No. _____

In The Supreme Court of the United States

PACIFIC OPERATORS OFFSHORE, LLP, and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA,

Petitioners,

v.

LUISA L. VALLADOLID,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

HORVITZ & LEVY LLP
PEDER K. BATALDEN
*PETER ABRAHAMS
15760 Ventura Boulevard, 18th Floor
Encino, California 91436
(818) 995-0800 •
Fax: (818) 995-3157
pbatalden@horvitzlevy.com
pabrahams@horvitzlevy.com

THOMAS, QUINN & KRIEGER, LLP
MICHAEL W. THOMAS
199 Fremont Street, 20th Floor
San Francisco, California 94105
(415) 546-6100 •
Fax: (415) 358-5868
mthomas@tqklaw.com

**Counsel of Record*

Counsel for Petitioners Pacific Operators Offshore, LLP and Insurance Company of the State of Pennsylvania

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

The Outer Continental Shelf Lands Act, 43 U.S.C., §§ 1331-1356 (OCSLA), governs those who work on oil drilling platforms and other fixed structures beyond state maritime boundaries. Workers are eligible for compensation for "any injury occurring as the result of operations conducted on the outer Continental Shelf." 43 U.S.C. § 1333(b) (2006). When an outer continental shelf worker is injured *on land*, is he (or his heir):

(1) *always* eligible for compensation, because his employer's operations on the shelf are the but for cause of his injury (as the Third Circuit holds); or

(2) *never* eligible for compensation, because the Act applies only to injuries occurring on the shelf (as the Fifth Circuit holds);

(3) *sometimes* eligible for compensation, because eligibility for benefits depends on the nature and extent of the factual relationship between the injury and the operations on the shelf (as the Ninth Circuit holds)?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

All parties are listed in the caption.

Petitioner Pacific Operators Offshore, LLP, is a limited liability corporation wholly-owned by AnAmerica Corporation, a successor to AnAmerica & Drilling Company. Petitioner the Insurance Company of the State of Pennsylvania (ICSOP) is a direct, wholly-owned subsidiary of Chartis U.S., Inc. Chartis U.S., Inc., is a wholly-owned subsidiary of Chartis, Inc. Chartis, Inc., is a wholly-owned subsidiary of American International Group, Inc., which is a publically held corporation. With the exception of the AIG Credit Facility Trust (a trust established for the sole benefit of the United States Treasury), no parent corporation or publicly held corporation owns 10 percent or more of the stock of American International Group, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

PETITION FOR A WRIT OF CERTIORARI

Pacific Operators and ICSOP petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The unpublished decision of the Administrative Law Judge in the Department of Labor's Office of Workers' Compensation Programs is printed in the appendix (App.) at 53a. The unpublished decision of the Benefits Review Board is reprinted in the appendix at App. 35a. The opinion of the Court of Appeals is reported at 604 F.3d 1126 and is reprinted in the appendix at App. 1a. The unpublished order of the Court of Appeals denying rehearing en banc is reprinted in the appendix at App. 94a.

JURISDICTION

The Benefits Review Board had jurisdiction under 33 U.S.C. § 921(b)(3). The Ninth Circuit had jurisdiction to review the decision of the Benefits Review Board under 33 U.S.C. § 921(c). The Ninth Circuit entered judgment on May 13, 2010, App. 1a, and denied petitioners' timely petition for rehearing en banc on July 19, 2010. App. 94a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant portions of 33 U.S.C. § 903 and 43 U.S.C. §§ 1301, 1312, 1331, 1332, and 1333 are reproduced at App. 96a-106a.

INTRODUCTION

The Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356, extends the jurisdiction of the United States to the seabed, subsoil, and fixed structures of the outer continental shelf, an area that lies more than three miles offshore and beyond the territorial jurisdiction of the States. The Act governs the rights and obligations of those who own, operate, and work on offshore oil drilling platforms. The Act creates (and Department of Labor regulations implement) an administrative scheme for compensating injured workers that resembles the workers' compensation schemes developed in most States. Under the Act, a worker is eligible for compensation for "any injury occurring as the result of operations conducted on the outer Continental Shelf." 43 U.S.C. § 1333(b).

Three circuit courts have considered whether a worker injured on land is eligible for compensation under the Act. Each circuit has adopted a different test for resolving that question. The Third Circuit has adopted a "status" test: a worker is eligible for benefits no matter where he is injured, so long as he is involved in operations conducted on the outer continental shelf. *See Curtis v. Schlumberger Offshore*

Serv., Inc., 849 F.2d 805 (3d Cir. 1988) (applying the Act to a rig worker killed in a car accident on a New Jersey freeway while traveling to a helicopter that would have taken him to a rig on the shelf). The Fifth Circuit requires a worker to meet both a "status" test and a "situs" test: a worker is eligible for benefits only if his work is related to development on the outer continental shelf and the injury occurs while working on the shelf. Thus, injuries on land are not compensable. *See Mills v. Director, Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 877 F.2d 356 (5th Cir. 1989) (refusing to apply the Act to a welder injured on land while constructing an offshore oil platform). And the Ninth Circuit (in the case below) has adopted a separate and fact-specific test: a worker injured on land is eligible for benefits if there is "a substantial nexus between the injury and extractive operations on the shelf," meaning 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 1126, 1139 (9th Cir. 2010), App. 28a.

This disputed legal issue – the proper test of eligibility for OCSLA benefits – is one of nationwide importance because the three circuit courts that have divided on this question cover a majority of the Nation's coastline and offshore drilling operations. There is no reason to believe that this circuit split will resolve itself. The Third and Fifth Circuits have both followed their standards for more than two decades. Because each of the three circuits has adopted a

fundamentally different test, the split will not be resolved even if one of the circuits were to alter its standard through the en banc process. In sum, a writ of certiorari should be granted here because a worker's eligibility for OCSLA benefits should not depend on the circuit in which his injury occurs.

STATEMENT OF THE CASE

The Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-950, provides benefits to employees engaged in maritime employment who are injured upon navigable waters, including adjoining piers, wharfs, and other structures customarily used in loading, unloading, repairing or building vessels. 33 U.S.C. § 903(a) (2006). Section 4 of OCSLA extends LHWCA benefits to cover the disability or death of non-maritime employees "resulting from any injury occurring as the 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 outer Continental Shelf." 43 U.S.C. § 1333(b). The outer continental shelf is comprised of "all submerged lands lying seaward and outside of the area of lands beneath navigable waters," that is, submerged lands lying outside the territorial jurisdiction of the states, which generally extends three miles from the coast line. 43 U.S.C. §§ 1301(a)(2), 1312, 1331(a) (2006).

Respondent Luisa Valladolid, the widow of decedent Juan Valladolid, brought this proceeding against Pacific Operators and ICSOP for workers' compensation benefits under the LHWCA and the OCSLA. Pacific's primary business involves oil exploration and extraction. The decedent worked for Pacific as a roustabout, stationed primarily on one of Pacific's two drilling platforms located on the outer continental shelf off the coast of California. He spent approximately 98 percent of his working time on one of the drilling platforms, primarily performing maintenance and repair duties. He also spent time working at Pacific's onshore oil flocculation facility. The facility is separated from the Pacific Ocean by railroad tracks, a highway, and a beach. The facility received crude oil slurry from the offshore platforms via pipeline. Pacific processed the slurry, separating its oil, gas, water, and solid constituents, then routed the oil and gas through pipelines to third parties. The decedent performed maintenance duties at the facility, including painting, sandblasting, weed-pulling, cleaning drain-culverts, and operating a forklift.

Pacific's employees traveled to and from the offshore platforms on a crew boat departing from a pier located approximately three miles from the oil flocculation facility. The boat was also used to ferry equipment and supplies, and to remove scrap metal from the platforms. The scrap metal was ferried to the pier, where it was loaded into trucks and driven to the facility. There it was dumped at various spots on the property. One of the decedent's duties at the

onshore facility was to use a forklift to retrieve the scattered scrap metal and transport it to a central location so that third-party scrap metal vendors could pick the metal up and haul it away. He performed this process roughly once every two years.

Between May 5, 2004 and June 5, 2004, Pacific assigned decedent to work at the onshore facility assisting in an ongoing project painting a water tank. He performed that work most of the day on June 2, 2004. At 4:00 p.m. that day, the decedent's supervisor directed him to take a forklift to the rear yard of the facility and move some scrap metal. One hour and 15 minutes later, the supervisor found the decedent next to a tree roughly 10 feet from a service road in the facility, with the forklift resting on his abdomen and chest. He was pronounced dead at the scene. The decedent had not moved any of the scrap metal he had been directed to move.

The accident report stated that the decedent apparently had stood on the top of one of the raised tines of the forklift to cut fruit hanging from a tree that was out of reach of a person on the ground. The forklift apparently moved forward while the decedent was attempting to harvest the fruit, which caused him to lose his balance, fall in front of the forklift, and sustain fatal injuries when it rolled over him.

Respondent received death benefits under California's workers' compensation scheme. She also filed a claim for benefits under the LHWCA and under OCSLA's extension to outer continental shelf workers.

An administrative law judge in the Department of Labor's Office of Workers' Compensation Programs denied respondent's OCSLA claim on the ground the death had not occurred on the outer continental shelf, and denied the LHWCA claim on the grounds the decedent was not engaged in maritime employment and was not injured on a maritime situs. App. 81a, 93a. The Benefits Review Board upheld the administrative law judge's decision. App. 42a-43a, 51a-52a.

On respondent's petition for review, the United States Court of Appeals for the Ninth Circuit upheld the Board's finding that the facility was not a maritime situs, meaning she had no direct right to LHWCA benefits. *Valladolid v. Pac. Operations Offshore LLP*, 604 F.3d 1126, 1141 (9th Cir. 2010), App. 32a. However, the court rejected the Board's situs-of-injury test for determining the applicability of OCSLA's extension of the LHWCA. *Id.* at 1137-38, App. 23a-24a. The Ninth Circuit formulated a new and different test: "An injury is 'the result of' outer continental shelf operations if there is a substantial nexus between the injury and the operations." *Id.* at 1142, App. 34a. "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." *Id.* at 1139, App. 28a. The Ninth Circuit remanded for further agency proceedings involving the new test. *Id.* at 1142, App. 34a.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT'S DECISION CREATES A THREE-WAY CIRCUIT SPLIT ON THE IMPORTANT QUESTION OF OIL PLATFORM WORKERS' ELIGIBILITY FOR OCSLA BENEFITS.

Three Courts of Appeals have considered whether a worker injured on land is eligible for LHWCA benefits, as extended by section 4 of OCSLA, 43 U.S.C. § 1333(b). One court adopted a status test – the employee's work must further mineral extraction from the outer continental shelf. Another court required an employee to satisfy both a status and a situs test – the employee's work must be related to development on the outer continental shelf and he must have suffered injury or death from an occurrence on the shelf. And a third court rejected both the status and situs tests in favor of a fact-intensive inquiry into the nature and extent of the employee's work.

In *Curtis v. Schlumberger Offshore Ser., Inc.*, 849 F.2d 805, 809 (3d Cir. 1988) (citation omitted), the Third Circuit adopted the status test. It held that an oil rig worker injured in a car accident on a New Jersey freeway while traveling to a helicopter that would have taken him to an offshore rig was entitled to LHWCA benefits. As interpreted by the Third Circuit, "[t]he only criterion [under OCSLA] . . . for securing LHWCA benefits is for injured employees to be involved in 'any operations conducted on the outer Continental Shelf for the purpose of exploring for,

[and] developing . . . the natural resources . . . of the outer Continental Shelf.' There [is] . . . no limitation . . . to 'artificial islands and fixed structures'. . . ."; *Id.* at 810 n.9 ("[s]itus does not control the application of the LHWCA"). Thus, the Third Circuit has adopted a "but for" test: the employee's injury on the freeway occurred as a result of operations on the outer continental shelf because "'[b]ut for' his traveling to the [offshore rig] for the purpose of conducting 'operations' within § 1333(b), [he] would not have sustained injuries in the automobile accident." *Id.* at 811.

The Fifth Circuit took a different approach in *Mills v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 877 F.2d 356 (5th Cir. 1989), holding that an employee must satisfy both a status and a situs test to be eligible for benefits under the LHWCA as extended by OCSLA: "We interpret § 1333(b) to require that covered operations be (1) related to OCS development; and (2) conducted on the OCS. Given the second requirement, activity conducted off the OCS, even though related to OCS mineral extraction, does not satisfy § 1333(b)." *Id.* at 359. Accordingly, the Fifth Circuit in *Mills* held that a welder injured during the onshore construction of a platform designed for the outer continental shelf was not eligible for LHWCA benefits.

In this case, the Ninth Circuit disagreed with both the Third and Fifth Circuits. Rejecting the Fifth Circuit's holding in *Mills*, it held that "a situs-of-injury test is unambiguously absent from § 1333(b)." *Valladolid*, 604 F.3d at 1135, App. 19a. However,

refusing to follow the Third Circuit, the Ninth Circuit did not "find that Congress intended to enact a simple 'but for' test in covering injuries that occur 'as the result of' outer continental shelf operations. Injuries with a tenuous connection to the outer continental shelf are not covered." *Id.* at 1139, App. 27a.

Instead, the Ninth Circuit 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 during employment on the outer continental shelf itself would, by definition, meet the 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.

Id., App. 28a.

Although the facts in this case are undisputed (the decedent suffered fatal injuries while attempting to harvest fruit at Pacific's onshore facility), the Ninth Circuit declined to decide whether they satisfied its "substantial nexus" test. Instead, it remanded

the case for further consideration by the agency. *Id.* at 1142, App. 34a.

These three circuit courts are hopelessly divided, and their territories include a majority of the Nation's coastline, giving rise to the vast majority of OCSLA claims. The purely legal question of whether outer continental shelf workers injured on land are eligible for OCSLA benefits therefore deserves this Court's review.

II. THE NINTH CIRCUIT'S INTERPRETATION OF OCSLA IS INCONSISTENT WITH CONGRESSIONAL PURPOSE AND THIS COURT'S STATEMENTS.

The Ninth Circuit's decision in this case disregarded Congress' purpose in enacting OCSLA. Before the enactment of OCSLA in 1953, the outer continental shelf was "an area of intense activity that lacked an established legal system because it lies beyond state boundaries." *Mills*, 877 F.2d at 358. Consequently, "to define a body of law applicable to the seabed, the subsoil, and the fixed structures . . . on the outer Continental Shelf," *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352, 355 (1969), Congress extended "[t]he Constitution and laws and civil and political jurisdiction of the United States" to those locales "to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a state. . . ." 43 U.S.C. § 1333(a)(1) (2006). In the event no federal law existed on a

particular issue, Congress borrowed the adjacent state's law as surrogate federal law. 43 U.S.C. § 1333(a)(2)(A) (2006).

"One obvious void in the law governing the OCS was the lack of a workers' compensation scheme for thousands of workers employed in the dangerous oilfield extraction industry. Congress filled that void in § 1333(b) when it adopted the LHWCA's benefits provision to cover non-seamen employed in the oil patch on the OCS." *Mills*, 877 F.2d at 358.

No such void existed when outer continental shelf workers were injured on land. Like the decedent in this case, those workers were covered by the applicable state workers' compensation scheme. As the Fifth Circuit in *Mills* correctly observed, "Congress intended to regulate the OCS, not those areas that already were governed by state law." *Id.* at 359. There was no "legislative history suggesting that Congress intended to single out OCSLA's workers' compensation scheme for different treatment." *Id.* The Ninth Circuit's decision anticipates that some outer continental shelf workers injured on land will be eligible for OCSLA benefits (and even some workers who never set foot on the outer continental shelf, so long as their work "directly furthers outer continental shelf development"), and to that extent the decision runs afoul of Congress' intentions.

The Ninth Circuit's decision also has important insurance consequences that are inconsistent with Congress' intentions. If, as the Ninth Circuit held

here, workers injured on land are entitled to both state workers' compensation benefits and OCSLA benefits so long as their work "directly furthers outer continental shelf operations," *Valladolid*, 604 F.3d at 1139, App. 28a, then employers must purchase insurance covering their liability to land based workers (like the welder in *Mills*) under both the state and federal compensation acts. As the Fifth Circuit explained, however, there is "no evidence indicating that Congress intended to create such a cumbersome and uncertain compensation scheme or that it intended to intrude in a significant way on established state workers' compensation programs." *Mills*, 877 F.2d at 362.

The Ninth Circuit believed its decision was compelled by what it characterized as OCSLA's plain language, asserting that "a situs-of-injury test is unambiguously absent from § 1333(b)." *Valladolid*, 604 F.3d at 1135, App. 19a. The language of § 1333(b) is anything but plain, however. Interpreting the same language, the Fifth Circuit showed that eligibility for benefits rests on an injury occurring on the shelf: although the phrase "'[injured] as the result of *operations* conducted on the outer Continental Shelf for the purpose of . . . developing . . . the natural resources . . . of the [OCS]' [in §1333(b)] is open to interpretation," given the congressional purpose underlying OCSLA, "under [a] . . . plausible reading of 43 U.S.C. § 1333(b), coverage requires that the relevant 'operations' out of which the injury arises occur on the OCS." *Mills*, 877 F.2d at 359.

Moreover, even if the Ninth Circuit's interpretation of 43 U.S.C. § 1333(b) were correct, there was no reason for it to infer meaning from the absence of a situs requirement. As two decisions of this Court confirm, a situs requirement already appears in § 1333(a), which limits OCSLA's coverage "to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed. . . ."; it was unnecessary for Congress to repeat that requirement in 43 U.S.C. § 1333(b).

