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	)	DATE ISSUED: 08/12/2008 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

[1] Claimant is decedent's surviving spouse.

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 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 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

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

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.

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

[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.

> 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 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

[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).

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]

[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).

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 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 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]

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"

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

as there is in Section 1333(a)(1).[7] *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. 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*

[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).

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

[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'

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 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 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

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

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.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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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.