DOWN WITH THE DEVIL: THE RISE AND FALL OF SUBSTANTIAL NEXUS

By: Aubrey Baudean*

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* J.D. Candidate 2022, Loyola Maritime Law Candidate 2021, Loyola University New Orleans College of Law; B.A. 2014, Loyola University New Orleans.

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I. Overview

The *Mays v. Chevron Pipe Line Co.*[1] decision represents another domino falling for employers connected with extractive operations on the outer continental shelf in a line of many to follow in future employee benefits claims unless Congress steps in to intervene on the matter. Initially, Congress enacted the Outer Continental Lands Act (hereafter referred to as OCSLA) in 1953 to extend federal jurisdiction so "the area in the outer Continental Shelf beyond boundaries of the States may be leased and developed by the Federal Government."[2] To enact a body of law that governs the subsoil, seabed, artificial islands, and all other installations or devices permanently or temporally attached to the outer continental shelf (hereafter referred to OCS) to exploring for, develop, and produce the shelf's resources, Congress also had to consider the employees developing the OCS operations.

In steps 43 U.S.C. §1333(b) of OCSLA, which under the Longshore and Harbor Workers' Compensation Act[3] (hereafter referred to as LHWCA) extends workers' compensation benefits to employees whose injuries occur "*as the result of operations*" conducted on the outer continental shelf.[4] Congress intended for the body of law that makes up the OCSLA to apply "beyond the boundaries of the States."[5] As a whole, the provisions within OCSLA apply only to the OCS and declare the OCS an "exclusive Federal jurisdiction located within a state,"[6] However, at the same time, it gives no "interest or jurisdiction" to the adjacent states.[7] Why should a worker injured in an area covered under state jurisdiction be covered by an employee compensation scheme extending from an Act (OCLSA) that predominately deals with the government imposing federal jurisdiction over the OCS? Nevertheless, the Supreme Court applies a substantial nexus standard to OCSLA benefits claims to determine employee eligibility and does not interpret §1333(b) as requiring for recovery an employee's injury to occur on an OCS platform or the waters above the OCS.[8]

As a result, the outcome of some claims do not align with the congressional intent behind enacting OCSLA. For example, an employee may be covered via OCSLA even though the employee's injuries occurred outside of the OCS in an area already covered by state workers' compensation law, as long as the employee's injury took place while performing work *connected* to an employer's operations on the OCS. This comment argues that interpreting §1333(b) in such a manner is historically against congressional intent while it also places an unjust burden on certain employers to purchase both state and federal liability insurance for their employees. Most importantly, this comment puts forth that the simplest way to satisfy congressional intent and solve the ambiguity of §1333(b) is for Congress to amend the provision by adding a situs of injury requirement to recover OCSLA benefits claims.

To better understand the present status, Part I of this comment gives a brief overview of the history of the OCS leading up to Congress' 1953 enactment of OCSLA; Part II of this comment gives the legislative history of the OCSLA and breakdown of §1333(b)'s language; Part III

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[1] Mays v. Chevron Pipe Line Co., 968 F.3d 442 (5th Cir. Ct. App. 8/4/20). [Herein *Mays*]
[2] H. R. Rep. No. 83-413 (1953), reprinted as 1953 U.S.C.C.A.N. 2177.
[3] Longshore and Harbor Worker's Compensation Act codified at 33 U.S.C. § 901 et seq (2018).
[4] 43 U.S.C. § 1333(b) (2018) (emphasis added).
[5] 1953 U.S.C.C.A.N. 2177 at 2177
[6] 43 U.C.S. 1333(a)(1).
[7] 43 U.C.S. 1333(B)(3).
[8] *See* Pacific Operators, LLP v. Valladolid, 132 S. Ct. 680 (2012). [Herein *Valladolid II*]

explores the administrative process of an OCSLA claim; Part IV examines several cases that preceded the *Mays* decision: *Curtis v. Schlumberger Offshore Service, Inc.*,[9] *Mills v. Director, Office of Workers' Compensation Programs*,[10] and *Valladolid v. Pacific Operations Offshore LLP*.[11] Part V discusses the ramifications of the most recent OCSLA benefits claim to appear in front of the Fifth Circuit Court of Appeals. Lastly, Part VI offers conclusions and remarks.