In one of those decisions, *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986), two offshore drilling platform workers were killed when the helicopter carrying them from the platform to the shore crashed 30 miles off the Louisiana coast. Their widows brought actions against the owner and operator of the helicopter. They claimed they were not limited to awards of pecuniary damages provided by the Death on the High Seas Act, 46 U.S.C. §§ 30301-30308, but were also entitled to nonpecuniary damages under the Louisiana wrongful death statute, which applied either of its own force, or as surrogate federal law under OCSLA. *See* 43 U.S.C. § 1333(a)(2)(A) (2006). This Court held that because the helicopter crash did not occur in the area covered by OCSLA, but rather on the high seas, the maritime remedy for wrongful death under the Death on the High Seas Act controlled:

> We do not interpret § 4 of OCSLA, 43 U.S.C., § 1333 to require or permit us to extend the

> coverage of the statute to the platform workers in this case who were killed miles away from the platform and on the high seas simply because they were platform workers. Congress determined that the general scope of OCSLA's coverage, like the operation of DOHSA's remedies, would be determined principally by locale, not by the status of the individual injured or killed. Because the fatalities underlying this suit did not arise from an accident in the area covered by OCSLA but rather occurred on the high seas, DOHSA plainly was intended to control.

477 U.S. at 219-20.

In a footnote, this Court in *Offshore Logistics* added:

> Only one provision of OCSLA superimposes a status requirement on the otherwise determinative OCSLA situs requirement; § 1333(b) makes compensation for the death or injury of an "employee" resulting from certain operations on the Outer Continental Shelf payable under the Longshoreman's and Harbor Workers' Compensation Act. We note that because this case does not involve a suit by an injured employee against his employer pursuant to § 1333(b), this provision has no bearing on this case.

477 U.S. at 220 n.2.

In *Offshore Logistics*, this Court referred to its discussion in *Herb's Welding, Inc. v. Gray*, 470 U.S.

414 (1985), regarding the "status and situs requirements of the Longshoremen's and Harbor Workers' Compensation Act as applied to platform workers making claims against their employers. . . ." *Offshore Logistics*, 477 U.S. at 220. In *Herb's Welding,* a welder who spent roughly three-fourths of his working time on oil drilling platforms in state waters and the rest on platforms on the outer continental shelf claimed a direct right to LHWCA benefits after he was injured on a platform in state waters. This Court held that he did not have a direct right to LHWCA benefits because he was not engaged in maritime employment. It declined to decide whether the welder was entitled to benefits under OCSLA because the issue had not been fully briefed in or discussed by the Court of Appeals. *Herb's Welding*, 470 U.S. at 426 n.12, & 427. Nonetheless, the Court made clear that entitlement to benefits under that Act depended on situs as well as status. Noting "the explicit geographical limitation to the Lands Act's incorporation of the LHWCA," it commented that "Gray would indeed have been covered for a significant portion of his work-time, but because of the Lands Act, not because he fell within the terms of the LHWCA. . . . [T]hat statute draws a clear geographical boundary that will predictably result in workers moving in and out of coverage." *Id.* at 427.

The Ninth Circuit here dismissed this Court's statements in *Offshore Logistics* and *Herb's Welding* as dicta. *Valladolid*, 604 F.3d at 1131-32 & n.2, App. 9a-11a & n.2. But as the Fifth Circuit in *Mills*

correctly found, those statements firmly acknowledge "the geographic boundaries to OCSLA's coverage. . . ." *Mills*, 877 F.2d at 361. They make clear that when a worker seeks benefits under OCSLA, § 1333(b) does not replace the Act's situs requirement with a status requirement. Rather, it "superimposes," i.e., adds, a status requirement to "the otherwise determinative OCSLA situs requirement" found in § 1333(a). *Offshore Logistics*, 477 U.S. at 220 n.2. Consequently, a worker will "mov[e] in and out of coverage," *Herb's Welding*, 470 U.S. at 427, depending on where he is working. As the Fifth Circuit stated in *Mills*, "[w]e cannot accept the Director's explanation that the Court meant to 'replace' situs with status when it used 'superimposes.' The Court could not have made it clearer that a worker must demonstrate status and situs to recover LHWCA benefits under § 1333(b)." *Mills*, 877 F.2d at 361.

In sum, the Ninth Circuit's justifications for its decision can be reconciled with neither Congressional intent nor this Court's statements in prior cases involving the OCSLA. And as we have explained, the Ninth Circuit's decision deepens an existing circuit split on a threshold issue of benefits eligibility and formulates a test that provides no meaningful guidance to administrative law judges and the Benefits Review Board. The current three-way split among the circuits regarding the interpretation of 43 U.S.C. § 1333(b) and the import of this Court's statements in *Offshore Logistics* and *Herb's Welding* means that a worker's entitlement to OCSLA benefits for an injury

on land depends on the circuit in which the claim arises, an intolerable situation. Only a decision by this Court can bring clarity and consistency to this area of the law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

HORVITZ & LEVY LLP
PEDER K. BATALDEN
*PETER ABRAHAMS

THOMAS, QUINN & KRIEGER, LLP
MICHAEL W. THOMAS

Counsel for Petitioners
Pacific Operators Offshore, LLP
and Insurance Company of
the State of Pennsylvania

**Counsel of Record*

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LUISA VALLADOLID,

Petitioner,

v.

PACIFIC OPERATIONS OFFSHORE, LLP; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Respondents.

No. 08-73862

BRB No. 07-965

OPINION

On Petition for Review of an Order of the Benefits Review Board

Argued and Submitted
March 9, 2010 – San Francisco, California

Filed May 13, 2010

Before: Stephen Reinhardt and Jay S. Bybee, Circuit Judges, and James V. Selna,* District Judge.

* The Honorable James V. Selna, United States District Judge for the Central District of California, sitting by designation.

COUNSEL

Timothy K. Sprinkles, Law Office of Charles D. Naylor, San Pedro, California, and Joshua T. Gillelan II, Longshore Claimants' National Law Center, Washington, DC, for the petitioner.

Michael W. Thomas, Laughlin, Falbo, Levy & Moresi LLP, San Francisco, California, for the respondents.

OPINION

SELNA, District Judge:

In this case, we consider whether an employee must be injured on the outer continental shelf to be eligible for workers' compensation benefits under the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1331 *et seq*. The two other circuits that have considered this question have reached conflicting conclusions.

I.

Decedent Juan Valladolid worked for Pacific Operations Offshore as a roustabout, stationed primarily on one of Pacific Operations's two offshore drilling platforms. He was killed, however, on the grounds of Pacific Operations's onshore oil-processing facility when he was crushed by a forklift. His widow seeks workers' compensation benefits under OCSLA and the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq*.

Pacific Operations runs two offshore oil drilling platforms, the Hogan and the Houchin, both located more than three miles off the coast of California. Valladolid spent roughly 98% of his working time aboard the Hogan. As a roustabout, his work primarily consisted of cleaning and maintenance duties: picking up litter, emptying trash cans, washing decks, painting, fixing equipment, and helping load and unload the platform crane.

Valladolid also spent time working at Pacific Operations's onshore oil flocculation facility, located on the California coast just 250-300 feet from the shore.[1] This facility, referred to as La Conchita, received crude oil slurry from the Hogan and the Houchin via pipeline. The slurry would then be processed, separating its oil, gas, water, and solid constituents, with the oil and gas routed off site through pipelines to third parties. Valladolid performed maintenance duties at La Conchita, including painting, sandblasting, weed-pulling, cleaning drain-culverts, and operating a forklift.

Crew members traveled to and from the offshore platforms on a crew boat departing from the Casitas Pass Pier, located about three miles from La Conchita. The crew boat was also used to ferry

---

[1] Pacific contends that the facility is actually 250-300 *yards* from the ocean. Because our decision does not turn on the difference between 250-300 feet and 250-300 yards, we assume for the purposes of this appeal that Petitioner's measure is correct.

equipment and supplies and to remove scrap metal – pieces of old pipe, storage tanks, catwalks, chain, and cables – from the platforms. The scrap metal was ferried to the Casitas Pass Pier, where it was loaded into trucks and driven to La Conchita. There it was dumped at various spots on the property. Neither the loading crew at the pier nor the truck drivers were employed by Pacific Operations.

One of Valladolid's duties at La Conchita was to "centralize" the scrap metal from the various locations so that third-party scrap metal vendors could pick the metal up and haul it away. Valladolid would use a forklift to retrieve the scattered metal and transport it to a central location. The consolidation process was performed roughly once every two years. Valladolid was killed during this process when he was crushed by a forklift.

Petitioner, Valladolid's widow, received death benefits under California's workers' compensation scheme. She also filed a claim for benefits under the LHWCA, both directly under the LHWCA and via the OCSLA extension to outer continental shelf workers. After informal proceedings before the local district director of the Department of Labor's Office of Workers' Compensation Programs, the matter was referred to an Administrative Law Judge ("ALJ").

The ALJ denied Petitioner's OCSLA claim on the grounds that Valladolid's injury had occurred outside the geographic situs of the outer continental shelf. The ALJ denied the LHWCA claim on two grounds:

(1) Valladolid was not engaged in maritime employment, and (2) he was not injured on a maritime situs. The Benefits Review Board ("BRB") upheld the ALJ's denial of the OCSLA benefits under the "situs-of-injury" test, and affirmed the denial of LHWCA benefits on the maritime situs ground. The BRB did not reach the maritime employment issue.

II.

We have jurisdiction to review the final orders of the BRB under 33 U.S.C. § 921(c). We review the BRB's decisions for errors of law and adherence to the substantial evidence standard. *Pedroza v. BRB,* 583 F.3d 1139, 1143 (9th Cir. 2009). The BRB's decisions on questions of law are reviewed de novo. *M. Cutter Co. v. Carroll,* 458 F.3d 991, 993 (9th Cir. 2006). Because the BRB is not a policymaking body, its constructions of the LHWCA are not entitled to special deference. *Dyer v. Cenex Harvest States Coop.,* 563 F.3d 1044, 1047 (9th Cir. 2009). However, the Court must "respect the [BRB's] interpretation of the statute where such interpretation is reasonable and reflects the policy underlying the statute." *Christensen v. Stevedoring Servs. of Am.,* 557 F.3d 1049, 1052 (9th Cir. 2009) (quoting *McDonald v. Dir., Office of Workers' Comp. Programs,* 897 F.2d 1510, 1512 (9th Cir. 1990)).

III.

The LHWCA provides compensation for the disability or death of a maritime employee "if the disability or death results from an injury occurring upon the navigable waters of the United States." 33 U.S.C. § 903(a). Under the OCSLA workers' compensation provision, LHWCA benefits are extended to:

> [the] disability or death of an employee resulting from any injury occurring as the 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 outer Continental Shelf.

43 U.S.C. § 1333(b). The outer continental shelf is comprised of "all submerged lands lying seaward and outside of the area of lands beneath navigable waters" – that is, submerged lands lying outside the territorial jurisdiction of the states. *Id.* § 1331(a); *see id.* § 1301(a)(2). State jurisdiction over offshore lands generally extends three miles from the coast line, though in certain cases not relevant here, it may extend further. *See id.* § 1301(a)(2).

Petitioner contends that the BRB impermissibly applied a "situs-of-injury" requirement for OCSLA workers' compensation, denying her claim because her husband was killed on shore and not on the outer continental shelf. This is an issue of first impression in the Ninth Circuit. Two other circuits presented

with this exact issue have reached conflicting conclusions.

In *Curtis v. Schlumberger Offshore Service, Inc.,* 849 F.2d 805 (3d Cir. 1988), the Third Circuit rejected the situs-of-injury test and held that a claimant need only satisfy a "but for" test in establishing that the injury occurred "as the result of" operations on the outer continental shelf. *Id.* at 809-11. Accordingly, an employee injured in a car accident on his way to meet a helicopter that would take him to an offshore platform was eligible for OCSLA disability benefits. *Id.* at 806, 811.

However, in *Mills v. Director, Office of Workers' Compensation Programs,* 877 F.2d 356 (5th Cir. 1989) (en banc), the Fifth Circuit adopted a situs-of-injury requirement for OCSLA claims. Under *Mills,* an OCSLA claimant must show that the injury occurred on an outer continental shelf platform or on the waters above the outer continental shelf, in addition to satisfying the "but for" test. *Id.* at 362; *see also Becker v. Tidewater, Inc.,* 586 F.3d 358, 366-67 (5th Cir. 2009); *Pickett v. Petroleum Helicopters, Inc.,* 266 F.3d 366, 368 (5th Cir. 2001); *Sisson v. Davis & Sons, Inc.,* 131 F.3d 555, 558 (5th Cir. 1998). Thus, a welder injured during the onshore construction of a platform destined for the outer continental shelf was not eligible for OCSLA disability benefits. *Mills,* 877 F.2d at 357, 362.

A.

Aside from the two conflicting Court of Appeals decisions, there is little precedent on the question before us. The Supreme Court touched on the question in passing in *Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207 (1986). The relevant issue there was whether a choice-of-law provision in OCSLA, 43 U.S.C. § 1333(a)(2)(A), applied so as to allow the widows of employees killed in a helicopter crash to pursue a wrongful death action under state law. *Id.* at 209. Section 1333(a)(2)(A) applies the law of the nearest state as surrogate federal law for "the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon." 43 U.S.C. § 1333(a)(2)(A). The Court declined to extend this provision to an accident occurring on the waters above the outer continental shelf, finding that "Congress determined that the general scope of OCSLA's coverage . . . would be determined principally by locale, not by the status of the individual injured or killed." *Tallentire,* 477 U.S. at 219. In an accompanying footnote, the Court added:

> Only one provision of OCSLA superimposes a status requirement on the otherwise determinative OCSLA situs requirement; § 1333(b) makes compensation for the death or injury of an "employee" resulting from certain operations on the Outer Continental Shelf payable under the Longshoremen's and Harbor Workers' Compensation Act. We note that because this case does not involve a suit by an injured employee against his employer

> pursuant to § 1333(b), this provision has no bearing on this case.

Id. at 219 n.2.

Pacific Operations contends that this footnote is dispositive of this case. We, on the other hand, agree with the Third Circuit that *Tallentire* is simply not on point. *See Curtis,* 849 F.2d at 810. *Tallentire* dealt with the applicability of the § 1333(a)(2)(A) choice-of-law provision, not the § 1333(b) benefits provision, as explicitly noted by the Court. 477 U.S. at 219 n.2 ("[Section 1333(b)] has no bearing on this case"). The Court's footnote about § 1333(b) is textbook dictum.

Of course, we treat the considered dicta of the Supreme Court with greater weight and deference "as prophecy of what that Court might hold." *United States v. Montero-Camargo,* 208 F.3d 1122, 1132 n.17 (9th Cir. 2000) (en banc) (quoting *Zal v. Steppe,* 968 F.2d 924, 935 (9th Cir. 1992) (Noonan, J., concurring and dissenting)). They are not to be "blandly shrug[ged] . . . off because they were not a holding." *Zal,* 968 F.2d at 935 (Noonan, J., concurring and dissenting). We do not blindly, however, follow an unconsidered statement simply because it was uttered by the Supreme Court. *See Montero-Camargo,* 208 F.3d at 1132 n.17. As the Court itself has noted, "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. . . . [T]heir possible bearing on all other cases is seldom completely investigated." *Humphrey's Executor v. United States,* 295 U.S. 602,

627 (1935) (quoting *Cohens v. Virginia,* 19 U.S. (6 Wheat.) 264, 399-400 (1821)).

For the following reasons, we are convinced that the footnote in *Tallentire* is of the unconsidered variety not entitled to special deference. The § 1333(b) benefits issue was not before the Court, was not briefed by the parties, and had no relevance to the case before it. *See Tallentire,* 477 U.S. at 219 & n.2. There is no analysis or reasoning behind the Court's statement that a situs requirement applies to § 1333(b). *See id.* These circumstances strip the dictum of any predictive or persuasive value. *See District of Columbia v. Heller,* 128 S. Ct. 2783, 2816 n.25 (2008).

Moreover, the import of the Court's statement to the case at hand is debatable. The Court spoke generally of an OCSLA "situs" requirement, but it is not clear that the Court's statement requires a "situs-of-injury," as opposed to a "situs-of-operations," test. Section 1333(b) applies only to injuries occurring "as the result of operations conducted on the outer Continental Shelf." 43 U.S.C. § 1333(b). Clearly, the *operations* must be on the outer continental shelf. *See Herb's Welding v. Gray* (*Herb's Welding II*), 766 F.2d 898, 900 (5th Cir. 1985) (holding that an injury occurring on an oil platform in state waters is not eligible for OCSLA benefits). It is less clear – and the *Tallentire* footnote does not illuminate the issue –

that the *injury* must also be on the outer continental shelf.[2]

The Ninth Circuit cases cited by the parties are similarly unhelpful. In *Kaiser Steel Corp. v. Director, Office of Workers' Compensation Programs,* 812 F.2d 518 (9th Cir. 1986), a pipefitter/welder was injured while working on an outer continental shelf platform and sought benefits under OCSLA. *Id.* at 520. The issue was whether he was an eligible "employee" even though his work was "primarily land based." *Id.* at 521-22. This Court, finding him eligible for § 1333(b) benefits, stated that:

> [i]n the absence of any other limitation on the face of the statute or in the legislative history of [OCSLA], section 1333(b) should

[2] The *Mills* court also found support for its situs-of-injury test in *Herb's Welding, Inc. v. Gray* (*Herb's Welding I*), 470 U.S. 414 (1985). *Mills,* 877 F.2d at 361. The issue in *Herb's Welding I* was whether a worker on a platform in state waters was engaged in "maritime employment" so as to entitle him to benefits under the LHWCA. 470 U.S. at 415-16. The Fifth Circuit found significance in the Court's passing comment that "the inconsistent coverage here results primarily from the explicit geographic limitation to [OCSLA's] incorporation of the LHWCA. . . . [T]hat statute draws a clear geographic boundary that will predictably result in workers moving in and out of coverage." *Id.* at 427. As with *Tallentire,* however, the scope of § 1333(b) was never considered, rendering this passage unhelpful on the issue before us. In fact, the Court explicitly declined to consider whether the worker was entitled to OCSLA benefits even though he had argued the issue throughout the proceedings. *Id.* at 426 n.12.

