 49 BRBS at 45. The Board agreed with the Director, OWCP, and the ALJ that the link between Baker’s work and OCS operations was too attenuated to bring him within OCSLA’s coverage. Baker’s work took place on land years before Big Foot was ready to perform extraction operations on the Shelf and was essentially identical to work performed on non-OCS projects. The Board’s decision summarized the facts by citing the Director, OWCP’s statement that Baker’s work activities were “geographically, temporally, and functionally distant” from shelf extraction operations. 49 BRBS at 50. The facts considered as a whole, the Board held, simply demonstrated 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.S. § 1333(b).⁹

Flores v. MMR Constructors, Inc.

⁸ TLPs are a type of offshore oil platform used for deep water drilling. Big Foot’s hull was constructed in Korea and transported to Ingleside, Texas. Meanwhile, Gulf Marine Fabricators, LP fabricated Big Foot’s operations modules in Aransas Pass, Texas. Those modules, including the housing module Baker constructed, were transported via barge to Ingleside for integration with the hull. Once assembled, the Big Foot was towed 200 miles off the coast of Louisiana and anchored to the sea floor by 16 tendons. Moving and installing the Big Foot cost over 40 million dollars, and it was expected to remain in place for the productive life of the oil field, estimated at 20 years. As it turned out, after being towed to its planned OCS drilling site in early 2015, 9 of the 16 tendons securing it to the seabed malfunctioned and the Big Foot had to be towed back to Texas for repair in October 2015. <http://finance.yahoo.com/news/chevrons-big-foot-platform-pulled-194007046.html>.

⁹ The Director has taken a similar position in the pending Fifth Circuit appeal. See Director’s Brief in No. 15-60634 (5th Cir.).

Like Baker, Henry Flores was engaged in constructing a component of the Big Foot tension leg oil platform.¹⁰ A licensed electrician, Flores' job was to inspect the Big Foot's electrical wiring to ensure it passed installation inspections. On January 20, 2014, Flores tore his Achilles tendon when his foot got caught under a door after becoming entangled in a cable. Flores' injury occurred while working on Big Foot's electrical building module which was tied to a fabrication yard dock and was floating on pontoons in the navigable waters of Corpus Christi, Texas Bay. ALJ Decision at 4.

Arguing in the alternative, Flores contended that he was covered by OCSLA because he met *Valladolid's* substantial nexus test.¹¹ Flores' employer argued that OCSLA did not apply because there was no causal link between the injury and his employer's on-OCS extractive operations; indeed, Flores' employer did not conduct any such operations at all.

The ALJ denied Flores benefits under OCSLA. He found *Valladolid's* substantial nexus test was not satisfied and thus that OCSLA did not supply a remedy. The ALJ found Flores' electrical inspection work to be equally as disconnected from OCS extraction operations as Baker's housing module construction work. ALJ Decision at 26.

Although recognizing that the *en banc* Fifth Circuit's situs-based test for OCSLA coverage was overruled by *Valladolid*, the ALJ believed that *Mills II* remained good law for the proposition that an injured worker's activities described by OCSLA's definition of "development" did not automatically satisfy the statutory requirement that the disability or death result from an injury occurring as a result of OCS operations. The ALJ found that despite the statute's broad definition of development, Flores' employer, only a subcontractor on Big Foot construction, was not engaged in the type of extractive operations required by *Valladolid*. ALJ Decision at 22-23 n. 10. The ALJ believed that *Valladolid's* substantial nexus standard required a substantial causal link between the injury and an employer's on OCS-extractive operations. Finding no such substantial connection, the ALJ denied Flores' claim. Flores appealed to the Benefits Review Board, BRB No. 16-0133, where briefing is underway.

A second set of cases has arisen in which the work injuries were sustained not in connection with construction of oil drilling rig components but incidental to oil rig workers' transportation to the OCS to perform activities essential to natural resource extraction.

Boudreaux v. Owensby & Kritikos, Inc.
49 BRBS 83 (2015), 2015 WL 9606397

10 Flores' employer, MMR, was a subcontractor to the general contractor, Kiewit, which built the platform for Chevron. The contract between MMR and Kiewit was scheduled to end when the Big Foot was floated out to the OCS.

11 Flores also argued that he was covered by the LHWCA directly under the holding of *Director, OWCP v. Perini North River Assocs.*, 459 U.S. 297, **Error! Main Document Only.** 74 L. Ed. 2d 465, 103 S. Ct. 634, 15 BRBS 62(CRT) (1983).