A. The Era of the Free Seas

Before World War II, there was little economic interest in mineral resources beyond the territorial sea.[12] Technological barriers limited offshore drilling predominantly to waters closer to the shore.[13] Scholars refer to this oceanic period leading up to World War II as the free seas era, as vessels from all countries were free to traverse the high seas beyond the territorial seas.[14] Each country exercised its jurisdiction over the waters and seabed three nautical miles around their nation's coast within the territorial seas. Before the Truman Proclamation in 1945, in which the United States exercised its jurisdiction over the mineral resources extending beyond a nation-state's traditional territorial waters, no other nation had attempted such a bold move for hundreds of years. [15] However, in the aftermath of World War II, the discovery of oil and gas on the continental shelf in conjunction with developing technologies sparked global interest in the resources beyond the territorial seas buried within the seabed and subsoil of the continental shelf.[16] Furthermore, with the Truman Proclamation, the United States ignited a wave by which other nations worldwide began to extend their jurisdiction to the high seas.[17]

B. The First UN Conference on the Law of the Sea (1958)

After World War II, the world soon saw a global increase in the oil demand, and thereby many coastal nations sought to unilaterally extend their jurisdiction over the resources on the continental shelf, beyond the territorial seas off their nations' coast.[18] In 1947, the UN General Assembly created the International Law Commission (ILC) to help regulate this process with a goal in mind for the ILC to develop and further codify international law.[19] The report on "Articles Concerning the Law of the Sea" emerged as the fruits of the ILC's labor as the report became the groundwork for the discussions at the First United Nations Conference on the Law of the Sea (UNCLOS I).[20]

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[9] Curtis v. Schlumberger Offshore Service, Inc., 849 F.2d 805 (3rd Cir. Ct. App. 6/14/88). [Herein *Curtis*]
[10] Mills v. Dir., OWCP, 877 F.2d 356 (5th Cir. Ct. App. 7/4/89). [Herein *Mill II*]
[11] *Valladolid II*, 132 S. Ct. 680 (2012).

[12] Arthur H. Dean, *Geneva Convention on the Continental Shelf*, 41 Tul. L. Rev. 419 (1966-1967).

[13] G. Kevin Jones, *The Development of Outer Continental Shelf Energy Resources*, 11 Pepp. L. Rev. Iss., at 27. (1984)
[14] Jacobson, Jon L., Rieser, Alison, *Scientific American Presents: The Evolution of Ocean Law,* 15240223 (1998).
[15] Robert B. Krueger, *The Background of the Doctrine of the Continental Shelf and the Outer Continental Shelf Lands Act*, Natural Resources Journal, Vol. 10, No. 3, pp. 442-514 at 464.
[16] Arthur H. Dean, *Geneva Convention on the Continental Shelf*, 41 Tul. L. Rev. 419 (1966-1967).
[17] Yoshifumi Tanaka, The International Law of the Sea*,* 137 (2015).
[18] *Id*. at 21-22.
[19] *Id*. at 22.
[20] *Id*.

In 1958, representatives from eighty-six nations met in Geneva to draft UNCLOS I, and the meeting concluded with the adoption of four conventions.[21] The 1958 Geneva Conventions broke down the ocean into three distinct categories: internal waters, territorial sea, and high seas.[22] The Geneva Convention defined "territorial seas" as the belt of sea adjacent to a nation's coast, beyond its land territory and its internal water by which the sovereignty of a nation is extended.[23] Whereas the term "high seas" encapsulates all the parts of the sea that are not the territorial sea or the nation's internal waters.[24] Most significant to this comment, the Geneva Convention enacted a governing body of law for the continental shelf and thereby solidified the shelf as a legal institution by adopting the "Convention on the Continental Shelf."[25]

C. What is the Continental Shelf?

In geographic terms, the continental shelf is an area adjacent to a continent submerged under the ocean.[26] The continental shelf is part of the same continental mass that forms the lands above the water.[27] A continental shelf's outer boundary begins where the continental mass begins to decline steeply into the ocean's depths.[28] The United Nations Convention on Law of the Sea (LOSC) outlined the criteria for determining the outer limits of the continental shelf beyond 200 nautical miles in Article 76(1), which states,

> The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[29]

For the Atlantic coast of the United States, the average distance from the shore to the continental shelf's outer edge is roughly 70 miles, whereas, in the Gulf of Mexico, the average distance is slightly above 90 miles.[30] The continental shelf area extending off the coasts of the United States is an estimated 290,000 square miles.[31] Existing in this expansive area of submerged lands are valuable natural resources such as oil and gas that now power the United States' economy and, consequently, spurred Congress's need to legislate a new body of law governing this vast territory.