> be construed as extending [LHWCA] coverage to all victims of disabling or fatal injuries sustained while working to develop the mineral wealth of the OCS [outer continental shelf].

Id. at 522. This passage does not directly apply to the situs issue, as it came within the context of whether the claimant met the § 1333(b) "employee" requirement. *Id.* at 522-23.

In *A-Z International v. Phillips,* 179 F.3d 1187 (9th Cir. 1999), this Court reviewed a BRB decision vacating an ALJ's order recommending sanctions for a fraudulent OCSLA claim. *Id.* at 1189. In the underlying case, the ALJ had found the claimant ineligible for OCSLA benefits because, contrary to his allegation, his injury did not occur on an offshore platform and he therefore failed to satisfy the situs-of-injury test. *Id.* That decision was never appealed. *Id.* However, on review of the subsequent sanctions order, this Court stated in a footnote accompanying the recitation of the facts:

> The situs requirement is a predicate for coverage under OCSLA. *See* 43 U.S.C. § 1333 (1994); *see also Offshore Logistics, Inc. v. Tallentire,* 477 U.S. 207, 219 (1986) (noting that "Congress determined that the general scope of OCSLA's coverage . . . would be determined principally by locale").

Id. at 1189 n.1. We do not find this statement binding or especially persuasive, given that the situs issue was neither argued by the parties nor considered by

the Court because the claimant never appealed the decision on the situs question. *Id.* at 1189. The issue in *A-Z International* was a procedural question about an ALJ's contempt power. *Id.* The comment on the situs issue was gratuitous language appended to the statement of facts and not a considered statement of the law.

B.

Absent clear precedent to guide us on the situs-of-injury issue, we are presented with a straightforward question of statutory construction. "The purpose of statutory construction is to discern the intent of Congress in enacting a particular statute." *Robinson v. United States,* 586 F.3d 683, 686 (9th Cir. 2009) (quoting *United States v. Daas,* 198 F.3d 1167, 1174 (9th Cir. 1999)). We first look to the plain language of the statute, which controls "unless its application leads to unreasonable or impracticable results." *Id.* at 687 (quoting *Daas,* 198 F.3d at 1174). The plain meaning is determined with an eye towards the context of the language and design of the statute as a whole. *Id.* "It is a cardinal canon of statutory construction that statutes should be interpreted harmoniously with their dominant legislative purpose." *United States v. Gallenardo,* 579 F.3d 1076, 1085 (9th Cir. 2009) (quoting *United States v. Nader,* 542 F.3d 713, 720 (9th Cir. 2008)).

There are two distinct arguments that OCSLA's language supports a situs-of-injury requirement. The

first argument – the route taken by the Fifth Circuit in *Mills* – is that § 1333(b) itself contains the situs-of-injury requirement. *See* 877 F.2d at 358-59. The second argument – advanced by Pacific Operations – is that the situs requirement of § 1333(a) applies to OCSLA as a whole. For the reasons discussed below, we find neither argument persuasive and find the statute unambiguous in not requiring a situs-of-injury test.

OCSLA was enacted in 1953 to establish federal jurisdiction over the submerged lands beyond the jurisdiction of the states in order to promote the orderly exploitation of minerals lying below the seabed. *See Rodrigue v. Aetna Cas. & Sur. Co.,* 395 U.S. 352, 355-56 (1969); Outer Continental Shelf Lands Act, Pub. L. No. 83-212, 67 Stat. 462, 462 (1953); S. Rep. No. 83-411, at 2 (1953). As part of this endeavor, Congress needed to establish a body of substantive law to cover the outer continental shelf. *See Rodrigue,* 395 U.S. at 355-56; S. Rep. No. 83-411, at 2. Section 4 of OCSLA, codified at 43 U.S.C. § 1333, set forth the laws to be applied. § 4, 67 Stat. at 462-63. For example, subsection (a) establishes the substantive civil and criminal law applying to the outer continental shelf, artificial islands, and platforms fixed to the seabed. 43 U.S.C. § 1333(a). Subsection (c) applies the National Labor Relations Act ("NLRA") to "any unfair labor practice . . . occurring upon any artificial island, installation, or other device referred to in subsection (a)." *Id.* § 1333(c). Subsection (d) provides the Coast Guard with the authority to

promulgate regulations governing the safety equipment, warning devices, and other safety matters on artificial islands and fixed platforms. *Id.* § 1333(d). Subsection (e) extends the Army's authority to prevent obstruction of the navigable waters to fixed platforms on the outer continental shelf. *Id.* § 1333(e).

Section 1333(b) provides workers' compensation benefits for "any injury occurring *as the result of* operations conducted on the outer Continental Shelf." *Id.* § 1333(b) (emphasis added). The situs-of-operations requirement is clear; the *operations* must be conducted on the outer continental shelf. However, the only limitation on the *injury* is that it be "the result of" operations on the outer continental shelf. As many courts have recognized, the phrase "as the result of" simply denotes causation. *See, e.g., Brown v. Gardner,* 513 U.S. 115, 119 (1994) ("as a result of" in veterans' benefits statute indicates causation with no fault requirement); *Murakami v. United States,* 398 F.3d 1342, 1351-52 (Fed. Cir. 2005) ("as a result of" in federal claims statute indicates causation with no temporal limitation); *Black Hills Aviation, Inc. v. United States,* 34 F.3d 968, 975 (10th Cir. 1994) ("as a result of" in Department of Defense regulation means "caused by" rather than "connected with"). Thus, the most natural reading of § 1333(b) provides coverage for any injury *caused by* outer continental shelf operations regardless of where the injury occurred.

The *Mills* court found ambiguity in § 1333(b) by focusing on the word "operations." According to *Mills,*

because the *operations* must occur on the outer continental shelf, the *injury* must also occur on the outer continental shelf: "activity conducted off the OCS, even though related to OCS mineral extraction, does not satisfy § 1333(b)." 877 F.2d at 359. However, this interpretation fails to acknowledge the connecting phrase "as the result of." The results of an operation may regularly extend beyond its immediate physical location. When a pitcher hits a batter with a pitch, the batter's injury is the result of "operations" on the mound. The Fifth Circuit's attempt to unearth ambiguity in § 1333(b) by ignoring a key phrase does not persuade us.[3]

Neither are we persuaded that the situs limitations in the other provisions of § 1333 indicate a

[3] Our position finds support in *Murakami,* a Federal Circuit decision interpreting similar language in a reparations statute. *Murakami* involved a claim under the Civil Liberties Act of 1988, which provided a redress payment for individuals who were "deprived of liberty or property *as a result of*" the internment of Japanese-Americans during World War II. 398 F.3d at 1344 (emphasis added); 50 U.S.C. app. § 1989b-7(2). The claimant challenged a regulation categorically denying payments to individuals born after the restraints on travel were lifted. *Murakami,* 398 F.3d at 1347-48. The Federal Circuit rejected this categorical exclusion, noting that the result of the travel restrictions could, in certain cases, extend beyond the date of their repeal. *Id.* at 1352-53. *Murakami* teaches that "as a result of" contains no temporal limitation; likewise, in this case, we see no reason to import a spatial one. If travel restrictions can cause an injury after their repeal, similar logic supports the view that operations on the outer continental shelf can cause injury outside the outer continental shelf.

situs-of-injury requirement for subsection (b). The *Mills* majority felt that these limitations reflected a Congressional intent to limit the reach of the statute to occurrences on the outer continental shelf as part of a "gap-filling" purpose. 877 F.2d at 359-60. We, however, find the *Mills* dissent to be more persuasive: the absence of a situs-of-injury requirement in subsection (b), in light of the explicit limitations in the other subsections, reflects an intent not to limit that subsection in the same manner. *Id.* at 362 (Duhe, J., dissenting). The different treatment of subsection (b) is quite clear, given that it is the only subsection not to incorporate the situs definition of subsection (a). *See* 43 U.S.C. § 1333. This distinction ought to be given effect.

Moreover, a comparison of the language of the different provisions strongly implies that subsection (b)'s coverage extends beyond the outer continental shelf. Subsection (c) applies the NLRA to unfair labor practices "occurring *upon* any artificial island, installation, or other [fixed platform]," *id.* § 1333(c), while subsection (b) provides coverage for injuries "occurring *as the result of* operations conducted on the outer Continental Shelf," *id.* § 1333(b) (emphasis added). Congress had the ability to craft a situs-of-injury requirement – and did so within the very same section of the statute – yet left it out of subsection (b). *See also* Longshore & Harbor Workers' Compensation Act, 33 U.S.C. § 903(a) (limiting coverage to injuries "occurring *upon* the navigable waters of the United States" (emphasis added)). We should not read one in.

Accordingly, we find that the language of § 1333(b) is unambiguous in not including a situs-of-injury requirement. Indeed, our interpretation of § 1333(b) is confirmed by a Fifth Circuit decision, *Demette v. Falcon Drilling Co., Inc.,* 280 F.3d 492, 500 (5th Cir. 2002), *overruled on other grounds, Grand Isle Shipyard, Inc. v. Seacor Marine, LLC,* 589 F.3d 778 (5th Cir. 2009) (en banc), subsequent to *Mills*. *Demette* held that "section 1333(b) contains only a status requirement." *Id.* at 500 n.29. According to *Demette,* the situs-of-injury requirement derives from § 1333(a)(1), which "creates a 'situs' requirement for the application of other sections of the OCSLA, including sections 1333(a)(2) and 1333(b)." *Id.* at 496. As *Demette* explains, "[i]n order for the LHWCA to apply by virtue of section 1333(b), . . . the injured worker must satisfy the 'status' requirement of section 1333(b) as well as the situs requirement of section 1333(a)(1)." *Id.* at 498. This is, however, a misstatement of *Mills*'s holding, which clearly finds a situs-of-injury requirement in the language of § 1333(b).[4] *Mills,* 877 F.2d at 362. This disagreement

[4] In fact, *Demette* 's interpretation of *Mills* would put that decision in direct conflict with the Supreme Court's decision in *Tallentire.* In an effort to avoid overruling its own precedent applying OCSLA to helicopter crashes on the waters above the outer continental shelf, *Mills* defined § 1333(b) as applying to "injury or death on an OCS platform or the waters above the OCS." 877 F.2d at 362. *Tallentire,* however, expressly held that § 1333(a) does not apply to the waters above the outer continental shelf. 477 U.S. at 219. Had *Mills* pulled its situs-of-injury

(Continued on following page)

among Fifth Circuit panels underscores the extent to which *Mills* departed from the plain language of § 1333(b) and confirms what we find fairly obvious – a situs-of-injury test is unambiguously absent from § 1333(b).

The legislative history does not indicate otherwise. The *Mills* court interpreted § 1333 as a "gap-filler," solely intended to fill a void in substantive law due to the fact that the outer continental shelf lies beyond state jurisdiction. *See Mills,* 877 F.2d at 358. Therefore, *Mills* reasoned, no provision of OCSLA was intended to apply outside that situs. The opinion cited a statement during debate on the floor of the Senate that "[OCSLA] is legislatively joined with the Submerged Lands Act. . . . [T]he Submerged Lands Act deals with lands within State boundaries, while this bill [OCSLA] concerns itself with the areas seaward of such boundaries." *Id.* at 359 n.6 (quoting 99 Cong. Rec. 6962 (daily ed. June 22, 1953) (statement of Sen. Cordon)). The House Conference Report also notes that under OCSLA "certain Federal laws are made applicable *to the [outer continental shelf] area* such as the [LHWCA]." H.R. Rep. No. 83-1031, at 12 (1953) (Conf. Rep.) (emphasis added).

However, certain legislative history cuts against the gap-filing interpretation of § 1333(b). In particular, a provision allowing benefits only "if recovery for

---

test from § 1333(a), its holding would be inconsistent with *Tallentire.*

such disability or death through workmen's compensation proceedings is not provided by State law," was deleted from the original version of Section 4(c), which became § 1333(b). S. Rep. No. 83-411, at 16 (1953). The Senate committee explained that "[i]t was deemed inadvisable to have the [LHWCA] apply only if there is no applicable State law. By this amendment, all workers on the outer shelf not already protected under laws respecting seamen are protected by the [LHWCA]." *Id.* at 23. The deletion of this anti-overlap provision gives a clear indication that Congress intended to provide LHWCA coverage regardless of the applicability of state law, seriously undercutting the conception of § 1333(b) as a gap-filler.[5]

This makes sense, given that at the time of OCSLA's enactment the workers' compensation laws of most relevant states provided coverage for injuries occurring outside state jurisdiction if the employment contract was made within the state. *See, e.g.,*

---

[5] *Mills* attempts to explain away the deletion, arguing that it "indicates that, at most, Congress was prepared to tolerate overlapping federal and state workers' compensation coverage on the OCS itself. But the proviso's deletion does not justify overlapping coverage for employees whose feet are planted firmly on state soil." *Mills,* 877 F.2d at 360. The Fifth Circuit essentially concedes that § 1333(b) was not intended to be a gap-filler. Its summary assertion that Congress was only willing to "tolerate" overlapping coverage on the outer continental shelf and nowhere else is supported by no more than general statements by individual legislators that OCSLA "concerns itself" with the outer continental shelf.

Ohlhausen v. Sternberg Dredging Co., 218 La. 677, 680-81 (1951) (applying Louisiana workers' compensation statute to injury occurring in Arkansas); *Maryland Cas. Co. v. Brown,* 131 Tex. 404, 406, 408 (1938) (holding that "an injury 'outside the state' [of Texas] is compensable, regardless of where it may occur" and noting that "practically every state in the Union has made provision for extension of the benefits of compensation laws to employees injured 'outside the state'"); *Alaska Packers' Ass'n v. Indus. Accident Comm'n of Cal.,* 1 Cal.2d 250, 257-58 (1934) (holding that California workers' compensation law may apply to injury sustained in Alaska). Because most state workers' compensation laws applied extraterritorially at the time, there was generally no gap to fill.

Finally, *Mills* points to an exchange among senators during the committee hearings where the senators concluded that a worker on a platform above state waters would be covered by state workers' compensation laws even if the drilling slanted into the outer continental shelf. *Outer Continental Shelf: Hearings on S. 1901 Before the Comm. on Interior and Insular Affairs,* 83d Cong. 15-16 (1953) ("*OCS Comm. Hearings*"). The *Mills* majority relied on this exchange as evidence of intent that the site of the injury would control coverage. 877 F.2d at 359. The reliance is unwarranted for two reasons. First, the senators were debating the early version of the bill that contained the anti-overlap provision that was later deleted. *See OCS Comm. Hearings, supra,* at

29-30. At that time, the issue of whether state law applied was quite significant as it would preclude OCSLA coverage. But the exchange loses its significance in light of the subsequent deletion of the anti-overlap provision.[6]

Second, the exchange came during the discussion of Section 4(a) of the bill, the federal jurisdiction and choice-of-law provision later codified at § 1333(a). *Id.* at 8-16. The committee was not yet considering the text of Section 4(c), the workers' compensation provision. *See id.* at 29. The slant-drilling hypothetical was part of a discussion about the applicability of substantive law in general. *See id.* at 13-17. Workers' compensation was simply an example used, along with marriage and domestic laws, to illustrate the bounds of the choice-of-law provision. *See id.* The usefulness of this exchange in relation to the actual text of Section 4(c) is minimal.

Considered as a whole, the legislative history is inconclusive on the situs issue, other than establishing that § 1333(b) was not intended to simply fill a gap in workers' compensation law. There is certainly nothing clear enough to persuade us that our reading of the statute is incorrect.

---

[6] In any case, the senators only concluded that state law applied on state soil and never considered whether LHWCA benefits might also apply. *See id.* at 15-16; *Mills,* 877 F.2d at 363 (Duhe, J., dissenting).

Nor are we persuaded that policy considerations compel the addition of a situs-of-injury requirement. Pacific Operations points out the supposed absurdity of workers receiving extra coverage on shore because they "fortuitously" work to further outer continental shelf operations. Pacific Operations also complains about the burden on employers having to purchase coverage under both state and federal schemes.

First, Congress clearly contemplated overlapping coverage with the deletion of the anti-overlap provision in § 1333(b) and has enacted overlapping coverage in other related contexts. *See* 33 U.S.C. § 903(a) (applying LHWCA coverage to shoreside activities); *Sun Ship, Inc. v. Pennsylvania,* 447 U.S. 715, 719-20 (1980). Second, the supposed absurdity in coverage is a natural consequence of line-drawing, which is Congress's decision, not ours. Coverage is just as absurd under the line drawn by *Mills:* an employee is covered for a helicopter crash 3.1 miles from shore, but not 2.9 miles, even though the activity and risk is identical. Finally, Congress may have had good reason to apply uniform coverage across the full range of activities of an outer continental shelf worker – including work on a platform, in transit to and from a platform, on pipelines between platforms and shore, or at onshore facilities crucial to the mineral extraction process – so that a worker does not step in and out of coverage.

In any case, it is not necessary to speculate about policy, as the language of § 1333(b) is clear in not containing a situs-of-injury requirement. "[I]f Congress'

coverage decisions are mistaken as a matter of policy, it is for Congress to change them. We should not legislate for them." *Herb's Welding I,* 470 U.S. at 427. Because the language is unambiguous and the legislative history and policy considerations do not compel a contrary result, we find that § 1333(b) does not contain a situs-of-injury requirement.

C.

Pacific Operations presents a different argument, contending that § 1333(a) sets forth a situs requirement that is intended to apply to all of § 1333, including subsection (b). This is a novel argument; it has no support in either *Mills,* the Fifth Circuit decision, or *Curtis,* the Third Circuit decision. The only case supporting the proposition is *Demette,* the Fifth Circuit decision that misstates *Mills*' holding.

Section 1333(a)(1) provides that:

> The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, . . . to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State.

43 U.S.C. § 1333(a)(1). This subsection simply provides for federal law and jurisdiction over the situs.

Nothing in the language purports to limit the applicability of the Constitution, federal laws, or jurisdiction to the outer continental shelf, nor is there anything applying the subsection (a)(1) situs to any other parts of § 1333.