Scotty 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 off-shore oil platforms for possible defects. Boudreaux spent 89% of his work time in the 52 weeks prior to his injury working off-shore and was routinely compensated for his travel to and from off-shore testing sites. In fact, more than half of his \$85,000 annual salary came from overtime, mileage reimbursement, and compensation for travel time. Boudreaux's employer required him to travel to a specific location at a specific time to be transported off-shore.

Boudreaux was injured in a car accident en route to a dock in Freshwater City, Louisiana to meet a boat to transport him to an off-shore oil rig. He was driving his own vehicle and had planned his own route to the dock from his home. As his employer required, Boudreaux was carrying testing equipment that he needed to do his off-shore job and was being paid a pre-negotiated rate for travel time and mileage.

The ALJ found a substantial nexus between Boudreaux's injury and OCS operations and also found that Boudreaux was acting within the course and scope of his employment when he was injured. The ALJ therefore concluded the injury was covered by OCSLA. In evaluating whether OCSLA coverage was established, the ALJ carefully considered the facts and circumstances surrounding Boudreaux's injury and determined the link between his injury and offshore operations was sufficiently immediate to meet the substantial nexus test. The ALJ noted that the injury occurred while Boudreaux was traveling to a dock to be transported to an offshore facility that stored natural resources extracted from the Outer Continental Shelf. As part of his job, Boudreaux was required to be at a specific dock at a specific time to obtain transportation to the offshore facility, and he was compensated for his travel time. Finally, at the time of his injury, Mr. Boudreaux was traveling to perform services to ensure the safe, continued operation of an offshore shelf facility, just as he had over the entire course of his career with the employer. The ALJ found that Boudreaux's duties examining OCS facility storage tanks for defects was in the "regular course of" and "directly furthered" operations at that facility.

On appeal to the Board, the employer's chief argument was that the ALJ erred in considering Boudreaux's ordinary work duties to determine whether there was a substantial nexus between his injury and OCS operations under *Valladolid*. The employer contended that the proper focus of the inquiry was limited to whether the injury was directly caused by Outer Continental Shelf operations. Because Boudreaux's injury resulted from a distracted driver on land, the employer argued, it lacked any nexus to shelf operations. Thus, the employer contended that OCSLA coverage should turn on the claimant's activity at the time of the injury and its relation to extractive operations—not on the claimant's regular job duties and their connection to shelf extraction.

The Board affirmed the ALJ's finding of OCSLA coverage, 85 BRBS at 87-88,¹² at the urging of the Director, OWCP, and rejected the employer's cramped interpretation of the "substantial nexus" test. The Board held it inconsistent with the Ninth Circuit's articulation of the test—which, the Board noted, the Supreme Court had adopted without modification. 85

12 The Board criticized the ALJ for deciding only the coverage issue and not issuing a compensation order, either rejecting the claim or making an award as required by 33 U.S.C.S. § 919(c). 49 BRBS at 84 n. 2. The Board remanded the case for consideration of any other disputed issues and the entry of an order.

BRBS at 86. Claimants may establish a substantial nexus between their injury and operations on the shelf by showing that “the work performed directly furthers outer continental shelf operations and is in the regular course of such operations.” *Valladolid v. Pac. Operations Offshore, LLP*, 604 F.3d at 1139. Thus, the test is whether the employee’s usual work duties further Outer Continental Shelf operations; not solely whether the employee was injured performing an activity that directly fostered offshore operations, as the employer argued. The Board found that the Ninth Circuit suggested as much in its statement that “a roustabout’s injury in a helicopter en route to the outer continental shelf likely would be” covered under the test. 604 F.3d at 1139.

The employer further argued that only transportation injuries sustained in helicopter or vessel accidents en route to an OCS platform could satisfy the substantial nexus test and that a car accident would never be sufficiently related to result in OCSLA coverage. It reasoned that the risks faced in helicopter and vessel transportation to the shelf are more closely related to offshore operations. The Board rejected that argument because the substantial nexus test is based on causation rather than a risk-based assessment of the circumstances surrounding the injury. Quantifying the risks posed by various aspects of a claimant’s work, the Board noted, would add complexity to case adjudication and possibly be inconsistent with the no-fault nature of the LHWCA. *Boudreaux v. Owensby & Kritikos, Inc.*, 49 BRBS at 88.