D. Post-World War II: The Truman Proclamation

The United States, arising out of World War II as a global power, then set its sights on the wealth of resources located on the continental shelf.[32] In September of 1945, to seize control of

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[21] *Id*.
[22] *Id*. at 23.
[23] *Id*.
[24] *Id*.
[25] *Id*.
[26] *Id*. at 137.
[27] 1953 U.S.C.C.A.N. 2177 at 2177.
[28] *Id*.
[29] Yoshifumi Tanaka, The International Law of the Sea, 138 (2015).
[30] 1953 U.S.C.C.A.N. 2177 at 2177.
[31] *Id.*
[32] G. Kevin Jones, *The Development of Outer Continental Shelf Energy Resources*, 11 Pepp. L. Rev. Iss., at 27-28. (1984)

petroleum and other mineral resources beyond the U.S. territorial seas, President Truman defied international precedent and issued a proclamation declaring "…the natural resources of the subsoil and the sea bed of the continental shelf beneath the high seas but contiguous to the coast of the United States, subject to jurisdiction and control."[33] In one stroke, the U.S. set an international trend by becoming the first nation to declare exclusive ownership and control over the continental shelf's resources beyond its coasts' territorial seas.[34]

Further, the proclamation sets forth the grounds by which the U.S. federal government claims exclusive control to the resources of its continental shelf:[35]

(1) need for new sources of petroleum and other minerals,

(2) such resources are likely to be found on the Continental Shelf off the United States,

(3) advancements in technology make extraction of these resources possible and use of the resources applicable, and

(4) to develop and utilize these resources, rules must be established and governed.

Following the proclamation, President Truman signed an Executive Order shifting the jurisdictional control over the natural resources of subsoil and seabed of the continental shelf from the U.S. to the Secretary of the Interior until later Congressional legislation.[36]

Before 1945, the U.S. federal government recognized coastal states' rights to the submarine land and resources extending in territorial waters three miles past their coastal shores.[37] However, in 1947, in response to the Truman Proclamation, the federal government pursued action against the state of California, claiming ownership over all the submerged lands and minerals beyond California's coast, even those areas extending three nautical miles off California's coast.[38] The Supreme Court settled this jurisdictional dispute in a series of cases involving California, Louisiana, and Texas by affirming the federal government's rights over the submerged lands beyond the states' coast, including the three nautical area miles off the States's coastlines.[39]

II. The Outer Continental Shelf Lands Act

A. The 1953 Submerged Lands Act

In 1953, responding to the Supreme Court's decisions, Congress helped clear the blurred territorial boundaries of federal or state jurisdiction regarding coastal shores and beyond by enacting the Submerged Lands Act (hereafter referred to as the SLA) and the Outer Continental Shelf Lands Act.[40] The SLA returned title to the coastal states of all the lands and resources in the

[33] Proclamation No. 2667, 10 Fed. Reg. 12. 303 (Sept 28, 1945).
[34] Jacobson, Jon L., Rieser, Alison, *Scientific American Presents: The Evolution of Ocean Law,* 15240223 (1998).
[35] Proclamation No. 2667, 10 Fed. Reg. 12. 303 (Sept 28, 1945).
[36] Exec. Order No. 9633, 10 Fed. Reg. 12. 305, 1945 WL 3400 (Sept. 28, 1945) [hereinafter Executive Order].
[37] G. Kevin Jones, *The Development of Outer Continental Shelf Energy Resources*, 11 Pepp. L. Rev. Iss., at 34-35. (1984)
[38] *United States v. California*, 332 U.S 19 (1947).
[39] *United States v. California*, 332 U.S 19 (1947); *United States v. Louisiana*, 339 U.S. 699 (1950); *United States v. Texas*, 339 U.S. 707 (1950).
[40] 43 U.S.C. §§ 1311-1315 (2018).

area of three geographical miles from their coastlines.[41] The SLA vested the lands and resources beneath navigable waters within the boundaries of the coastal states and management of those resources "under the law of the respected States in which the land is located."[42] The SLA defines most coastal states' seaward boundary as "a line three geographical miles distant from its coastline."[43] While the SLA does relinquish the federal government's right to the submerged lands and natural resources within seaward boundaries back to the coastal states, it also simultaneously acknowledges the federal government's control and jurisdiction over the natural resources on the seabed of the continental shelf, beyond the seaward boundaries, established by the SLA.[44]

B. The Enactment of OCSLA

Congress enacted OCSLA days following the SLA, and it supplements the SLA by detailing the minutia of the federal government's jurisdiction over the submerged lands of the continental shelf, those lands beyond the states' boundaries.[45] The OCSLA defines the outer continental shelf as all the submerged lands lying outside of the coastal states' seaward boundaries as outlined in the SLA.[46] OCSLA extended "The Constitution and laws and civil and political jurisdiction of the United States…to the subsoil and seabed of the outer Continental Shelf."[47] In doing so, OCSLA fulfilled Congressional intent by defining a body of law that will apply to the seabed, the subsoil, and fixed and temporary structures on the outer Continental Shelf.[48] It is clear from the language of the 1953 OCSLA that Congress intended for federal law to apply on the outer continental shelf and the fixed and temporary structures on it and that state law is only applicable to this area as a supplement or surrogate to federal law when there is any inconsistency or void.[49]

Significantly, OCSLA mainly:

(1) authorized the Secretary of the Interior to lease the submerged lands of the continental shelf to discover and develop the potential oil,

(2) seized jurisdictional control over the submerged lands on the continental shelf,

(3) enabled the federal government to lease the lands for oil and gas operations,

(4) and provided a body of law to be applied to the area that previously lacked substantive law.