Section 1333(a)(2) does not provide a basis for an overarching situs requirement either. It states that:

> the civil and criminal laws of each adjacent State . . . are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its boundaries were extended seaward to the outer margin of the outer Continental Shelf.

Id. § 1333(a)(2)(A). Again, nothing purports to limit state law to the subsection (a) situs, nor to apply that situs to the other § 1333 subsections.

This is consistent with the structure of § 1333. Each subsection has its own situs definition, some broader and some narrower than subsection (a)'s. For example, the subsection (c) situs is narrower, applying the NLRA to unfair labor practices "occurring upon any artificial island, installation, or other device referred to in subsection (a)," but not to occurrences on the subsoil or seabed. *Id.* § 1333(c). The subsection (d) situs is broader, allowing Coast Guard safety regulations for "the artificial islands, installations, and other devices referred to in subsection (a) of

this section *or on the waters adjacent thereto.*" *Id.* § 1333(d) (emphasis added). As the Supreme Court held in *Tallentire*, § 1333(a) does not apply to the waters above the outer continental shelf. 477 U.S. at 219. If subsection (a) was intended to be a strict situs requirement for the entire statute, there would be no need for individualized situs tests for each subsection, much less ones that are inconsistent with subsection (a).

Moreover, each subsection expressly incorporates a portion of the subsection (a) situs in their own situs definitions – with the significant exception of subsection (b), the workers' compensation provision. If subsection (a) applied to all other provisions by its own terms, there would be no need for those provisions to independently incorporate parts of it. And because subsection (a) is referenced in each subsection *except* subsection (b), the obvious conclusion is that subsection (b) was not intended to be limited by subsection (a).

The legislative history of § 1333 also conclusively demonstrates that subsection (a) was not intended to limit the other provisions. Subsection (b) was originally a jurisdictional provision, providing federal courts with "original jurisdiction of cases and controversies *arising out of or in connection with* any operations conducted on the outer Continental Shelf." Pub. L. No. 83-212, § 4(b), 67 Stat. 462, 463 (1953) (emphasis added). This was clearly meant to encompass

more than just occurrences on the subsection (a) situs.[7]

The theory that subsection (a) provides a situs requirement applicable to all of § 1333 is simply inconsistent with its plain language, statutory structure, and legislative history. Subsection (a) merely extends federal jurisdiction and federal and state law to the outer continental shelf. It has no applicability beyond that purpose, other than to provide a situs definition that several other provisions expressly incorporate. Because subsection (b) does not incorporate (a), that provision has no bearing on our analysis.

We hold that § 1333(b) may apply to injuries occurring outside the situs of the outer continental shelf, so long as they occur "as the result of operations conducted on the outer continental shelf."

D.

We do not, however, find that Congress intended to enact a simple "but for" test in covering injuries that occur "as the result of" outer continental shelf

[7] When the statute was amended in 1978 to merge subsection (b) with the workers' compensation provision in subsection (c), the House Conference Report stated that "this amendment involves no change in existing law. It was not the intent . . . to alter in any way the existing coverage of the [LHWCA]." H.R. Rep. 95-1474, at 81 (1978) (Conf. Rep.), *reprinted in* 1978 U.S.C.C.A.N. 1674, 1680.

operations. Injuries with a tenuous connection to the outer continental shelf are not covered. *Cf. Black Hills Aviation,* 34 F.3d at 975 ("as a result of" requires more than just a "connection with"). Thus, we do not agree with, and decline to adopt, the Third Circuit's decision in *Curtis* to the extent that it requires only a "but for" test of causation. *See* 849 F.2d at 811.

Instead, we adopt the following test: the 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 during employment 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.

This is consistent with the pre-*Mills* Fifth Circuit interpretation of § 1333(b), which we endorse. Prior to *Mills,* the Fifth Circuit had long held that § 1333(b) applied to injuries occurring outside the outer continental shelf. *See Nations v. Morris,* 483 F.2d 577 (5th Cir. 1973) ("OCSLA, in its incorporation of [the LHWCA], did not speak in terms of injuries occurring *on* such platforms so as to distinguish them from

those *off* the platforms . . . Obviously Congress purposefully established a system that would apply without regard to physical location."). However, it required a more direct connection than simple "but for" causation. In *Herb's Welding II,* the Fifth Circuit denied OCSLA benefits to a welder working on a platform in state waters, even though it was connected by pipeline to platforms on the outer continental shelf, upon which the welder spent approximately 25% of his time. 766 F.2d at 899-900. The court reasoned that the accident would have occurred regardless of whether the employer had the outer continental shelf rigs. *Id.* at 900. It contrasted helicopter crash cases where the employee's "work had furthered the operations of a fixed rig on the shelf and was in the regular course of extractive operations on the shelf." *Id.*

In *Mills v. Director, Office of Workers' Compensation Programs,* 846 F.2d 1013 (5th Cir. 1988), *rev'd en banc,* 877 F.2d 356 (5th Cir. 1989), the three-judge panel decision later reversed by the *Mills* en banc panel, the court clarified the scope of the then-prevailing "but for" test in the Fifth Circuit:

> Our decision does not extend LHWCA coverage to those whose connection with operations on the Shelf is tenuous. Workers like [the welder in *Herb's Welding II*] whose work is only indirectly connected with the Shelf will still not be covered. The "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. at 1015 (quoting *Herb's Welding II,* 766 F.2d at 900) (footnote omitted). Applying this test, the court held that a welder injured during the onshore construction of a platform destined for the outer continental shelf was covered by OCSLA. *Id.* This holding was, of course, reversed by the Fifth Circuit en banc panel in a 9-5 vote. *Mills,* 877 F.2d at 357.

In this case, the BRB affirmed the dismissal of Petitioner's OCSLA claim because Valladolid's injury did not satisfy the *Mills* situs-of-injury test. Because we decline to adopt that test, we remand the OCSLA question to the BRB for further consideration consistent with this opinion.

IV.

We next consider whether the BRB erred in denying benefits under the LHWCA. Under 33 U.S.C. § 903(a):

> compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the 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).

A LHWCA "employee" is "any person engaged in maritime employment." *Id.* § 902(3). Thus, a claimant seeking workers' compensation under the LHWCA must establish both a maritime situs and a maritime status. *Herb's Welding I,* 470 U.S. at 415-16; *Peru v. Sharpshooter Spectrum Venture LLC,* 493 F.3d 1058, 1061 (9th Cir. 2007).

Petitioner contends that the BRB erred in affirming the ALJ's determination that the onshore La Conchita facility, where Valladolid was killed, was not a maritime situs. Petitioner does not contest the ALJ's factual findings regarding the facility, but argues that the BRB should have reversed the ALJ on the legal question of whether La Conchita qualifies as an "adjoining area customarily used by an employer in loading [or] unloading . . . a vessel." *Id.* § 903(a). We reject Petitioner's position and affirm the BRB.

We use a "functional relationship" test in determining whether a particular facility is a § 903(a) "adjoining area." *Brady-Hamilton Stevedore Co. v. Herron,* 568 F.2d 137, 141 (9th Cir. 1978). We consider, among other factors:

> the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the

> proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case.

Id. Although physical congruity with navigable water is not required, the facility must be "used as an integral part of longshoring operations." *Id.*

Applying the *Herron* factors, we agree with the BRB that La Conchita is not a maritime situs. Although the facility is only 250-300 feet from the ocean, it is separated from the water by a highway and railroad tracks and has no direct access to any pier, dock, or other loading facility. *See Motoviloff v. Dir., Office of Workers' Comp. Programs,* 692 F.2d 87, 89 (9th Cir. 1982). The closest pier used by Pacific Operations is the Casitas Pass Pier, roughly three miles away. There are no adjoining properties engaged in maritime commerce.

Petitioner argues that La Conchita should be considered a "transshipment" facility because scrap metal from the offshore platforms was dumped there before being sold to third parties. Petitioner analogizes to *P.C. Pfeiffer Co. v. Ford,* 444 U.S. 69 (1979), where the Supreme Court held that two warehousemen, who handled cargo within a port but were not permitted to move cargo directly from or onto a vessel, were LHWCA "employees." *Id.* at 71, 83. The Court held that the warehousemen "were engaged in maritime employment because they were engaged in

intermediate steps of moving cargo between ship and land transportation." *Id.* at 82-83.

We find the analogy unpersuasive. First of all, *Pfeiffer* never addressed the situs requirement because the injuries occurred on a dock and a pier, which are indisputably maritime situs. Second, the handling of scrap metal at La Conchita did not involve "moving cargo directly from ship to land transportation." *Id.* The scrap metal was unloaded at the pier by third-party longshoremen, loaded into trucks driven by third-party drivers, and driven three miles to La Conchita, where it was dumped and would wait for up to two years before being hauled away by third-party dealers. The maritime activities – the movement of cargo "directly from ship to land transportation" – began and ended at the Casitas Pass Pier. Finally, La Conchita is simply not an "adjoining area" within the meaning of § 903(a). It is three miles from the pier and not adjacent to any maritime facilities.

The record demonstrates that the primary purpose of the facility – and the only reason for its proximity to the coastline – is to receive and process crude oil slurry extracted by the offshore platforms, a non-maritime activity. *Herb's Welding I,* 470 U.S. at 422-24. Its use as a convenient dumping ground for scrap metal from the platforms does not convert it into a maritime situs.

Accordingly, we affirm the BRB's denial of benefits under the LHWCA. Because Valladolid's injury

does not satisfy the situs requirement, and because the BRB did not reach the status issue, we do not address whether Valladolid was a maritime employee. *Williams v. Dir., Office of Workers' Comp. Programs,* 825 F.2d 246, 247 (9th Cir. 1987); *Hurston v. Dir., Office of Workers' Comp. Programs,* 989 F.2d 1547, 1548 n. 3 (9th Cir. 1993).

V.

We hold that the OCSLA workers' compensation provision, 43 U.S.C. § 1333(b), applies to any injury resulting from operations on the outer continental shelf, regardless of the location of the injury. An injury is "the result of" outer continental shelf operations if there is a substantial nexus between the injury and the operations. We therefore reject the situs-of-injury test adopted by the BRB, and remand for further considerations consistent with this opinion.

We also hold that the BRB did not err in finding that La Conchita was not a maritime situs. Accordingly, we affirm the denial of workers' compensation benefits under the LHWCA.

Each side shall bear its owns costs.

GRANTED in part, DENIED in part, and REMANDED.

U.S. Department of Labor [SEAL]
Benefits Review Board
P.O. Box 37601
Washington DC 20013-7601

BRB No. 07-0965

L.V. (Widow of J.V.) Claimant-Petitioner v. PACIFIC OPERATIONS OFFSHORE, LLP and INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA Employer/Carrier-Respondents	)	**PUBLISHED** DATE ISSUED: **AUG 12 2008** DECISION and ORDER

Appeal of the Order Denying the Claimant's Motion to Withdraw or Amend Admissions, Denying the Respondents' Motion to Strike, and Granting Summary Decision of William Dorsey, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Timothy K. Sprinkles (Law Offices of Charles D. Naylor), San Pedro, California, for claimant.

Michael W. Thomas and Shana L. Prechtl (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Claimant[1] appeals the Order Denying the Claimant's Motion to Withdraw or Amend Admissions, Denying the Respondents' Motion to Strike, and Granting Summary Decision (2005-LHC-0343) of Administrative Law Judge William Dorsey rendered 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*. (the Act), as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1301 *et seq*. (OCSLA). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent worked for employer as a roustabout primarily at its offshore oil platforms, designated as Hogan and Houchin, which are located more than three miles off the coast of California, on the Outer Continental Shelf. Decedent also occasionally worked

[1] Claimant is decedent's surviving spouse.

at employer's crude oil flocculation facility, designated La Conchita, in Ventura, California. On June 2, 2004, decedent was directed by his immediate supervisor, Gordon Boswell, to take a forklift to the rear yard of the La Conchita plant and clean up some scrap metal debris. Mr. Boswell stated that approximately an hour and fifteen minutes later he found decedent lying on his back next to a plantain tree roughly ten feet off of one of the service roads within the plant facility, with the forklift resting on his abdomen and chest.

Decedent was pronounced dead at 5:27 p.m. as a result of asphyxia by abdominal and chest compression. An accident report stated that it appeared that decedent stood on top of the raised tines of the forklift to harvest fruit hanging from the plantain tree beyond the reach of a person on the ground. Presumably, the forklift was stopped while he did this, but for some unknown reason, the forklift moved forward, which caused decedent to lose his balance, fall in front of the forklift, and sustain fatal injuries when it rolled on top of him.

Claimant filed the instant claim, alleging that decedent's death was covered under either the Act or its OCSLA extension, since decedent was engaged in both maritime and oil production employment at covered locations.[2] Employer controverted the claim

[2] Employer paid benefits pursuant to the California Workers' Compensation Act for 52 weeks following decedent's death

(Continued on following page)

on coverage grounds and subsequently moved for summary decision with the administrative law judge, citing a lack of coverage under both the Act and the OCSLA.

Addressing employer's motion for summary decision, the administrative law judge found that claimant failed to submit any evidence raising an issue of fact that her claim falls within the coverage of either the Act or the OCSLA.[3] The administrative law judge also found that employer is entitled to summary decision as a matter of law because, applying the undisputed facts to the applicable law, he found that decedent was not a maritime worker on a maritime situs, and/or was not killed in a location that satisfies the OCSLA's situs requirement. Accordingly, the administrative law judge found that claimant is not entitled to benefits under either the Act or the OCSLA. He thus granted employer's motion for summary decision.

---

at a rate of $807.69 per week. The parties agreed that decedent's average weekly wage at the time of his death was $928.22.

[3] In his decision, the administrative law judge also found that claimant is deemed to have admitted all of the requests for admissions put forth by employer on February 25, 2005, by operation of 29 C.F.R. §18.20, since claimant failed to serve her responses to employer's requests within thirty days of service. The administrative law judge then considered but rejected claimant's motion to withdraw or amend the deemed admissions based on his finding that claimant's "confusing, evasive, and late answers" have prejudiced employer's ability to defend the claim.

On appeal, claimant challenges the administrative law judge's grant of employer's motion for summary decision and consequent denial of benefits under the Act and/or OCSLA. Employer responds, urging affirmance.

For a claim to be covered by the Act, a claimant must establish that the injury occurred upon the navigable waters of the United States, including any dry dock, or that it occurred on a landward area covered by Section 3(a), and that the employee's work is maritime in nature and is not specifically excluded by the Act. 33 U.S.C. §§902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Thus, in order to demonstrate that coverage under the Act exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id.*; *see also Crapanzano v. Rice Mohawk, U.S. Constr. Co., Ltd.*, 30 BRBS 81 (1996).

Claimant argues that the administrative law judge erred in finding that employer's La Conchita facility does not meet the situs requirement of the Act. Section 3(a) of the Act provides, in pertinent part, that:

> compensation shall be payable under this chapter . . . only if the 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).

33 U.S.C. §903(a). The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, has held that the phrase "adjoining area" should be read to describe a site which has a functional relationship with maritime commerce and a geographical nexus with navigable waters.[4] *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978).

The administrative law judge found that claimant did not establish the situs requirement, as there is no evidence establishing that employer's La Conchita facility has a functional relationship with any maritime commerce. The record establishes that the La Conchita facility, which is located approximately 250 to 300 feet from the Pacific Ocean, is a receiving station for the petroleum and oil that is pumped from the two offshore platforms. Employer's Exhibit (EX) 2, Dep. at 15. Specifically, a mixture of elements called "slurry" is pumped through pipelines from the platforms to the plant, where it is processed into oil, water, gas and solids. EX 2, Dep. at 34; EX 14, Dep. at 13. The processed oil and gas are then shipped away from La Conchita by pipeline to third

[4] The record contains no evidence, nor does claimant raise any contention, that decedent's death occurred at one of the sites specifically enumerated in Section 3(a), 33 U.S.C. §903(a).

parties. EX 2, Dep. at 34; EX 14, Dep. at 16. The facility has numerous storage tanks which temporarily hold the slurry, as well as the processed oil and gas, and its byproducts. EX 2, Dep. at 33-34. However, there is no evidence that the La Conchita facility is customarily used by employer in loading, unloading, repairing, dismantling or building a vessel. As such, it has no functional relationship with navigable water, *i.e.*, the Pacific Ocean.

Additionally, the La Conchita facility served as a storage area for scrap metal which came from the platforms and from around the plant. EX 2, Dep. at 40; EX 14, Dep. at 33. Specifically, the scrap metal consisted of old pipe, old pieces of storage tanks, old catwalk, old chain, and/or old cable. EX 2, Dep. at 42. Scrap metal from the offshore platforms would be initially collected in bins, which once full, would be loaded on the crew boat. The scrap metal was then unloaded from the crew boat at the Casitas Pass Pier and loaded onto a truck and delivered to the La Conchita facility, which is approximately three miles away. EX 2, Dep. at 42. The truck, operated by a third-party contractor, would dump the scrap metal out of the bins at various locations around the La Conchita facility. *Id.*; EX 14, Dep. at 32. The scrap metal would, perhaps once every two years, be "centralized" by workers at the La Conchita plant, including decedent, who was performing this work at the time of his death, and thereafter sold by the ton to contractors. EX 2, Dep. at 43; EX 14, Dep. at 33-34. The contractors would come in and cut the scrap

metal into manageable pieces, put it into bins, and then haul it away to a metal scrap yard. *Id.* As for other necessities related to employer's oil operations, "tools and parts and equipment [necessary for the platforms] all come from different vendors all over Southern California and the United States," EX 14, Dep. at 17, and they are "shipped by the vendors" directly to the staging area at the pier. EX 14, Dep. at 21. Thus, there is no evidence that the La Conchita facility served as a staging area for employer's use of the Casitas Pass Pier for either its employees or equipment.