The Board also rejected the employer’s argument that finding OCSLA coverage in the case required reliance on the discredited Third Circuit’s “but for” test. While it was true that the facts in *Boudreaux* were similar to those in *Curtis*, 849 F.2d 805, and the Supreme Court expressly criticized the “but for” test in *Valladolid*, the Board concluded that the Court rejected that test not because of the result in *Curtis* but because the Third Circuit’s standard might afford OCSLA coverage to “land-based office employees whose jobs have virtually nothing to do with extractive operations.” *Boudreaux*, 49 BRBS at 88, citing *Valladolid*, 132 S.Ct. at 690. By contrast, here the Board affirmed the ALJ’s finding that the evidence established a significant causal link between the claimant’s regular work testing platform tanks for defects, his injury and his employer’s OCS extractive operations. 49 BRBS at 88.

Grabert v. Besco Tubular Services Co.

OALJ Case No. 2015-LHC-0925, BRB No. 2016-0140

Anthony Grabert’s employer, Besco, is an oil services company that provides casing and tubing services to oil companies, including those conducting offshore operations to explore and drill for oil on the Outer Continental Shelf. Grabert began working for Besco in 2012. After an initial six months that were spent on a land-based project in Pennsylvania, he was transferred to Louisiana. Thereafter, approximately 80% of his work was performed offshore. On the offshore projects, Grabert most commonly worked as a tong operator on a four-man team, but he occasionally performed other duties relating to the extraction of oil from the Outer Continental Shelf.¹³

Grabert, like Boudreaux, was injured in an automobile accident while en route to his work shift on an oil platform on the Shelf. He was paid at an hourly rate and received that

¹³ Casing, tubing, and tong operations are all activities which extract oil and gas from underground.

hourly pay while traveling between his home or office and the dock from which he was to be transported offshore. If he drove his own vehicle, he was reimbursed for mileage as well.

Mr. Grabert's injury occurred after his employer called him to work an offshore shift. His wife dropped him at Besco's office in Gretna, Louisiana, where he met a co-worker, who agreed to give him and two other colleagues a ride to the dock. On the way there, the car Grabert was riding in rear-ended a stopped vehicle. Grabert was sitting in the back with his seat belt unfastened because equipment the men were taking off-shore prevented its use. He was injured when the collision threw him against the front seat. The parties stipulated that Grabert was acting within the course and scope of his employment at the time of injury.

The ALJ denied benefits, reasoning that the Ninth Circuit's articulation of the substantial nexus test did not apply. The ALJ reasoned that the Ninth Circuit's focus on the injured worker's overall duties makes such an inquiry necessarily status-based, and the Supreme Court specifically rejected a status-based test in favor of the OCLSA text's plainly causation-based test. ALJ order at 6. The ALJ further suggested that the Supreme Court in *Valladolid* indicated it would find the substantial nexus test met only if an offshore accident directly caused onshore injuries. In addition, the ALJ reasoned that an award to a worker injured in a land transportation accident would be the equivalent of adopting the Third Circuit's "but-for" causation test, *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (3d Cir. 1988), the very test the Supreme Court rejected in *Valladolid*.¹⁴ Grabert appealed to the Benefits Review Board where the case is currently pending.

In a brief to the Board supporting OCSLA coverage, the Director argued that although Grabert would clearly have satisfied the expansive "but for" test, that did not mean he could not also satisfy the substantial nexus test. The Director pointed to the Board's subsequent decision in *Boudreaux* and contended that it made clear the ALJ's denial of coverage here was erroneous. In *Boudreaux*, the Board emphasized the Ninth Circuit's statement that the "substantial nexus" test is met if "the work performed directly furthers [OCS] operations and is in the regular course of such operations." *Boudreaux*, 49 BRBS at 86-87 (emphasis added, quoting 604 F.3d at 1139). The Director argued that nothing in the Supreme Court's opinion suggested that it modified the Ninth Circuit's test so that it was limited to whether the *injury* furthered OCS operations. Rather, the Court described the Ninth Circuit's test and then unequivocally adopted it. Thus, the best reading of the Supreme Court's opinion is that it found the Ninth Circuit's test to be causation based and to be the best method of determining causation for purposes of OCSLA coverage.

The Director also disagreed with the *Grabert* ALJ's reliance on the Supreme Court's observation that "it is not difficult to imagine an accident occurring on an OCS platform that could injure employees located off the OCS." The Director disagreed with the ALJ's resulting inference that the only on-shore injuries that OCSLA covered were those directly resulting from such an offshore accident. The Director noted that the Supreme Court made that observation

¹⁴ When the ALJ decided *Grabert*, *Boudreaux* was pending before the Benefits Review Board but had not yet been decided. Thus, the ALJ did not have the advantage of the Board's decision in which it rejected that argument, noting that, "the Supreme Court said nothing about whether Curtis would have prevailed under the substantial nexus test." *Boudreaux*, 49 BRBS at 88.

only to counter the employer's argument that onshore injuries could never result from offshore operations. 132 S. Ct. at 687. Further, the Director argued that had the Supreme Court intended that only offshore accidents would result in OCSLA coverage for land injuries, it would not have remanded Valladolid's claim for application of the substantial nexus test, because Valladolid himself "died while tasked with onshore scrap metal consolidation"—not as a result of an incident that began offshore. 132 S. Ct. at 691. The Director requested that the Board vacate and remand Grabert's case for the ALJ to reconsider the issue in light of the Board's *Boudreaux* decision.