C. OCSLA: 1978 Amended

In 1978, Congress amended OCSLA to provide a framework for developing the OCS with more stringent environmental protections. Through the 1978 Amendments, Congress mainly sought to:[50]

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[41] 43 U.S.C. § 1312.
[42] 43 U.S.C. § 1311(a).
[43] 43 U.S.C. § 1312.
[44] 43 U.S.C. §§ 1311-1315 (2018).
[45] *See* 43 U.S.C. § 1331-1356(a) (2018).
[46] 43 U.S.C. § 1333(a)(1).
[47] *Id*.
[48] *See* Rodrigue v. Aetna Casualty and Surety Co., 395 U.S. 352, 355 (1969).
[49] 43 U.S.C. § 1333(a)(1).
[50] *See* 43 U.S.C. § 1802.

(1) establish guidelines for managing the natural resources of the OCS to expedite exploration and reduce dependence on foreign oil,

(2) find a balance between resource development and protecting "human, marine, and coastal environments,"

(3) and establish funds for fishers and others affected by oil spills or damage caused by developing the OCS.

By amending OCSLA in 1978, Congress also combined section 4(b) and 4(c) of the 1953 Act to enact §1333(b). Congress combined the two 1953 provisions into one, §1333(b), to help clarify "the applicability of the [LHWCA] to OCS activities. This amendment involves no change in the existing law. It was not the intent…to alter in any way the existing coverage of the [LHWCA]…for injury or death."[51]

D. The Longshore and Harbor Workers' Compensation Act (LHWCA)

One of Congress' goals with OCSLA was to extend workers' compensation benefits to employees in the oil industry, whose work predominately takes place beyond the jurisdictions of state worker's compensation programs. The dangers of exploring oil and gas on the outer continental shelf are well known, and oil industry workers routinely face many hazards.[52] Notably, Congress achieved this goal by enacting §1333(b) of OCSLA (amended in 1978), previously section 4(b) and 4(c) of the 1953 Act, which extends LHWCA coverage to compensate an employee who has been disabled or killed from an 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,"[53]

To analyze the applicability of §1333(b), one must first become familiar with the Longshore and Harbor Workers' Compensation Act[54] and its relation to OCSLA. The purpose of the LHWCA is to provide compensation to employees disabled from on-the-job injuries that occur on the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining areas customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).[55] Coverage of the LHWCA extends to traditional maritime employees such as longshoremen, harbor workers, ship repairers, and shipbuilders.[56] The LHWCA does not cover a "master or member of a crew of any vessel,"[57] otherwise referred to as "seaman" in the Jones Act.[58] The LHWCA does not cover seamen, but instead, they are covered by the Jones Act.[59]

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[51] *See* Ryan T. Martin, *Unraveling the Tangled Web*, citing H.R. Rep No. 95-1474, at 81. (1978) (Conf. Rep.).
[52] *See*, e.g., Knapp v. Chevron USA, Inc., 781 F.2d 1123 at 1130 (5th Cir. Ct. App.) (1986).
[53] 43 U.S.C. § 1333(b). (emphasis added).
[54] Longshore and Harbor Worker's Compensation Act codified at 33 U.S.C. § 901 et seq (2018).
[55] *See* 33 U.S.C. § 901-950.
[56] 33 U.S.C. § 902(3).
[57] 33 U.S.C. § 902(3)(G).
[58] *See* The Jones Act, 46 U.S.C. §§30104-30105(b).
[59] *Id.*

To be covered by LHWCA, a maritime worker must satisfy both the "status" and "situs" tests.[60] The "status" test requires that the worker be a maritime employee, as defined in the paragraph above, but does provide a notable exception for non-maritime employees working on navigable water who suffer an injury while on the navigable water.[61] To meet the "situs" test, the employee's injuries or death must occur "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)."[62]

The LHWCA's extension of coverage to the shore creates a jurisdictional overlap between federal compensation benefits and state workers' compensation statutes. The overlap between the LHWCA and state worker compensation will be discussed in this comment further, but for now, it will suffice to say that workers are not allowed to recover from both for the same injury.[63] Before LHWCA, states tried to extend workers' compensation to harbor workers working on vessels.[64] The Supreme Court in *Jenson* held this to be unconstitutional.[65] As a response, Congress enacted the Longshore Act to provide workers' compensation remedy to longshore and dock workers, creating what is referred to as the "twilight zone," where the federal Act overlapped with coverage under state workers' compensation laws.[66]

E. Overview of §1333(b)

Before interpreting the language of §1333(b) and providing an overview of how courts in OCLSA benefits claims apply it, it is beneficial to provide the provision's plain language to lay out precisely how each part relates to the next, and thereby have a better understanding of the provision as a whole.