The undisputed facts support the administrative law judge's finding that employer's La Conchita facility is not a covered situs pursuant to Section 3(a) of the Act. Specifically, there is no evidence that the La Conchita facility is an "adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. §903(a). Rather, the proximity of employer's La Conchita facility to navigable waters is not dictated by maritime concerns. *Bennett v. Matson Terminals, Inc.*, 14 BRBS 526 (1981), *aff'd sub nom. Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982). It therefore has no functional nexus with any maritime activities. *Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31 BRBS 199(CRT) (5th Cir. 1998); *Charles v. Universal Ogden Services*, 37 BRBS 37 (2003) (Board affirmed administrative law judge's finding that claimant's injury did not occur on an "adjoining area" where the proximity of employer's facility to the

Mississippi River was not dictated by maritime concerns and there was no functional relationship between employer's warehouse and the Mississippi River in that the area is not used for loading, unloading, building or repairing vessels); *cf. Waugh v. Matt's Enterprises, Inc.*, 33 BRBS 9 (1999) (field where scrap metal is hauled from barges is covered situs). Consequently, as the undisputed facts establish that employer's La Conchita facility, where the employee's death occurred, was not used for loading, unloading, repairing, dismantling, or building a vessel, we affirm the administrative law judge's finding that decedent's injury did not occur on a situs covered under the Act. *See generally Arjona v. Interport Maintenance Co., Inc.*, 34 BRBS 15 (2000); *Bennett,* 14 BRBS 526. We, therefore, affirm the administrative law judge's finding that claimant has not established coverage under the Act and his grant of summary judgment for employer on this issue.[5]

Alternatively, claimant contends that the administrative law judge erred in denying benefits under the OCSLA. Claimant argues that the administrative law judge committed legal error by stating that the

---

[5] Thus, we need not address claimant's assertions regarding the administrative law judge's finding that claimant did not establish the status element under the Act, as our affirmance of the administrative law judge's situs finding renders the status issue moot in this case. *Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT); *Williams v. Director, OWCP*, 825 F.2d 246, 20 BRBS 25(CRT) (9th Cir. 1987), *aff'g Williams v. Pan Marine Construction*, 18 BRBS 98 (1986).

decision of the United States Supreme Court in *Offshore Logistics v. Tallentire*, 477 U.S. 207 (1986), as well as decisions rendered by the United States Courts of Appeals for the Fifth and Ninth Circuits, require a situs-of-injury test, as opposed to only a situs-of-mineral extraction operations test, in order to establish coverage under the OCSLA. In particular, claimant argues that the Fifth Circuit stated, in *Demette v. Falcon Drilling Co.*, 280 F.3d 492, 500 n. 29, 35 BRBS 136 n. 29(CRT) (5th Cir. 2002), that the OCSLA contains "only a status requirement," and moreover, that the Ninth Circuit, in whose jurisdiction the instant case arises, similarly held that Section 1333(b) imposed only a "but for" test related to covered offshore operations and contained no situs-of-injury requirement. *Kaiser Steel Corp. v. Director, OWCP*, 812 F.2d 518 (9th Cir. 1987), *aff'g Robarge v. Kaiser Steel Corp.*, 17 BRBS 213 (1985).

Compensation is available under the Longshore Act for injuries to non-seaman [sic] occurring as a result of operations on the OCS for the purpose of "exploring for, developing, or producing resources" on the OCS. 43 U.S.C. §1333(a)(1), (b); *Tallentire*, 477 U.S. 207; *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969); *Kaiser Steel Corp*, 812 F.2d at 520. The issue in this case concerns whether the OCSLA applies only if the employee's injury or death occurs on the OCS.[6]

---

[6] Broadly speaking, the OCS requires that the employee be engaged in work in furtherance of the exploration, development,

(Continued on following page)

In *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805, 21 BRBS 61(CRT) (3d Cir. 1988), 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, *i.e.*, would the claimant have sustained injuries "but for" the operations on the shelf. The court noted that there was no limitation in Section 1333(b) to "artificial islands and fixed structures" as there is in Section 1333(a)(1).[7]

---

removal, or transportation of natural resources (the "but for" or status test) from the subsoil and seabed of the OCS or any artificial stand or installation attached to or erected on the seabed of the OCS (the situs test). The Board's decision in *Robarge*, 17 BRBS 213, did not address the situs-of-injury issue, as it noted that the only issue requiring resolution involved status under the OCSLA. Specifically, the Board recognized that, as employer conceded that claimant's injury occurred during construction of a fixed platform located on the outer continental shelf, *i.e.*, employer conceded situs under the OCSLA, the only question was whether claimant's activities in platform construction constituted "development" for purposes of 43 U.S.C. §1331(a)(1).

[7] The Third Circuit noted that Section 1333(a) of the pre-1978 version of the Lands Act makes no references to injuries and is a provision intended for the separate purpose of asserting federal jurisdiction over the seabed underlying the outer continental shelf. *Curtis*, 849 F.2d at 809, 21 BRBS at 68 (CRT). It further stated that the only criteria Section 1333(b) imposes for securing Longshore benefits is for injured employees to be involved in "any operations conducted on the outer continental shelf for the purpose of exploring for, [and] developing the natural resources of the outer continental shelf." *Id.*; 43 U.S.C. §1333(b).

Id. It therefore construed Section 1333(b) as extending Longshore Act coverage to all employees who sustain injuries while working to develop the mineral wealth of the OCS. *Curtis*, 849 F.2d at 810, 21 BRBS at 70 (CRT).

Subsequently, the Fifth Circuit held, in *Mills v. Director, OWCP*, 877 F.2d 356, 22 BRBS 97(CRT) (5th Cir. 1989) (*en banc*), that the claimant, who was a land-based worker injured during construction on state land of an oil production platform destined for the OCS, did not qualify for benefits under the OCSLA because he did not satisfy the situs-of-injury requirement.[8] In reaching its conclusion, the Fifth Circuit stated that, in furtherance of Congressional intent "to establish a bright-line geographic boundary for Section 1333(b) coverage," 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" described in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985), *i.e.*, the injury or death on the OCS would not have occurred "but for" the extractive operations on the shelf. *Mills*, 877 F.2d at 362, 22 BRBS at 102(CRT). Thus, the Fifth Circuit concluded that Section 1331(a)(1) creates a situs-of-injury requirement for the application of other sections of the OCSLA, including Sections 1333(a)(2) and 1333(b). *See also Strong v. B.P.*

---

[8] The *Mills* court noted the contrary *Curtis* decision. *Mills*, 877 F.2d at 363, 22 BRBS at 102(CRT).

Exploration & Production, Inc., 440 F.2d 665, 40 BRBS 1(CRT) (5th Cir. 2006); *Demette*, 280 F.3d 492, 35 BRBS 136(CRT). The Board, in cases arising in the Fifth Circuit, has explicitly acknowledged the existence of a situs-of-injury test under the OCSLA, which necessarily requires that the injury occur while the employee was on the OCS.[9] *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27, 28 (2004); *Martin v. Pride Offshore, Inc.*, 34 BRBS 192 (2001); *see also Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31 BRBS 199(CRT) (5th Cir. 1998).

The Ninth Circuit has not explicitly addressed the situs requirement, but it has stated, albeit in *dicta*, that "the situs requirement is a predicate for coverage under OCSLA."[10] *A-Z Int'l v. Phillips*, 179

---

[9] In contrast to claimant's assertion, the Fifth Circuit did not hold that the OCSLA contains only a status requirement. Rather, the court articulated that Section 1333(b) of the OCSLA, 43 U.S.C. §1333(b), "contains only a status requirement." *Demette*, 280 F.3d at 500 n. 29, 35 BRBS 136(CRT) n. 29. The Fifth Circuit explicitly held that "in order for the LHWCA to apply by virtue of Section 1333(b), notwithstanding any application of the LHWCA of its own force, the injured worker must satisfy the 'status' requirement of Section 1333(b) *as well as the situs requirement of Section 1333(a)(1)*." *Demette*, 280 F.3d at 498, 35 BRBS at 134(CRT) (emphasis added).

[10] In *Phillips*, the Ninth Circuit acknowledged that the administrative law judge denied the claimant's claim because he was not injured, as he had alleged, on the offshore oil platform *Hermosa*. Situs, however, was moot, as the issue considered by the Ninth Circuit on appeal pertained to whether the Board had jurisdiction to review the administrative law judge's certification

(Continued on following page)

F.3d 1187, 1189 n. 1, 33 BRBS 59(CRT), 61 n. 1 (CRT) (9th Cir. 1999), *citing* 43 U.S.C. §1333 (1994); *see also Tallentire*, 477 U.S. at 219. In support of this statement, the Ninth Circuit cited the language of the Supreme Court in *Tallentire*, 477 U.S. at 219, also referenced by the Fifth Circuit in *Mills*, 877 F.2d at 361, 22 BRBS at 101(CRT), that "Congress determined that the general scope of OCSLA's coverage . . . would be determined principally by locale."

In his decision, the administrative law judge initially found that decedent established "status" under the OCSLA because there is no dispute that his duties for employer, while he worked on platform Hogan, were in furtherance of its exploration and development of oil from the outer continental shelf. *See Barger v. Petroleum Helicopters, Inc.*, 692 F.2d 337 (5th Cir. 1983). After reviewing the conflicting positions on situs put forth by the Third and Fifth Circuits, the administrative law judge addressed the question of decedent's coverage under the OCSLA in terms of whether he sustained "an injury on the subsoil and seabed of the outer continental shelf, or the artificial islands and structures erected thereon the waters above it." Order at 18. The administrative law judge concluded that as decedent was killed while harvesting plantains at an onshore facility that served offshore oil platforms, the situs element for coverage

---

to the district court of his finding that claimant filed a fraudulent claim. *Phillips*, 179 F.3d 1187, 33 BRBS 59(CRT).

under the OCSLA could not be satisfied. Accordingly, the administrative law judge denied claimant's claim for benefits under this statute.

In resolving the situs issue, the administrative law judge applied the Fifth Circuit's test as it "adopts the narrow Supreme Court interpretation of situs" in *Tallentire*, 477 U.S. at 218. We reject claimant's contention that the administrative law judge erred in this regard. The language of OCSLA and its legislative history indicate that Congress intended, in writing the OCSLA, to regulate only the OCS. Congress enacted the OCSLA "to define a body of law applicable to the seabed, the subsoil, and the fixed structures . . . on the OCS." *Rodrigue*, 395 U.S. at 355. This is evidenced by the specific language of Section 1333(a)(1) which defines, and by its very nature limits, the coverage of the OCSLA to "the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State." 43 U.S.C. §1331(a)(1); *see also generally Mills*, 877 F.2d at 360-361, 22 BRBS at 99-100(CRT). Absent from this provision, is any Congressional intent to

extend coverage to individuals injured outside the geographical locale comprising the OCS.

As discussed by the Fifth Circuit in *Mills*, 877 F.2d at 360-361, 22 BRBS at 99-100(CRT), the legislative history of the OCSLA supports this position. In discussing S-1901, the bill that became OCSLA, the Senate committee discussed a scenario where a worker in state waters is injured while drilling a slant hole into the OCS and concluded that in such an instance the employee would be covered by state workers' compensation. *See Mills*, 877 F.2d at 361, 22 BRBS at 100(CRT), *citing* Outer Continental Shelf: Hearings on S-1901 before Senate Comm. on Interior and Insular Affairs, 83d Cong., 1st Sess., 12-16 (1953). Thus, Congress intended to make the place of injury a controlling factor in the application of benefits. *Id.*

Additionally, the Supreme Court recognized a geographic boundary to OCSLA coverage in *Tallentire*, 477 U.S. 207. In *Tallentire*, offshore drilling platform workers were killed when the helicopter in which they were riding crashed in the high seas some 35 miles off the Louisiana coast while transporting them from the offshore drilling platform where they worked to their home base in Louisiana. The Supreme Court determined that because the helicopter crash and ensuing death of the platform workers occurred "miles away from the platform and on the high seas," it would not be proper to extend OCSLA to the casualties in that case. *Tallentire*, 477 U.S. at 219. The Supreme Court thus discussed OCSLA situs in terms of injuries which occur within "the narrowly

circumscribed area defined by the statute." In particular, the Court stated, as also noted by the Fifth and Ninth Circuits, that "Congress determined that the general scope of OCSLA's coverage . . . would be determined principally by locale." *Id.*

Thus, the language and legislative history of the OCSLA, in conjunction with the Supreme Court's interpretation thereof, supports the decision of the Fifth Circuit in *Mills*, 877 F.2d at 361, 22 BRBS at 100(CRT), that coverage under the OCSLA involves meeting both a situs-of-injury and status test. Moreover, as the administrative law judge found, the *dicta* in *Phillips* provides a strong indication that the Ninth Circuit is more closely aligned with the Fifth Circuit than the Third Circuit on the issue of whether the OCSLA contains a situs-of-injury test. We thus reject claimant's position that a situs-of-mineral extraction operations test rather than a situs-of-injury test is more appropriate to determine coverage under the OCSLA. As it is undisputed that decedent's injury did not occur while he was working on the OCS, the administrative law judge's finding that claimant did not establish situs under the OCSLA, and thus, cannot obtain coverage under that statute, is affirmed.

Accordingly, the administrative law judge's findings that claimant has not established situs under the Act or the OCSLA, and resulting grant of employer's

motion for summary decision, and consequent denial of benefits, are affirmed.[11]

SO ORDERED.

/s/ Nancy S. Dolder
NANCY S. DOLDER, Chief
Administrative Appeals Judge

/s/ Regina C. McGranery
REGINA C. McGRANERY
Administrative Appeals Judge

/s/ Betty Jean Hall
BETTY JEAN HALL
Administrative Appeals Judge

[11] As the administrative law judge's findings that claimant did not establish that decedent's injury occurred on a covered situs under either the Act or the OCSLA are based on the uncontested facts in this case, we need not address claimant's contentions regarding the administrative law judge's denial of her motion to withdraw or amend the deemed admissions under 29 C.F.R. §18.20.

U.S. Department of Labor [SEAL]
Office of Administrative Law Judges
50 Fremont Street – Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 15 August 2007

CASE NO. 2005-LHC-00343

OWCP No.: 18-83701

In the Matter of:

L.V. AS WIDOW OF J.V. (deceased),

Claimant,

vs.

PACIFIC OPERATIONS OFFSHORE, LLP,

Employer

and

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA

Carrier.

Order Denying the Claimant's Motion to Withdraw or Amend Admissions, Denying the Respondents' Motion to Strike, and Granting Summary Decision

I. Introduction

The Claimant's husband (the Decedent) died when a forklift he operated at his employer's crude oil

flocculation plant rolled over him and crushed him. For some reason he had used it in a way unrelated to his job – to harvest fruit. On June 3, 2004, the Decedent's employer,[1] Pacific Operations Offshore, LLP, submitted a claim on the Claimant's behalf and began paying death benefits pursuant to the California Workers' Compensation Act.[2] On July 22, 2004, the Claimant filed for compensation under the Longshore and Harbor Workers' Compensation Act (LHWCA or Longshore Act), 33 U.S.C.A. §§ 901, *et seq*. (West 2007). On February 7, 2006, the Claimant also filed for compensation under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C.A. § 1333 (West 2007), an extension to the LHWCA. She claims entitlement to benefits under either statute on grounds that the Decedent engaged in both maritime and oil production employment at covered locations.[3] The Employer, together with its carrier, the Insurance Company of

---

[1] The parties agree that there was an employer-employee relationship, and that the claim was timely noticed.

[2] Employer provided $807.69 per week for 52 weeks after the decedent's death. The parties agree that his average weekly wage when injured was $928.22.

[3] The Defendants assert that the Claimant is not claiming injury under the LHWCA except as it may have occurred under the OCSLA. However, the Claimant's former counsel believed that jurisdiction is proper under the LHWCA and her current counsel has not stated otherwise. *See,* the Declaration of Diane Middleton in support of the Claimant's Motion to Withdraw or Amend. The parties argued the merits jurisdiction under both statutes, so I accept that the Claimant seeks benefits under either statute.

the State of Pennsylvania, adjusted by AIG Claim Services, Inc. (collectively referred to as the Defendants) controvert these claims for federal benefits on jurisdictional grounds.

Three motions are before me, two discovery disputes and one dispositive motion for summary decision. I deny the Claimant's motion to withdraw or amend and the Defendants' motion to strike, but grant summary decision not only as a result of the Claimant's admissions, but also because the Decedent was not a maritime worker and was not killed in a location that satisfies the OCSLA's situs requirement.

II. Procedural Background

On February 25, 2005, the Defendants served their requests for admissions on the Claimant, which were due by April 1, 2005. Declaration of Michael Thomas in Support of Defendants' Opposition to Claimant's Motion to Withdraw or Amend Deemed Admissions (Dec. Thomas). The Claimant's attorney obtained extensions to respond, first until April 8, then until May 7, 2005. *Id.* The hearing on this case, initially scheduled to proceed on May 16, 2005, was continued to October 17, 2005. Approximately one month before the hearing, the Claimant substituted counsel, whose request for an additional continuance to prepare adequately was granted, and the trial date rescheduled to April 24, 2006. Change in the Claimant's counsel gave rise to two additional continuances, to August 28, and December 11, 2006.

On September 27, 2006, the Defendants moved for summary decision, arguing that the Claimant's failure to respond to their requests for admissions had admitted the matters, thereby disproving coverage under both the LHWCA and the OSCLA. In the alternative, the Defendants insist that there is no dispute of material fact regarding the non-maritime nature of the Decedent's job duties, which disqualifies the Claimant from receiving benefits under the LHWCA, and that the Claimant cannot meet the situs requirements under either statute.