Mays v. Chevron Pipe Line Co.

W.D. La., No. 14-CA-030908, 2016 U.S. Dist. LEXIS 26801, 2016 WL 762615

James Mays was killed by a flying valve cover plate that struck him in the head while he was performing valve maintenance on an oil platform in state territorial waters. The cover plate was forcibly expelled due to a broken valve stem that could not withstand the pressure it was meant to contain. *Mays v. Chevron Pipe Line Co.*, -- F. Supp. 3d --, 2016 U.S. Dist. LEXIS 26801 (2016), 2016 WL 762615. Mays' survivors brought suit in tort against Chevron, the platform operator, with whom Mays' employer had a contract to service offshore facilities. Resolution of that suit required a determination of whether Mays was covered by the LHWCA, and therefore its OCSLA extension, at the time of his death.¹⁵ *Id.* at slip. op. 5. The U.S. District Court initially found OCSLA coverage absent.

Mays' survivors claimed that *Valladolid's* substantial nexus test was satisfied because at the time of his death, Mays was working on a valve that was part of Chevron's pipeline, carrying natural gas from two Chevron wells located on the OCS to the valve and then on to an onshore facility. *Id.* at 6. Chevron countered that OCSLA did not apply because Mays' employer did not conduct any extractive operations on the Shelf and because there was no substantial nexus between Mays' death and Chevron's OCS extractive operations.

The court found the substantial nexus issue to be determinative and determined that the necessary causation was lacking. *Id.* at 7. The court found the facts here to be analogous to those in *Herb's Welding*, 766 F.2d 898, in that the workers in each case were injured while working on a fixed oil platform in Louisiana state waters. It was deemed immaterial that the platforms in both cases were eventually linked to drilling rigs on the OCS. The *Mays* court reasoned that accepting the argument that working on a part of Chevron's pipeline was a sufficient nexus "would come perilously close to the 'but for' analysis rejected by the Supreme Court" in *Valladolid*. The District Court also determined that the Supreme Court could not have intended to cover "a random mechanic who might be repairing a third party transport truck on land, used to transport product originating from an OCS platform," and deemed Mays' situation to be no more closely tied to extractive operations on the Shelf.

Thus, the District Court granted summary judgment in Chevron's favor. The case remains pending on the plaintiff's motion for reconsideration. The Mays survivors' motion

¹⁵ If the LHWCA applies, Chevron is not immune from tort liability. Conversely, if the LHWCA does not apply, the Louisiana Workers' Compensation Act does apply and provides the exclusive remedy for the plaintiffs. The district court concluded that the LHWCA does not apply and thus Chevron is immune.

contends that a genuine issue of material fact remains as to whether there was a substantial nexus between Mays' death and Chevron's OCS operations. In the motion, they specifically allege for the first time that the pressure that caused the deadly valve cover to blow could be directly traced to gas and oil being extracted from the OCS.

Conclusion

The factual scenarios in cases involving off-OCS injuries prior to *Valladolid* continue to recur and raise the question whether *Valladolid*'s substantial nexus test will produce OCSLA coverage determinations that vary as significantly as the now discredited standards. Under *Valladolid*, adjudicators applying the substantial nexus test have considerable discretion in its application. The Supreme Court itself specifically foresaw that coverage would depend on the individual circumstances of each case. To date, adjudicators have, at least in some instances, reached varying results even in quite similar factual circumstances. Although the land transportation accident scenarios in *Curtis, Boudreaux* (ALJ finding of coverage), and *Grabert* (ALJ finding of no coverage) seem to call for a uniform result, such an outcome has been elusive to date.

Likewise, the OCS platform construction work performed on land by workers such as Mills is not very different from the Big Foot TLP rig component construction of workers such as Baker and Flores. Although both Baker's and Flores' claims have been denied to date, it has not yet been finally resolved whether they, or perhaps other onshore workers furthering OCS extractive operations in a somewhat different manner, will ultimately be deemed covered by OCSLA. Ongoing litigation in these and other cases hopefully will lead to more consistent and predictable results for similarly situated workers as the contours of the substantial nexus test are defined.

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