F. Language of §1333(b) OCSLA

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 the 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 US.C.A §901 et seq.]. For the purposes of the extension of the provision of the Longshore and Harbor Workers' Compensation Act under this section[67]—

(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

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[60] *See* Herb's Welding, Inc. v. Gray, 470 U.S. 414 (1985).
[61] *See* Director, O.W.C.P. v. Perini N. River Assocs., 459 U.S. 297 (1983).
[62] 33 U.S.C. § 903(a).
[63] 33 U.S.C. § 933(e); Strachan Shipping Co. v. Nash, 782. F.2d 513 (5th Cir. 1986).
[64] *See* Southern Pacific Co. v. Jensen, 244 U.S. 205 (1917).
[65] *Id*.
[66] *Id*.
[67] 43 U.S.C. § 1333(b).

(3) the term "United States" when used in a geographical sense includes the outer Continental Shelf and artificial islands and fixed structures thereon[68]

G. Breakdown of §1333(b)

§1333(b) of OCSLA extends the provisions of the LHWCA to an employee injured or killed as a result of operations conducted on the outer continental shelf. Under §1333(b)(2), for purposes of OCSLA, "employer" is defined as an employer whose employees are employed in the operations outlined in §1333(b).[69] Those operations include "exploring for, developing, removing, or transporting by pipeline the natural resources, or involving rights to the natural resources" of the OCS.[70] The OCSLA does not limit the term "employer" to operations conducted by the employee's direct employer.[71] Instead, the LHWCA broadens the definition of an "employer" as outlined in OCSLA to include an indirect employer who may be liable for worker compensation benefits to a "subcontractor."[72]

Currently, coverage under §1333(b) requires a *connection* between the employee's "disability" or "death" and the employer's extractive operations on the OCS.[73] Under the provisions of the LHWCA, the disabled or dead employee's employer will compensate the employee and or, in the case of death, the employee's beneficiaries.[74] However, unlike LHWCA, OCSLA does not require that the injured employee or decedent be engaged in "maritime employment" for coverage under the Act.[75]

Further, none of the language of §1333(b) necessarily suggests that the employee's death or injury must occur on the outer continental shelf for coverage to apply.[76] Instead, the language of 1333(b) suggest that OCSLA compensation may be extended hypothetically to an employee injured or killed landward, hundreds of miles away from the OCS as long as the injury or death occurred as a result of operations conducted on the OCS for "exploring for, developing, removing, or transporting by pipeline the natural resources, or involving the rights to the natural resources, of the subsoil and seabed of the outer Continental Shelf,"[77] Boiled down, OCSLA has no situs requirement, and its status requirement is not concerned with the employee's "maritime employment" status but instead applies to the employer's OCS extractive operations.

H. Ramifications of the Language

As a result of §1333(b) and the broad language Congress uses to define its scope of coverage, "injury occurring as the result of operations conducted on the outer Continental Shelf," Administrative Law Judges, Benefits Review Boards, and appellate courts have and continue to struggle to define the geographic limitations of OCSLA. The following section will break down the administrative process for an LHWCA compensation claim to illustrate how an OCSLA claim

[68] 43 U.S.C. § 1333(b)(1).
[69] 43 U.S.C. §1333(b)(2).
[70] 43 U.S.C. §1333(b).
[71] *Mays*, 968 F.3d 442, 449.
[72] 33 U.S.C. § 904(a).
[73] *Mays*, 968 F.3d 442, 449. *See* 43 U.S.C § 1333(b).
[74] 33 U.S.C. § 904(a).
[75] *See* 43 U.S.C. § 1333(b).
[76] 43 U.S.C. § 1333(b).
[77] *Id.*

travels from an informal conference to the Supreme Court and how the ambiguity of the language of §1333(b) has a trickle-down effect on the entire claims process.