On October 9, 2006, the Claimant moved to withdraw or amend the deemed admissions, on grounds that all of the continuances muddled the deadline for replying, and that it would be manifestly unjust to accept the admissions in light of the Defendants' motion for summary decision. The Defendants opposed the motion to withdraw or amend and later moved to strike the Claimant's reply to their opposition because she had not requested leave to submit a reply brief, that brief was untimely, and it raised new legal arguments and evidence. I requested further argument on the summary decision motion and consequently removed the case from the December 11, 2006 calendar.[4]

---

[4] By Order dated October 24, 2006, I directed the Claimant to submit further argument on the Defendants' motion for summary decision. On November 21, 2006, I granted the Defendants leave to reply to the Claimant's argument in opposition to summary decision and continued the trial once again.

III. Factual Background

The employer is a company whose primary business includes oil exploration and extraction. Declaration of Clement M. Alberts in Support of Motion for Summary Decision (Dec. Alberts). It operates a crude oil flocculation facility, La Conchita, in Ventura, California. *Id.* Crude oil is pumped into the plant via pipeline from two offshore platforms designated Hogan and Houchin, which is processed and stored in tanks temporarily before being transported away from the plant by pipeline. *Id.* The Decedent worked as a roustabout both at La Conchita and on offshore platform Hogan, which is located more than three miles off the coast of California on the outer continental shelf. *Id.* He accessed this platform via crew boat from the Casitas Pass Pier, which stands about three miles from La Conchita. *Id*.

At La Conchita, the Decedent performed maintenance and cleaning duties that included painting, sandblasting, weed-pulling, cleaning drain culverts, and operating a forklift. Declaration of Gordon "Scoop" Boswell in Support of Motion for Summary Decision (Dec. Boswell). His regular job duties on platform Hogan involved picking up trash and emptying wastebaskets, washing the decks and well bay, assisting in repairing wellhead safety equipment, piping projects, painting, and assisting on the pipe deck with crane loads going on or off the platform. *Id.* On rare occasions (no more than 2% of his work time) he used a forklift at La Conchita to move scrap metal, which had been transported by boat from the offshore

platforms to a pier, and then by truck from the pier to the onshore plant. Deposition of Chris Magill (Depo. Magill)[5] at 31-33.

At approximately 4:00 PM on June 2, 2004, the Decedent's supervisor, Gordon "Scoop" Boswell, directed him to take a forklift to the rear yard of the La Conchita plant and clean up some debris.[6] Dec. Boswell. About an hour and fifteen minutes later, Mr. Boswell found the Decedent next to a plantain tree roughly ten feet off of one of the service roads within the plant facility. Dec. Alberts. He was lying on his back with a forklift resting on his abdomen and chest. *Id.* He was pronounced dead at 5:27 P.M. Dec. Alberts, Exh 2.

The accident report said it appeared that the Decedent stood on top of the raised tines of the forklift to harvest a hand of fruit hanging from a plantain tree out of reach of a person on the ground. Dec. Alberts, Exh 2. Presumably the forklift was stopped as he did this, but it apparently moved forward for unknown reasons, which caused him to lose his balance, fall in front of the forklift, and sustain fatal injuries when it rolled over him. *Id*.

---

[5] This deposition is exhibit 14 in support of the Declaration of Timothy K. Sprinkles in Opposition to Motion for Summary Decision.

[6] Although the Claimant disputes where the Decedent worked on June 1 and 2, 2004, she takes no issue with where and how he died.

IV. Analysis

A. The Claimant's Motion to Withdraw or Amend

A party must respond in writing to a request for admissions within thirty days after service of the request, or each matter is deemed admitted. Fed. R. Civ. P. 36(a); 29 C.F.R. § 18.20 (2006). On February 25, 2005, the Respondents served their requests for admissions on the Claimant's prior attorney, Diane Middleton, which were due by April 1, 2005. She requested an extension until April 8, and then again until May 7, 2005, to which the Respondents agreed. Dec. Thomas. On or about September 14, 2005, the Claimant substituted Charles Naylor as counsel, who explained in a letter to Judge Mapes that he needed to conduct "significant research" and "appropriate investigations" in order to properly respond to the discovery requests, which he acknowledged were past due. Exh. 10 to Dec. Thomas. The Claimant also insists that Mr. Naylor met with Defendants' counsel, Mr. Thomas, to tell him that he needed more time to respond to the discovery requests, but there is no evidence that Mr. Thomas agreed to extend the deadline for the requests for admissions, only that he agreed to a continuance. Regardless of the change in counsel and multiple continuances, the Claimant failed to serve her responses to the Defendants' requests for admissions within thirty days after service. The Claimant is deemed to have admitted all of the requests by operation of 29 C.F.R. § 18.20 (2006).

After the Defendants filed their motion for summary judgment, based in part on the Claimant's lapse in responding to the requests for admissions, the Claimant moved to withdraw or amend her deemed admissions, arguing that a late response should be permitted because the Defendants knew she needed more time and discovery was still open. The Claimant particularly emphasizes that she scheduled depositions for September 15, and 19, 2006; she questions the Defendants' intention in moving for summary decision so quickly on the heels of these depositions because, she contends, the Defendants should have known that she would need those depositions [sic] transcripts in order to make meaningful opposition to any dispositive motion. The Claimant represents that she still did not have the transcripts from these depositions by October 10, 2006.

Facts admitted when a party fails to respond to a request for admissions may serve as the basis for a dispositive motion. *Asea, Inc. v. Southern Pacific Transportation Co.,* 669 F.2d 1242, 1248 (9th Cir. 1981); *Moosman v. Joseph P. Blitz, Inc.,* 358 F.2d 686 (2nd Cir. 1966). In appropriate circumstances, untimely replies may be permitted where the merits of the action would otherwise be subserved, and the party who obtained the admission cannot establish that withdrawing or amending them will prejudice its defense on the merits. FED. R. CIV. P. 36(b); *Sonada v. Cabrera,* 255 F.3d 1035 (9th Cir. 2001) (allowing withdrawal for lack of prejudice); *see also, In re: Heritage Bond Litig.,* 220 F.R.D. 624, 626 (C.D. Cal.

2004) (deeming matters admitted where responses were filed 12 days late, but explaining that a late response should be permitted only when necessary to relieve a party from default by the use of the admissions to obtain a summary or default judgment).

1. Merits of the Claimant's case subserved

The merits are subserved when deemed admissions "practically eliminate[s] any presentation of the merits of the case." *Hadley v. U.S.*, 45 F.3d 1345, 1348 (9th Cir. 1995). The Claimant insists that it would be manifestly unjust to allow the admissions to stand because they establish that the Decedent's death is not covered by the LHWCA or OSCLA. Most of the admissions are dispositive (all but numbers 1 and 6), but holding the Claimant to them is not necessarily unjust, when she had the opportunity to withdraw or amend those admissions for over a year. At the latest, responses to the Defendants' requests for admissions were due on May 7, 2005. Without the opportunity to withdraw or amend, however, the admissions eliminate the need for presentation of the merits because they preclude coverage under either statute. Consequently, I find that the merits would be subserved if the Claimant is relieved from the admissions. That does not end the inquiry, however.

2. Prejudice to the Defendants

The party that obtained the admission has the opportunity to prove how it would be prejudiced

if withdrawal of the admissions were permitted. *Sonada,* 255 F.3d at 1039. Prejudice relates to the difficulty a party may face in proving its case. *Id.*; *see also Hadley,* 45 F.3d at 1349 (finding no prejudice where the moving party would have been able to engage in more extensive trial preparation had the admission been timely). The Defendants assert that the Claimant has failed to respond not only to admissions requests, but also to interrogatories and requests for production of documents. They also argue that some of the Claimant's late answers to the requests for admissions are unreasonable. For example, the Defendants' request number 5 asks the Claimant to admit that the Decedent was not en route to a barge, floating platform, floating island, ship, or other vessel located on the outer continental shelf when he was killed. This is neither vague nor ambiguous, despite the Claimant's objection to the contrary. The parties' lists of undisputed facts both explain that the Decedent was killed by a forklift while attempting to harvest plantains while working on shore. Defendants' Statement of Undisputed Facts (DF) 29; Claimant's Statement of Undisputed Facts (CF) 34. They also agree that workers accessed the offshore platforms from a pier three miles distant from the La Conchita plant. DF 27; CF 20. It makes no sense that the Decedent would have driven the forklift three miles en route to this pier. Therefore, I agree that the Claimant had enough information to admit or deny

this request.[7] This evasive response is prejudicial to the Defendants because it is more difficult to defend against claims when the Claimant keeps the factual basis for them to herself. It also runs counter to the purpose of admissions, which is to narrow the issues for trial. *See Asea,* 669 F.2d at 1248.

The Defendants believe they would prevail on summary judgment even without the deemed admissions. This implies that they will suffer little prejudice if the Claimant were allowed to withdraw and amend her responses. Yet the Defendants' belief in their success does not discount a prejudicial impact on their ability to defend against this claim. When the Defendants filed their motion for summary decision, the Claimant had not responded to any of their discovery requests. She had over a year to answer the requests for admissions, but aside from her response to the Defendants' request number. 6, I still cannot tell what her answers are. The Claimant submitted her objections and answers to the Defendants' requests for admissions as an exhibit to her motion to withdraw or amend, but those answers themselves do not match those listed in the text of the motion.[8]

---

[7] The Claimant eventually admitted this request, but she did so in an amended response filed after the Defendant submitted its opposition to her motion to amend or withdraw.

[8] To request for admissions number 1: "The Decedent has no other dependent under the Act than the Claimant," the Claimant answered, "admit," and "admit in part, deny in part. Number 2: "The Decedent was never present on Platform Hogan on the date of death," she answered "unable to admit or deny,"

(Continued on following page)

She submitted a third, amended set of responses as part of her reply to the Defendants' opposition to her motion to amend or withdraw.[9] I decline to accept this final set as the Claimant's intended responses because no leave had been granted to withdraw or amend the first (and second) set of responses. The Defendants certainly face increased difficulty in preparing their defense when the Claimant has offered

---

and "deny." Number. 3: "The Decedent did not do any work on any barges, floating platforms, floating islands, ships, or other type of vessel located on the outer continental shelf on the date of death," she answered, "unable to admit or deny," and "deny." Number. 4: "The Decedent was never present on any barges, floating platforms, floating islands, ships, or other type of vessel located on the outer continental shelf on the date of death," she answered, "unable to admit or deny," and "deny." Number. 5: "The Decedent was not en route to a barge, floating platform, floating island, ship, or other vessel located on the outer continental shelf when he was killed," she answered: "unable to admit or deny," and "deny." Number. 6: "The Decedent was not scheduled to be on Platform Hogan or any other Outer Continental Shelf Lands Act covered site on the date of death," she answered, "deny," and "deny." Number. 7: "The Decedent was not scheduled to be on Platform Hogan or any other Outer Continental Shelf Lands Act covered site on the date of death," she answered, "deny," and "admit in party, deny in part" Number. 8: "The Decedent is not claiming injury under §901 *et seq*. of the Act except as it may have occurred under 43. U.S.C. § 1333(b) of the Outer Continental Shelf Lands Act," she answered, "unable to admit or deny," and "deny."

[9] Although the federal rules require that a party supplement its discovery responses as different information becomes available, the Claimant's responses contained in her reply brief seek to replace, rather than supplement the deemed admissions. *See* Fed. R. Civ. P. 26(e). Therefore, they are not accepted as supplemental answers.

three different answers to one round of requests for admissions, without answering the rest of the Defendants' discovery requests.

The Claimant asserts that the Defendants are not prejudiced by the late responses because they were aware of the factual issues and had complete access to all discoverable evidence. She claims they knew the Decedent worked 98% of his time on the platforms, that his duties included unloading and loading supplies and things off and onto the crew boat he and others used to access Platform Hogan, and that there was no record of his precise duties or locations on the day he died. Therefore, they would have known that the Claimant would deny at least some of the requests for admissions. Regardless of what the Defendants knew of the Decedent's daily activities, litigation remains an adversary system. It is inappropriate to expect the Defendants to concede a denial to any of their own requests for admissions by anticipating the Claimant's response. Were that so, admission requests would lose much of their value. It is the Claimant's duty to answer the requests, not the Defendants' responsibility to anticipate (or guess about) the answers.

Although it would be unreasonable to hold the Claimant's new counsel to answer for all of the Defendants' discovery requests shortly after accepting the case, that was not required of him. The Claimant waited to seek relief from the deemed admissions until after the Defendants had submitted their summary judgment motion. It does not matter that

discovery was still ongoing or that there had been multiple continuances.

Allowing the deemed admissions to stand is somewhat harsh, but in this case it is appropriate in light of the Claimant's failure to withdraw them as soon as she discovered that they were late. *See U.S. v. Kasuboski,* 834 F.2d 1345, 1350 (7th Cir. 1987) (explaining that the harshness of maintaining deemed admissions is tempered by the availability of the motion to withdraw, a procedure that the admitting party had failed to employ). Moreover, this result does not disturb the Claimant's entitlement to a remedy under state law; the Defendants paid workers' compensation benefits at $807.69 per week for 52 weeks after the Decedent's death. Declaration of Michael Thomas in Support of Summary Decision (Dec. Thomas 2) Exh. 11. Therefore, I find that the Claimant's confusing, evasive, and late answers have prejudiced the Defendants' ability to defend against this claim, and deny the Claimant's motion to withdraw and amend.

B. Defendants' Motion to Strike the Claimant's Reply Brief.

No reply to an answer, response to a reply, or any further responsive document, shall be filed unless the presiding judge permits it. 29 C.F.R. § 18.6(b) (2006). The Claimant did not request leave to file a reply. The Defendants argue that this procedural misstep means I should not consider the reply brief. They also argue

that it should not be considered because the Claimant filed it 41 days after they served their opposition[10] and because it introduces new factual and legal issues, which cannot be done in a reply. *See Lujan v. National Wildlife Federation,* 497 U.S. 871, 894-95 (1990) (explaining that it is improper to introduce new facts or different legal arguments in a reply brief).

A court must give the opposing party the opportunity to respond to a reply brief if it relies upon new material in the brief. *Beaird v. Seagate Tech. Inc.,* 145 F.3d 1159, 1164-65 (10th Cir. 1998). The Claimant made the following four new arguments in her reply that do not appear in her initial request to withdraw or amend: 1) the responses are timely; 2) she never refused to respond; 3) she was granted an extension to respond to the requests for admissions by virtue of her multiple requests to continue the trial; and 4) she was compelled to prematurely respond to the requests for admissions because she had not received some of the Decedent's timesheets or transcripts from depositions that were taken in September of 2006. The Claimant raised these arguments because the Defendants asserted in opposition that her answers were untimely and failed to explain why she had not responded earlier.

---

[10] Generally, responses to motions and replies are due within ten days after the initial motion or opposition was served. 29 C.F.R. § 18.6(b) (2006).

Denying the Claimant the opportunity to counter the Defendants' opposition brief, especially in light of the pending summary decision motion, would interfere with the Claimant's right to address important defense arguments. *See El Pollo Loco, Inc. v. Hashim,* 316 F.3d 1032, 1040 (9th Cir. 2003) (finding that the district court did not abuse its discretion when it entertained an argument raised for the first time in the reply brief). Therefore, the Claimant's peccadillo of failing to request leave before submitting a reply is excused.

The Defendants addressed the Claimant's fourth argument in their motion to strike, explaining that 591 days had passed between the service of the requests for admissions and the Claimant's motion to withdraw or amend. Even with two extensions to respond granted to the Claimant's prior attorney, these admissions were late as of May 8, 2005. A party rarely has access to all discovery before it answers requests for admissions. That is precisely why the federal rules provide an option to respond "unable to admit or deny," while they also impose a duty to supplement discovery responses. *See* Fed. R. Civ. P. 26(e), 36(a)(4). The Claimant attempted to answer the requests for admissions much too late. Therefore, I agree with the Defendants that the Claimant was not compelled to respond prematurely.

None of the Claimant's other arguments alter the fact that her responses to the requests for admissions were well over a year late. Neither the change in counsel nor the requests for continuance has any

affect on the timeliness of the responses. None of the exhibits attached to the Claimant's reply brief show that the parties agreed to restart the clock on the requests for admissions. They show only that the Claimant's new counsel was aware that he would need more time to complete discovery and prepare for the hearing. There was no motion to withdraw until October 9, 2006, nearly one month after the Claimant's new counsel acknowledged that responses to discovery were late. The Claimant has not argued that she qualifies for equitable tolling. That she never "refused" to respond does not count as a timely response, and there is no evidence that an extension to respond to the requests for admissions, except for the first two extending the deadline to May 7, 2005, was requested. Indeed, it would have done no good to request one after this deadline had passed, when the remedy for late responses is to request to withdraw or amend the admissions made by operation of law. Therefore, I deny the Defendants' motion to strike, but allow the deemed admissions to stand because the arguments in the Claimant's reply brief do not persuade me to alter that result.

C. Legal Standard for Granting Summary Judgment

A summary decision may be entered if the pleadings, affidavits, and other evidence show that there is no genuine issue of material fact and the moving party is entitled to prevail as a matter of law. 29 C.F.R. § 18.40(d); *Friday v. Northwest Airlines, Inc.,*

2005 WL 1827745 *2, ARB no. 03-132, ALJ No. 2003 AIR 19 (July 29, 2005) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 247 (1986)). The rule on summary decisions mirrors Rule 56 of the Federal Rules of Civil Procedure. *Mehen v. Delta Air Lines,* Case No. 03-070 (ARB Feb. 24, 2005).

The proof must be grounded in affidavits, declarations, and answers to discovery from the complainant and (or) other witnesses. 29 C.F.R. § 18.40(d) (2006). Affidavits must be made on personal knowledge, setting forth facts that would be admissible in evidence and show affirmatively that the witness is competent to testify to the matters stated. 29 C.F.R. § 18.40(c) and Fed. R. Civ. P. 56(e). The judge weighs none of this evidence, and indulges reasonable inferences in the claimant's favor. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The burden first is on the moving party to explain why there is no genuine issue of material fact for trial. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986); *see also Matsushita,* 475 U.S. at 587 (finding no genuine issue for trial when the record as a whole could not lead a trier of fact to find for the non-moving party). Once this burden has been met, the "adverse party must set forth specific facts showing that there is a genuine issue for trial." *Anderson,* 477 U.S. at 250. The non-moving party cannot rest upon "mere allegations, speculation, or denials of the moving party's pleadings, but must set forth specific facts on each issue upon which he would bear the

ultimate burden of proof." *Id.* at 256. If the non-moving party fails to establish an element essential to his case, there can be "no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Celotex,* 477 U.S. at 322-23.

The Defendants argue that the Claimant's admissions establish that the Decedent is not covered by either the LHWCA or the OCSLA because he was not a maritime employee and was not working on an outer continental shelf when he died. Moreover, they insist that even if the Claimant had denied the requests for admissions, she cannot show by sufficient evidence that the Decedent's death is covered by either statute. The Claimant counters that the Decedent loaded and unloaded supplies onto a crew boat, which should qualify as maritime work. She contends that he spent a majority of his time on platform Hogan, and therefore his death on an onshore location that served the offshore oil drilling business should be covered under the OCSLA. She also attacks the Defendants' motion as procedurally defective, but I find this last argument unpersuasive.

Although the deemed admissions are enough to find in the Defendants' favor, in the alternative it is undisputed that the Defendants conducted an offshore drilling business. Offshore drilling and any task essential to it is not maritime employment for purposes of the LHWCA. *Herb's Welding, Inc., v. Gray,* 470 U.S. 414, 422 (1985). Therefore, unloading and

loading a supply boat intended to support the offshore drilling business does not qualify as maritime employment. Likewise, the undisputed location of the Decedent's death does not satisfy the narrow situs requirement of the OCSLA. Consequently, the Claimant cannot establish coverage, an essential element to her case. There is no genuine issue of material fact that could overcome the Defendants' motion for summary decision.

1. Technical Defects of Motion

The Claimant argues that the summary decision motion fails to comply with 29 C.F.R. § 18.6(a) and (b), which require that applications for an order must be made by motion and all parties must have a reasonable opportunity to state an objection, and that an answer in opposition to a motion is due within 10 days after the motion is served. The Claimant's counsel argues that he could not prepare a meaningful answer to the Defendants' summary decision motion before deposition transcripts became available. Whether the Claimant had all of the evidence sought in her possession has nothing to do with these requirements. Moreover, these depositions were conducted by the Claimant's counsel. If he had wanted expedited transcripts then he could have asked for them, and if he needed an extension to respond to this motion for summary decision then he could have made this request before the answer was due. The Defendants filed a motion for summary decision, to

which the Claimant had a reasonable opportunity to answer. Therefore, the Defendants satisfied the regulations.

The Claimant also alleges that the motion is deficient under 29 C.F.R. §18.7(a), (b)(2), and (b)(7). Section 7(a) and b(2) state that an administrative law judge may order a party to file a pre-hearing statement, which includes stipulated facts and a statement that the parties have conferred in attempt to reach stipulation. This places no restrictions on when a motion for summary decision may be filed, so the Defendants' motion is not deficient on that basis. Section 7(b)(7) requires that the parties give suggested hearing times and locations for the presentation of their cases. Again, this is inapplicable to a motion for summary decision, for which no hearing is required. *See* 29 C.F.R. § 18.6(c) (No oral argument will be heard on motions unless the administrative law judge otherwise directs.) Therefore, I find that the motion for summary decision is proper.

2. Deemed Admissions form a proper basis for summary decision

Any matter admitted is conclusively established unless the court permits withdrawal or amendment. Fed. R. Civ. P. 36(b); 29 C.F.R. § 18.20(e). Admissions made under Rule 36, even default admissions, can serve as the factual predicate for summary judgment. *Kasuboski,* 834 F.2d at 1350; *see also In re Carney,* 258 F.3d 415, 421 (5th Cir. 2001) (explaining that

failure to timely respond to requests for admission can prevent a party from contesting the merits of the case); *Kathryn Cook v. Allstate Ins. Co.,* 337 F. Supp.2d 1206 (C.D. CA 2004). Here, the Defendants moved for summary judgment prior to the Claimant's motion to withdraw or amend the deemed admissions. Where there has been no previous motion to withdraw or amend deemed admissions, a party may not oppose summary judgment by revisiting issues determined by the deemed admissions. *Tillamook Country Smoker, Inc. v. Tillamook County Creamery Association,* 333 F. Supp.2d 975, 984 (D. Or. 2004). The deemed admissions will stand because to allow the Claimant to withdraw or amend them would prejudice the Defendants. The Claimant may not claim coverage under the LHWCA or the OSCLA because the admissions establish that the Decedent was not a maritime worker and his death did not occur on an outer continental shelf. Therefore, it is proper to grant summary decision based on the Claimant's admissions.

3. Coverage under the LHWCA

The Longshore Act provides compensation to certain employees engaged in maritime employment for occupational diseases or unintentional work-related injuries, irrespective of fault, occurring on the navigable waterways of the United States or certain adjoining areas, resulting in disability. *See* 33 U.S.C.A. §§ 901, *et seq.* To be eligible for compensation, a person must be an employee (status) as

defined by § 902(3) who sustains injury in a place (situs) defined by § 903(a). *P.C. Pfieffer Co., Inc., v. Ford,* 444 U.S. 69, 74 (1979). For a claim to succeed both the situs and status requirements must be satisfied. *Herb's Welding,* 470 U.S. at 415-16; *Brady-Hamilton Stevedore Co., v. Herron,* 568 F.2d 137, 140 (9th Cir. 1978).

a. *Status*

To qualify for benefits under the LHWCA a worker must engage in maritime employment. 33 U.S.C.A. § 903 (West 2007). Maritime employment requires that workers spend "at least some of their time in indisputably longshoring operations." *Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249 (1977). Any worker who moves cargo between ship and land transportation qualifies as a maritime employee. *P.C. Pfeiffer,* 444 U.S. at 82-84 (covering workers who did tasks "traditionally" performed by longshoremen); *Chesapeake & Ohio R.R. v. Schwalb,* 493 U.S. 40, 45 (1989) (explaining it is "clearly decided that, aside from the specified occupations, land-based activity occurring within the § 903 situs will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel"). Rather than focus on the particular task at the time of injury, a worker's status turns on the nature of work that he or she may be assigned to do. *P.C. Pfeiffer,* 444 U.S. at 81-82; *see also Schwabenland v. Sanger Boats,* 683 F.2d 309, 312 (9th Cir. 1982) (finding that inspection, testing of new models, and occasional maintenance of

recreational small boats is sufficiently related to the construction of the vessels to constitute maritime employment, even though these duties were not a substantial portion of the employee's overall working time).

The Claimant insists that the Decedent was a maritime employee because "a few times" he assisted the platform crane operators by putting supplies into baskets to be loaded onto the crew boat.[11] Deposition of Jose Rosales (Depo. Rosales) at 20-21. This crew boat is used to take personnel to and from platforms to the shore, and also for delivering supplies, pipe, or equipment to and from the platforms. Deposition of Gordon "Scoop" Boswell[12] (Depo. Boswell) at 27. Mr. Boswell did not know whether the Decedent ever put supplies on the crew boat, but he admitted that it was possible. *Id.* at 29.

At La Conchita, he operated a forklift, loaded and unloaded trucks, moved, staged and marshaled worn out equipment, valves, and other scrap metal. Depo. Magill at 30-31. The Claimant argues that the Decedent was performing maritime duties at the time of

---

[11] Jose Rosales, a coworker, testified that the Decedent brought materials to the pier once a week, but he did not put them on the crew boat. Depo. Rosales at 17-18. Mr. Rosales's deposition appears as Exh 15 in support of the Declaration of Timothy K. Sprinkles (Dec. Sprinkles) in Opposition to Motion for Summary Decision.

[12] This deposition appears as Exh. 2 in support of Dec. Sprinkles.

his death because he was operating a forklift while engaged in the "intermediate steps" of moving scrap metal between the Defendants' ship and scrap metal dealers. *See id.* at 33. At the time he died, however, he was harvesting plantains, not moving scrap metal.

The Defendants assert that whatever material the Decedent might have moved onto or off of a crew boat was incidental to the offshore drilling business, rather than linked to longshore work. His primary duties on the platforms, they say, involved maintenance, painting, cleaning oil spills, fixing leaks and repairing valves. Although they agree that the Decedent spent approximately 5% of his time loading and unloading supplies onto and off of the crew boat, they emphasize that the Casitas Pass Pier is owned by a different company, Venoco Oil Company. Depo. Magill at 13. The Venoco pier operators would crane-lift scrap and equipment from the crew boat, onto a truck.[13] *Id.* at 32.

Chris Magill, one of the Decedent's former supervisors, testified that the crew boat made two trips daily to the platforms, carrying cargo, equipment, tools, and parts, and that Venoco has two crew members that do all the loading and off-loading of equipment. Depo. Magill at 14, 44. He said that when pipe and equipment came from other vendors, the "guys that operate the pier" would do all the unloading,

[13] This deposition appears as Exh 14 in support of Dec. Sprinkles.

staging, and loading onto the boat. *Id.* at 21. "A few times" the Decedent might have assisted in chocking a load of pipe which was to be loaded onto the crew boat at the pier by the Venoco crew. *Id.* at 20. It was not the Decedent's normal job to assist in rigging pipe out on the platforms; he did it only once a month. *Id.* at 20-21. There was a rigging crew assisted by the Venoco boat crew that handled most the cargo. *Id.* at 44.

Where loading and unloading of equipment is incidental to an employee's primary role in support of oil and gas production, he does not qualify for coverage under the LHWCA. *See Herb's Welding,* 470 U.S. at 423 (explaining that the Claimant's primary welding work was far removed from traditional LHWCA activities, notwithstanding the fact that he unloaded his own gear upon arriving at the platform by boat); *Munguia v. Director O.W.C.P.,* 999 F.2d 808, 812-13 (5th Cir. 1993) (holding that a roustabout/relief pumper-gauger lacked maritime status under the LHWCA, because he loaded and unloaded tools and supplies for the non-maritime purpose of servicing fixed platforms); *Alexander v. Hudson Engineering Co,* 18 BRBS 78 (1986) (finding no longshore status where onshore loading duties were incidental to the claimant's primary role as an electrician in the fabrication and outfitting of fixed offshore oil production facilities). *But cf., Maher v. Director, O.W.C.P.,* 330 F.3d 162, 167 (3rd Cir. 2003) (establishing status under the LHWCA where the employee worked 50%

of his time as a checker directly involved in loading and unloading functions).

It is immaterial whether the Decedent or Venoco's crew members loaded or unloaded scrap metal on and off of the crew boat. Even assuming that the Decedent occasionally performed this task does not amount to substantial evidence that he worked in maritime employment because the Defendants conduct an oil exploration and extraction business. There is no evidence his duties were for any purpose other than to support this non-maritime operation. Whatever loading and unloading the Decedent did was incidental to his primary role as a roustabout on the offshore platforms and the La Conchita site. *See McGray v. Director, O.W.C.P.,* 181 F.3d 1008, 1015 (9th Cir. 1999) ("So in the statutory context, the phrase 'engaged in maritime employment' means that an employer hired the individual to perform maritime work in this particular contract of employment."). Likewise, there is no evidence that the scrap metal that the Decedent marshaled around La Conchita was for the purpose of maritime commerce of any kind, especially because of the nature of the Defendants' oil operation. *See Cappelluti v. Sea-Land Service, Inc.,* 10 BRBS 1024 (BRB) (1979) (concluding that the claimant did not engage in maritime employment where he cut up damaged containers that were set aside for salvage and no longer involved in maritime commerce); *Scala v. Island City Iron and Supply, Inc.,* 9 BRBS 6000 (BRB) (1979) (finding no maritime employment where employee cut up rusty

iron from the dry dock for his employer in the scrap metal business). The Claimant provides no proof to support that the Decedent used a forklift to move scrap metal off of the supply boat; instead, the evidence shows that he used it to move scrap that had already been transported from the pier to the plant. This is not enough to connect him to maritime employment. Therefore, the Claimant cannot satisfy the status requirement based on the Decedent's primary duties, which supported an oil and gas exploration business.

The Claimant nonetheless insists that the Decedent should be covered by the LHWCA because the Defendants qualify as a maritime employer. A maritime employer is one whose employees conduct maritime employment. 33 U.S.C.A. § 902(4) (West 2007). The work must be done "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 or building a vessel." *Id.* The Claimant argues that the Employer is a maritime employer within the meaning of the LHWCA because it has an onshore facility and storage yard located 250-300 feet from the Pacific Ocean, and because workers took a boat twice daily from the Casitas Pass Pier to the offshore platforms. CF 19-21.

Viewing the evidence in light most favorable to the Claimant, it does not suggest that the Decedent worked for a maritime employer. An employer's

operations on offshore drilling platforms do not call for loading, unloading, repairing or building a vessel; rather, a pipeline serves as the relevant conduit between the platform and the shore. The operations at La Conchita did not involve loading or unloading onto or off of a marine vessel, ship repair or breaking. Dec. Alberts.

Moreover, the Claimant argues, "[b]ut for the Defendant's OCS oil and gas exploration, development, extraction, and transmission business, Defendant would not have owned and operated the La Conchita facility and storage yard." Claimant's Opposition at p. 37. If La Conchita existed because of oil and gas business, then the Supreme Court instructs that it is not maritime. *See Herb's Welding,* 470 U.S. at 422. In *Herb's Welding,* the Court explained that drilling platforms were "not even suggestive of traditional maritime affairs" and that "[t]he history of the Lands Act at the very least forecloses the . . . holding that offshore drilling is a maritime activity and that any task essential thereto is maritime employment for LHWCA purposes." *Id.* By linking La Conchita inextricably to oil and gas exploration, development, extraction, and transmission, the Claimant defeats her own argument that the Decedent performed maritime work for a maritime employer.

Consequently, I find that the Claimant failed to establish that either the Decedent was a maritime employee, or the Defendants maritime employers. Therefore, there is no genuine issue as to any material fact concerning status under the LHWCA.

b. *Situs*

In order to satisfy the situs test, the Decedent's death must have occurred upon the navigable waters of the United States, which is defined under the LHWCA to include any "adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel." 33 U.S.C.A § 903(a). *See McGray,* 181 F.3d at 1010 (expanding situs to include a pier that was not used to dock ships). Employees who are on the situs but not engaged in the overall process of loading or unloading vessels are not covered. *Caputo,* 432 U.S. at 267. Here, the Claimant did not establish that the Decedent engaged in maritime employment. Consequently, the site of his injury has no bearing on the question of coverage.

Even if he were a maritime worker, the Claimant would have to show by substantial evidence that La Conchita qualifies as an adjoining area customarily used to load and unload a vessel. *Caputo,* 432 U.S. 263-64. Coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *Griffin v. McLean Contracting Co.,* 30 BRBS 221 (ALJ) (1996). To determine whether a site is an "adjoining area," the Ninth Circuit[14] considers the following factors: 1) the particular suitability of the

[14] The Claimant argues that the circuit courts are split on how to define an adjoining area under the LHWCA. While the Third and Fifth Circuits analyze this issue slightly differently than the Ninth Circuit, their decisions have no bearing on this case, for binding Ninth Circuit precedent exists.

site for maritime use; 2) whether adjoining properties are devoted primarily to maritime commerce; 3) the proximity of the site to the waterway; and 4) whether the site is as close to the waterway as is feasible given all the circumstances in the case. *Brady-Hamilton Stevedore Co. v. Herron,* 568 F.2d 137, 141 (9th Cir. 1978).

Here, La Conchita is not particularly suited for maritime use because it is not over or contiguous with any body of water and does not possess any area to unload materials from a dock, barge, floating platform or island, ship or other type of vessel. Dec. Alberts. It does not possess any adjoining pier, or any other area used for loading, unloading, repairing, dismantling, or building of any vessel. *Id.* Therefore, the first factor weighs against finding that La Conchita qualifies as a proper situs under the LHWCA

There are no businesses engaged in shipping operations or other maritime activities within at least a one-mile radius of the La Conchita plant. Dec. Alberts. The Casitas Pass Pier is three miles away, but the Claimant provides no evidence that boats other than the crew boat used to ferry back and forth to the platforms use it. Consequently, this second factor also weighs against the Claimant.

The Claimant argues that the proximity of the plant to the ocean – 250-300 feet – lends itself to maritime employment. Nonetheless, it is undisputed that La Conchita is separated from the Pacific Ocean

by railroad tracks, a highway and a beach. DF 32. The plant processes oil delivered from the ground under the platforms via pipeline, not boat. Therefore, the proximity to the ocean is conducive to oil exploration and extraction, but not loading or unloading vessels, ship building or breaking because there is no way to cross from the plant to the ocean without dodging trains and highway traffic. Therefore, factors three and four tip in favor of the Defendants and I find that the Claimant cannot show by substantial evidence that La Conchita is an adjoining area under the LHWCA.

c. *Missing Time Sheets*

Although neither party disputes the location of the Decedent's death, the Claimant protests that it is uncertain whether the Decedent was scheduled to work at La Conchita during the week before his demise. The Claimant explains that she received the Decedent's time cards from April 1, 2004 through May 31, 2004, and his daily journal of work activities from May 5, 2004 through June 5, 2004. Declaration of Timothy K. Sprinkles in Support of Supplemental Opposition to Motion for Summary Decision (Dec. Sprinkles). She says they do not show that he was at La Conchita from May 22, 2004 through May 31, 2004. The Claimant also questions where the Decedent worked on June 1 and 2, 2004, because, she alleges, the Defendants had not produced time sheets for that period. The Claimant believes the Defendants have these missing timesheets and personnel records

that "have a substantial likelihood" of showing the precise locations where the Decedent worked, his specific job duties, and the names of supervisors, which would be material to the status and situs issues. She underscores this belief with testimony from Mr. Boswell, who said he did not know if the Decedent left La Conchita on the date of his death, and from Mr. Magill, who testified that the Decedent may have returned to the platforms to get some equipment. *See* Depo. Boswell at 39; Depo. Magill at 52.