III. The Administrative Process

A. Informal Conference

A claimant must file a claim for compensation under the LHWCA within one year of the employee or beneficiary being aware of the injury or death with the Office of Workers' Compensation Programs.[78] Within ten days of filing a claim, the claimant must provide written notice to the employer.[79] Unless the employer or insurer controvert or terminate the payment of benefits by fourteen days after notice or knowledge of the injury, the employer (or insurer) must start paying the Act's compensation benefits.[80] To controvert a claim, the employer must file a notice by which the employer outlines the employer's grounds for controversion.[81] For starters, when an employer or insurance company disputes an LHWCA claim, a claims examiner evaluates the contested issue(s) during an informal conference and issues a memorandum with recommendations to resolve matters.[82] If any party is unsatisfied with the examiner's memorandum and requests a hearing, then the claims examiner may transfer the case to the Office of Administrative Law Judges.[83]

B. Formal Hearing

The Administrative Law Judge (ALJ) who hears the case "has the power to approve settlements or disability; to approve withdrawals of claims; and to issue compensation orders."[84] In preparing a final decision, the ALJ reviews the prehearing statement from the claim's examiner, forms prepared by all the parties, and the evidence the parties submit at the formal hearing.[85] Once the ALJ files the final decision, the parties have 30 days to file an appeal with the Benefits Review Board (BRB).[86]

C. Appeal to the Benefits Review Board

The BRB bases its review on the hearing record and the ALJ's findings of fact as long as those findings are supported by substantial evidence.[87] Moreover, the BRB may either accept or reject the ALJ's decision.[88] A party subjected to, in their view, an unfavorable decision of the BRB may further appeal to the United States Court of Appeals for the circuit in which the injury or death occurred.[89]

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[78] Thomas Schoenbaum, Admiralty and Maritime Law §7:6, 640-641 (6th ed. 2018). [Hereinafter Schoenbaum].
[79] *Id*. at 642.
[80] *Id*.
[81] *Id*.
[82] *Id*. at 643.
[83] *Id*.
[84] *Id*. at 644.
[85] *Id*. at 643.
[86] *Id*. at 644.
[87] *Id*. at 645.
[88] *Id*.
[89] *Schoenbaum*, §7:6, pg. 646.

IV. Overview of the Inter-Circuit Split and the Rise of Substantial Nexus

A. Background

Before the Supreme Court settled the issue in *Valladolid II*, how to interpret the language of §1333(b) split three federal appellate courts, specifically that OCSLA covers "any injury occurring as the result of operations conducted on the outer continental shelf."[90] Each of these appellate courts established different analysis standards to interpret this provision, and each court's standard varied in degree in defining the scope of OCSLA coverage.

The least expansive interpretation of §1333(b)'s scope of coverage, the Fifth Circuit, imposed both a situs of injury requirement and a causation test. Whereas the most all-encompassing interpretation of the scope of coverage, the Third Circuit, only required that the employee satisfy a low burden causation test. The middle ground interpretation of the scope of coverage, the Ninth Circuit, had no situs of injury requirement, but the employee did have to satisfy a higher burden causation test. Most of OCSLA claims are Fifth Circuit cases because most of the OCS operations occur in the Gulf of Mexico, which falls under the Fifth Circuit's jurisdiction.

The purpose of examining the following three landmark cases from each of the three appellate courts is to demonstrate how over the years, the courts have struggled with the same concepts— (1) whether Congress intended for §1333(b) to contain a situs of injury requirement and (2) what type of causation test to deploy. Even once the Supreme Court attempted to settle the issue by adopting the Ninth Circuit's causation standard and interpreting 1333(b) as not having a situs of injury requirement in *Valladolid II*, ALJs, Benefits Review Boards, District Courts, and Appellate Courts are still plagued by the statute's ambiguous language alongside how to interpret the Supreme Court's newly adopted substantial nexus causation standard.

In the *Mays* opinion, United States District Court Judge Dorherty likens the mixed question of law and fact found in substantial nexus to a Jones Act determination. She wrote, "However, much like the often tortured historical evolution of the mixed question of law and fact inherit in a Jones Act determination, it would seem the Supreme Court has placed litigants and the Courts on that same circuitous path."[91] To better understand Judge Dorherty's description of the substantial nexus standard, one must first have a background on how the Supreme Court has placed litigants and courts on the "circuitous path."