The time sheets record two-week periods; the last covers May 16, 2004 through May 31, 2004. Dec. Sprinkles, Exh 1. Under the heading "work performed," it says "work on La Conchita plant painting." In the time slot underneath May 31, it reads "Hogan Day." The hours worked per day are listed under each date. There is an "X" underneath the days corresponding to May 16, and 22-30, rather than hours, suggesting that the Decedent did not work during those days.[15]

The Defendants explain that they produced the requested timesheets. They say there were no time sheets for June 1 and 2, 2004 because the Decedent maintained his own time sheets, kept them in his possession, and would submit them to his employer

[15] This corresponds to the total hours submitted for the two-week period: 72. There are 12 hours listed under May 17, 18, 19, 20, 21, and 31. (6*12=72).

every two weeks. *See* Depo. Magill at 42; Depo. Rosales at 27. Thus, he would not have submitted his time for June 1 and 2 until June 15, 2004, but he died before he could do so. Based on the deposition testimony that supports these facts, there is no reason to believe there were timesheets for June 1 and 2, 2004 for the Defendants to withhold.

Moreover, I find that the absence of timesheets for June 1 and 2, 2004 does not create a dispute of material fact because the parties agree on the place of death. Although it appears that the Decedent worked on platform Hogan on May 31, 2004, and it is possible that he could have returned to the platform on the day of his death, the place of injury (or death) controls the question of situs under the LHWCA. *See Griffin,* 30 BRBS 221. It does not matter if before his death he went out to the pier, the crew boat, or any other place that might have qualified under the Longshore Act. It is undisputed that he died 10 feet off of one of La Conchita's service roads, which do not qualify as adjoining areas. Therefore, the absence of time sheets covering the last two days of the Decedent's life do not evoke the possibility that the place of his death could have been somewhere the statute covers.

4. Coverage under the OCSLA

The OSCLA extends the benefits of the Longshore Act to employees injured or killed as the 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 outer continental shelf. 43 U.S.C.A. § 1333(b), (c) (West 2007). It provides "an essentially non-maritime remedy" and controls only on "the subsoil and seabed of the outer continental shelf, and artificial islands and fixed structures" upon it. 43 U.S.C.A. § 1333(a)(2)(A) (West 2007); *Offshore Logistics v. Tallentire,* 477 U.S. 207, 217 (1986). The coverage provisions of OCSLA are separate from and are not related to the coverage requirements of the LHWCA. *Robarge v. Kaiser Steel Corporation,* 17 BRBS 213 (1985), *aff'd sub nom., Kaiser Steel Corp. v. Director, OWCP,* 812 F.2d 518 (9th Cir. 1987).

a. *Status*

The OSCLA confers status broadly, excluding only those employees who are "a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof" 43 U.S.C.A. § 1333(b)(1) (West 2007). This section extends the Longshore Act to all victims of disabling or fatal injuries sustained while working to develop the mineral wealth of the outer continental shelf. *Kaiser Steel Corp,* 812 F.2d at 522 (covering a welder injured during construction of an offshore oil platform located on the outer continental shelf). There is no dispute that the Decedent has status

under this statute because of his duties on platform Hogan.

b. *Situs*

The parties dispute whether the OCSLA contains a situs requirement. In *Herb's Welding,* the Supreme Court recognized that the BRB had found that a claimant, who was injured while welding a gas flow line on a fixed platform located in Louisiana waters, could recover under the OCSLA despite the location of his injury away from the outer continental shelf because the injury occurred as the claimant performed work "integrally related" to operations on the outer continental shelf. 470 U.S. 418 & n. 12. Nonetheless, the Court declined to review the question of a situs requirement under the OCSLA because it had not been fully briefed and was not discussed by the appellate forum. *Id.*

One year later, the Supreme Court decided *Offshore Logistics v. Tallentire,* 477 U.S. 207, 219 (1986). The Court held that two offshore platform workers who died when a helicopter carrying them from the platform crashed 30 miles off of the Louisiana coast were not covered by the OCSLA because the accident did not arise on the subsoil and seabed of the outer continental shelf, or the artificial islands and structures erected thereon. *Id.* at 217. The crash occurred on the high seas, so the Death on the High Seas Act (46 U.S.C.A. §§ 761, 767) applied. The Court did not extend coverage to the platform workers

because they were killed miles away from the platform, explaining that, "Congress determined that the general scope of OCSLA's coverage . . . would be determined principally by locale, not by the status of the individual injured or killed." *Id.* at 218.

Dicta in the Ninth Circuit's decision in *A-Z International v. Phillips,* 179 F.3d 1187 (9th Cir. 1999), an appeal that involved whether the claimant had filed a fraudulent claim for benefits, refers to a situs requirement.[16] Although the court did not review the ALJ's denial of benefits on grounds that the claimant was not injured on the offshore platform, it cited to *Offshore Logistics* and mentioned that "[t]he situs requirement is a predicate for coverage under the OCSLA." *Id. at* 1189 & n.1.

The Claimant argues that *Offshore Logistics is* not binding precedent because it concerned a helicopter crash over the high seas and does not state

[16] In an earlier case, *Kaiser v. Director, O.W.C.P.,* 812 F.2d 518 (9th Cir. 1987), the court upheld benefits for an employee injured while on the outer continental shelf but during the construction of an offshore oil platform, before any oil or gas had been extracted from the earth. Although there was no question of extending coverage to workers injured off of the outer continental shelf, the court concluded that "section 1333(b) should be construed as extending coverage to all victims of disabling or fatal injuries sustained while working to develop the mineral wealth of the outer continental shelf." *Id.* at 522. This case avoids the issue of situs, however, and this broad statement was rejected in later case *A-Z International* when the court recognized a situs requirement.

definitively whether the OSCLA covers only those who are hurt on the outer continental shelf. Likewise, she challenges the authority of *A-Z International* because no issue of situs was raised during that appeal. Instead, she focuses on the vast majority of time the Decedent spent working on the platforms (98% of his work time), instead of on the place of his death, and urges application of either Third or Fifth Circuit precedent.

The Third Circuit does not recognize a situs requirement, therefore an injury on land can result in coverage under the OSCLA. *See Curtis v. Schlumberger Offshore Service, Inc.,* 849 F.2d 805, 809 (3rd Cir. 1988) (interpreting the statute to contain no geographic restrictions and covering any injury occurring as the result of oil-drilling operations). By this standard, the Claimant would likely be entitled to benefits, despite his death on shore, because it is undisputed that the work he performed at La Conchita supported the offshore drilling business. The problem is that the *Curtis* case appears to be the outlier result of recent cases that analyze coverage under the OCSLA, including an administrative proceeding within the Ninth Circuit. *See Morrison v. Pool California Energy Services, et. al.,* 36 BRBS 223 (ALJ) (2002) (rejecting the Third Circuit's decision in *Curtis* and opining that the employer was "probably correct in contending that there is a 'situs' requirement in the OCSLA").

The Claimant's reliance on Fifth Circuit authority is misplaced. Although she contends that the Fifth

Circuit has left the issue of situs "open to interpretation," *Mills v. Director, O.W.C.P.,* 877 F.2d 356, 359 (5th Cir. 1989), this is not correct. In *Mills,* the court took the opportunity to fill the gap in the statutory language and legislative history by interpreting Section 1333(b) to require that coverage extend to employees who "suffer injury or death on an OCS platform or the waters above the OCS." *Id.* at 359. It declined to extend benefits to workers injured off of the outer continental shelf, explaining, "[g]iven that Congress intended to establish a bright-line geographical boundary for § 1333(b) coverage, we now draw that line." *Id.* at 362.

She also cites to *Stansbury v. Sikorski Aircraft,* 681 F.2d 948, 950-51 (5th Cir. 1982), as authority that the OCSLA applies to injuries occurring without regard for situs. However, the circuit court explained in the *Mills* decision that it did not interpret *Stansbury* to read Section 1333(b) as extending longshore benefits to oilfield workers injured on land or state territorial waters. *Mills,* 877 F.2d at 361-62. The holding in *Mills* was reinforced in *Demette v. Falcon Drilling Co.,* 280 F.3d 492, 498 (5th Cir. 2002), which concludes that the Supreme Court and Fifth Circuit have held that Section 1333(a)(1) creates a situs requirement, and in *Diamond Offshore Co. v. A&B Builders,* 302 F.3d 531, 541-42 (5th Cir. 2002), in which the court enumerated three locations that satisfy the situs requirement of Section 1333(a)(1):

1) the subsoil and seabed of the OCS;

2) any artificial island, installation or other device if (a) it is permanently or temporarily attached to the seabed of the OCS, and (b) it has been erected on the seabed of the OCS, and (c) its presence on the OCS is to explore for develop, or produce resources from the OCS;

3) any artificial island, installation, or other device if (a) it is permanently or temporarily attached to the seabed of the OCS, and (b) it is not a ship or vessel, and (c) its presence on the OCS is to transport resources from the OCS.

On balance I find that the Fifth Circuit cases follow the Supreme Court's interpretation of the OCSLA as including a narrow situs requirement. Although the Ninth Circuit may not have analyzed the issue of situs directly, mention of situs as "predicate for coverage" gives a strong indication that it would align with the Fifth Circuit, rather than the Third Circuit, when the issue arises. Therefore, I find that Fifth Circuit precedent, as it adopts the narrow Supreme Court interpretation of situs in *Offshore Logistics,* is the most persuasive. In order to be covered by the OCSLA, an employee must have suffered an injury on the subsoil and seabed of the outer continental shelf, or the artificial islands and structures erected thereon the waters above it.

The parties agree that the Decedent was killed while harvesting plantains at an onshore facility that

served offshore oil platforms. This location does not satisfy the situs requirement of the OCSLA. Therefore, the Claimant is not entitled to benefits under this statute.

V. Conclusion

The Claimant's motion to withdraw or amend is denied because it would prejudice the Defendants' ability to defend against this claim. The Defendants' motion to strike is also denied to give the Claimant the opportunity to counter all of the defense arguments opposing the motion to withdraw or amend. The Claimant has failed to submit any evidence raising a triable issue of fact that her claim falls under the jurisdiction of either the LHWCA or the OCSLA. Therefore, I grant summary decision in the Defendants' favor, and dismiss this claim.

A

William Dorsey
Administrative Law Judge

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LUISA VALLADOLID, Petitioner, v. PACIFIC OPERATIONS OFF-SHORE, LLP; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, Respondents	No. 08-73862 BRB No. 07-965 ORDER DENYING PETITION FOR REHEARING EN BANC (Filed Jul. 19, 2010)

Before: REINHARDT and BYBEE, Circuit Judges, and SELNA,* District Judge.

Judges Reinhardt and Bybee have voted to deny rehearing en banc, and Judge Selna recommends denial of rehearing en banc. The full court has been advised of the Respondents' petition for rehearing en banc, filed June 3, 2010, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R.

* The Honorable James V. Selna, United States District Judge for the Central District of California, sitting by designation.

App. P. 35. The petition is DENIED. No further petitions shall be entertained.

33 U.S.C. section 903(a) provides:

(a) Disability or death; injuries occurring upon navigable waters of United States

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the 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).

43 U.S.C. section 1301(a), (b) & (c) provides:

When used in this subchapter subchapter and subchapter II of this chapter –

(a) The term "lands beneath navigable waters" means –

> **(1)** all lands within the boundaries of each of the respective States which are covered by nontidal waters that were navigable under the laws of the United States at the time such State became a member of the Union, or acquired sovereignty over such lands and waters thereafter, up to the ordinary high water mark as heretofore or hereafter modified by accretion, erosion, and reliction;
>
> **(2)** all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles distant from the coast line of each such State and to the boundary line of each such State where in any case such boundary as it existed at the time such State became a member of the Union, or as heretofore approved by Congress, extends seaward (or into the Gulf of Mexico) beyond three geographical miles, and
>
> **(3)** all filled in, made, or reclaimed lands which formerly were lands beneath navigable waters, as hereinabove defined;

(b) The term "boundaries" includes the seaward boundaries of a State or its boundaries in the Gulf of Mexico or any of the Great Lakes as they existed at the time such State became a member of the Union,

or as heretofore approved by the Congress, or as extended or confirmed pursuant to section 1312 of this title but in no event shall the term "boundaries" or the term "lands beneath navigable waters" be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico, except that any boundary between a State and the United States under this subchapter or subchapter II of this chapter which has been or is hereafter fixed by coordinates under a final decree of the United States Supreme Court shall remain immobilized at the coordinates provided under such decree and shall not be ambulatory;

(c) The term "coast line" means the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters;

* * *

43 U.S.C. section 1312 provides:

The seaward boundary of each original coastal State is approved and confirmed as a line three geographical miles distant from its coast line or, in the case of the Great Lakes, to the international boundary. Any State admitted subsequent to the formation of the Union which has not already done so may extend its seaward boundaries to a line three geographical miles distant from its coast line, or to the international boundaries of the United States in the Great Lakes or any other body of water traversed by such boundaries. Any claim heretofore or hereafter asserted either by constitutional provision, statute, or otherwise, indicating the intent of a State so to extend its boundaries is approved and confirmed, without prejudice to its claim, if any it has, that its boundaries extend beyond that line. Nothing in this section is to be construed as questioning or in any manner prejudicing the existence of any State's seaward boundary beyond three geographical miles if it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress.

43 U.S.C. section 1331(a) provides:

When used in this subchapter –

(a) The term "outer Continental Shelf" means 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. section 1332 provides in pertinent part:

It is hereby declared to be the policy of the United States that –

> **(1)** the subsoil and seabed of the outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter;
>
> **(2)** this subchapter shall be construed in such a manner that the character of the waters above the outer Continental Shelf as high seas and the right to navigation and fishing therein shall not be affected;
>
> * * *

---

43 U.S.C. section 1333 provides:

(a) Constitution and United States laws; laws of adjacent States; publication of projected State lines; international boundary disputes; restriction on State taxation and jurisdiction

(1) The Constitution and laws and civil and political jurisdiction of the United States are extended to the subsoil and seabed of the outer Continental Shelf and to all artificial islands, and all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring for, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources, to the same extent as if the outer Continental Shelf were an area of exclusive Federal jurisdiction located within a State: *Provided, however,* That mineral leases on the outer Continental Shelf shall be maintained or issued only under the provisions of this subchapter.

(2)(A) To the extent that they are applicable and not inconsistent with this subchapter or with other Federal laws and regulations of the Secretary now in effect or hereafter adopted, the civil and criminal laws of each adjacent State, now in effect or hereafter adopted, amended, or repealed are declared to be the law of the United States for that portion of the subsoil and seabed of the outer Continental Shelf, and artificial islands and fixed structures erected thereon, which would be within the area of the State if its

boundaries were extended seaward to the outer margin of the outer Continental Shelf, and the President shall determine and publish in the Federal Register such projected lines extending seaward and defining each such area. All of such applicable laws shall be administered and enforced by the appropriate officers and courts of the United States. State taxation laws shall not apply to the outer Continental Shelf.

(B) Within one year after September 18, 1978, the President shall establish procedures for setting any outstanding international boundary dispute respecting the outer Continental Shelf.

(3) The provisions of this section for adoption of State law as the law of the United States shall never be interpreted as a basis for claiming any interest in or jurisdiction on behalf of any State for any purpose over the seabed and subsoil of the outer Continental Shelf, or the property and natural resources thereof or the revenues therefrom.

(b) Longshore and Harbor Workers' Compensation Act applicable; definitions

With respect to disability or death of an employee resulting from any injury occurring as the 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 outer Continental Shelf, compensation shall be payable under the provisions

of the Longshore and Harbor Workers' Compensation Act [33 U.S.C.A. § 901 et seq.]. For the purposes of the extension of the provisions of the Longshore and Harbor Workers' Compensation Act under this section –

(1) the term "employee" does not include a master or member of a crew of any vessel, or an officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof;

(2) the term "employer" means an employer any of whose employees are employed in such operations; and

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon.

(c) National Labor Relations Act applicable

For the purposes of the National Labor Relations Act, as amended [29 U.S.C.A. § 151 et seq.], any unfair labor practice, as defined in such Act, occurring upon any artificial island, installation, or other device referred to in subsection (a) of this section shall be deemed to have occurred within the judicial district of the State, the laws of which apply to such artificial island, installation, or other device pursuant to such subsection, except that until the President determines the areas within which such State laws are applicable, the judicial district shall be that of the

State nearest the place of location of such artificial island, installation, or other device.

(d) Coast Guard regulations; marking of artificial islands, installations, and other devices; failure of owner suitably to mark according to regulations

(1) The Secretary of the Department in which the Coast Guard is operating shall have authority to promulgate and enforce such reasonable regulations with respect to lights and other warning devices, safety equipment, and other matters relating to the promotion of safety of life and property on the artificial islands, installations, and other devices referred to in subsection (a) of this section or on the waters adjacent thereto, as he may deem necessary.

(2) The Secretary of the Department in which the Coast Guard is operating may mark for the protection of navigation any artificial island, installation, or other device referred to in subsection (a) of this section whenever the owner has failed suitably to mark such island, installation, or other device in accordance with regulations issued under this subchapter, and the owner shall pay the cost of such marking.

(e) Authority of Secretary of the Army to prevent obstruction to navigation

The authority of the Secretary of the Army to prevent obstruction to navigation in the navigable waters of the United States is extended to the artificial islands,

installations, and other devices referred to in subsection (a) of this section.

(f) Provisions as nonexclusive

The specific application by this section of certain provisions of law to the subsoil and seabed of the outer Continental Shelf and the artificial islands, installations, and other devices referred to in subsection (a) of this section or to acts or offenses occurring or committed thereon shall not give rise to any inference that the application to such islands and structures, acts, or offenses of any other provision of law is not intended.