B. The Third Circuit: "But For" Test

In *Curtis v. Schlumberger Offshore Service, Inc.*, the petitioner, Samuel H. Curtis, worked for Schlumberger Offshore Service Inc. (Schlumberger) as a well-logging operator and sought workers' compensation benefits under the LHWCA for injuries he sustained as a result of the operations on the OCS.[92] In 1978, after working off the coast on a platform for a week, Mr. Curtis returned to Schlumberger's headquarters.[93] Soon after arriving at headquarters, Mr. Curtis received orders to return to the offshore location.[94] While Mr. Curtis was driving the company car to a helicopter scheduled to fly him back to the rig, another vehicle crashed into the company car.[95] As

[90] 43 U.S.C. § 1333(b).
[91] Mays v. Chevron Pipe Line Co., 2017 WL 2196093, *7 (2017).
[92] *Curtis*, 849 F.2d 805, 806.
[93] *Id*. at 806.
[94] *Id*.
[95] *Id*.

a result of the incident, Mr. Curtis sustained injuries leaving him partially disabled while the crash killed his passenger.[96]

At a formal hearing, an Administrative Law Judge (ALJ) found that OCSLA covered Mr. Curtis's claim and awarded him relief for his permanent disability under the LHWCA.[97] On appeal, the Benefits Review Board (BRB) reversed the ALJ holding.[98] The BRB reasoned that Mr. Curtis's injuries sustained in a shoreside traffic accident exceeded the geographic boundaries of the OCS and thereby did not fall within the scope of OCSLA.[99] On review, the Third Circuit had to decide whether Mr. Curtis's injury fell within the scope of §1333(b) of OCSLA.

The Third Circuit reasoned that the BRB's holding did not align with the language of §1333(b), which extends coverage to "any injury occurring as a result of operations conducted on the outer Continental Shelf…"[100] The court determined that the BRB was imposing a geographic limitation to OCSLA coverage when, in fact, §1333(b) "did not place any nexus, situs, or geographic restriction on claims for injuries in connection with continental shelf operations."[101] Instead of applying geographic boundaries or a "situs" test to Mr. Curtis' injuries as the BRB previously did, the court opted to use a "but for" test to determine whether Mr. Curtis' shoreside injuries occurred as a result of operations on the OCS.[102] Applying the test, the Third Circuit concluded that "but for" Mr. Curtis driving to meet the helicopter to take him to the drill rig off the coast for the purposes described in §1333(b), he would not have sustained disabling injuries in the car accident.[103] Therefore, the court concluded that the BRB erred in holding that Mr. Curtis' shoreside injury fell outside the scope of OCSLA since Mr. Curtis would not have sustained the injuries "but for" his employer's orders for him to return to the offshore facility.[104] Thus, the Third Circuit judges reversed the BRB's decision to deny the employee coverage under OCLA.[105] Most notably, with *Curtis*' holding , the Third Circuit adopted the least restrictive standard, a low burden causation test, of the other two appeals courts to be applied to future OCSLA claims.

C. The Fifth Circuit: "Situs of Injury" Requirement

In *Mills v. Director, Office of Workers' Compensation Programs, United States Department of Labor* (hereafter referred to as *Mills I*, *Mills en banc*, and *Mills II*), the petitioner, O'Neal Mills, worked for McDermott, Inc., as a land-based welder and sought recovery of LHWCA benefits for injuries he sustained as a result of operations conducted on the OCS.[106] While working at a shipyard in Louisiana, a crane dropped the basket the employee was working on, and he fell to the ground below, causing his injuries.[107] For several months before and including the day of the accident, the employee assisted in welding operations to construct an oil platform

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[96] *Id*.
[97] *Id*. at 806-807.
[98] *Id*. at 807.
[99] *Id*.
[100] *Id*. at 809, *see* 43 U.S.C. § 1333(b).
[101] *Id*. at 809.
[102] *Id*. at 811.
[103] *Id*.
[104] *Id*.
[105] *Id*.
[106] Mills v. Dir., OWCP, 846 F.2d 1013 (5th Cir. Ct. App. 6/13/88) [Herein *Mills I*], Mills v. Dir., OWCP, 856 F.2d 28 (5th Cir. Ct. App. 9/9/88) [Herein *Mills en banc],* Mills v. Dir., OWCP, 877 F.2d 356 (5th Cir. Ct. App. 7/4/89) [Herein *Mills II*]
[107] *Mills I*, 846 F.2d 1013, 1014.

destined for the OCS.[108] Preliminarily, the Deputy Commissioner approved Mills' application for LHWCA benefits according to §1333(b) of OCSLA.[109] However, an ALJ later reversed the Deputy Commissioner's approval for Mills' benefits, and then the BRB upheld the ALJ's decision.[110]

In *Mills I*, the employee appealed the BRB's ruling to the Fifth Circuit, which attempted to define the scope OCSLA's coverage. McDermott, the worker's employer, contended that as the worker's injury did not occur on the OCS, he was not entitled to recover the Longshore Act's benefits.[111] The Fifth Circuit rejected the notion that the language of §1333(b) requires a situs test, as McDermott argued. Instead, in *Mills I*, the Fifth Circuit interpreted §1333(b) as requiring a link with an employer's operations conducted on the Shelf, "but does not obviously require that the injury actually occurs on the outer Continental Shelf."[112]

The court then analyzed the definition of "development" as outlined in §1331(*l*), which reads; "The term "development" means those activities which take place following discovery of minerals in paying quantities, including geophysical activity, and operation of all onshore support facilities which are for the purpose of ultimately producing the minerals discovered."[113] The panel in *Mills I* reasoned that the worker's involvement in constructing an offshore platform naturally fit within the scope of "development" as defined in §1331(*l*).[114] It was then that the Fifth Circuit applied a two-part, "but for" test to the facts of the case ruling that "but for" operations on the OCS, the platform Mr. Mills worked on would not have been constructed.[115] Therefore, the court concluded that Mr. Mills' shoreside injury would not have occurred "but for" the OCS operations and reversed the BRB's decision.[116]

Not satisfied with the court's previous holding, McDermott requested for an *en banc* rehearing. In *Mills en banc*, the Fifth Circuit granted rehearing *en banc* to determine whether the employee qualified for benefits under the LHWCA as extended in OCSLA.[117] In *Mills II*, the Fifth Circuit reversed course and interpreted §1333(b) of OCSLA as containing a situs requirement for LHWCA coverage.[118] To make this determination, the Fifth Circuit analyzed the legislative history of OCSLA and the Congressional intent behind the entire Act.[119] In *Mills II* opinion, Circuit Judge Eugene W. Davis refers to 1953 congressional hearings regarding the OCS in which senators agreed that "situs" of injury dictates the application of benefits.[120] Next, the Fifth Circuit pointed out all other sections of OCSLA except for §1333(b) have a situs requirement and thereby only apply to the OCS.[121] The court reasoned that Congress applied situs requirements for all the other

[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.* at 1015.
[112] *Id.*
[113] 43 U.S.C. § 1331(l).
[114] *Mills I*, 846 F.2d 1013, 1015.
[115] *Id.*
[116] *Id.*
[117] *Mills en banc*, 856 F.2d 28.
[118] *Mills II*, 877 F.2d 356, 357.
[119] *Id*. at 358.
[120] *Mills II*, 877 F.2d 356, 359, citing *Outer Continental Shelf: Hearings* on S.1901 before Senate Comm. On Interior and Insular Affairs, 83d Cong., 1st Sess., 12-16 (1953).
[121] *Mills II*, 877 F.2d 356, 359.

subsections of OCSLA to show that the Congressional intent behind the Act was to provide law to the OCS, not areas already covered by state law.[122]

Afterward, the Fifth Circuit explained that Congress's deletion of a portion of a provision in the original 1953 Act, which later became §1333(b), did not signal Congress' intent to extend LHWCA coverage to workers on the shore, where state workers' compensation schemes were already in place.[123] The deleted provision in section 4(c) of the 1953 Act extended LHWCA coverage to workers injured due to operations taking place on the OCS only if state law workers' compensation did not apply.[124] The *en banc Mills II* court reasoned that by deleting this section of 4(c), Congress did not intend to extend LHWCA coverage regardless of whether state workers' compensation also applied but rather indicates that Congress would "tolerate" an overlap in federal and state workers' compensation coverage on the OCS.[125]

With that said, the court found that in no way did the deletion of the provision by Congress signify overlapping state and federal coverage for workers injured shoreside and thereby covered under applicable state law.[126] In the Fifth Circuit opinion, Congress legislated §1333(b) of the OCSLA to "provide law for an area already governed by state worker's compensation law."[127] Moreover, the Fifth Circuit concluded that in 1978 Congress added §1331(*l*)'s broad definition of "development" for OCS drilling regulation not to expand the scope of §1333(b)'s coverage for workers compensation as applied in *Mills I*.[128]

Finally, the Fifth Circuit majority discussed the impracticability of expanding the scope of 1333(b), and how such an expansive interpretation of §1333(b) would produce ill effects, not intended by Congress, such as a scheme requiring employers to purchase insurance coverage for liability under both state and federal compensation acts for shoreside employees who manufacture equipment destined for the OCS. The majority reasoned that under such a scheme, employers would be required to purchase additional coverage for shoreside workers manufacturing equipment for oil platforms on the OCS for protective measures, even if those employees represent a small portion of the employer's existing workforce. However, no extra layer of coverage would be required for shoreside employees constructing similar equipment that is not destined for platforms on the OCS.[129] The court fleshed the concept out further by proclaiming that under this expansive definition of the scope of §1333(b) coverage, shoreside employees injured while working on equipment destined for the OCS are entitled to both state workers' compensation and OCSLA benefits. In contrast, other shoreside employees constructing the same equipment not destined for the OCS are only entitled to coverage under the state workers' compensation program.[130]

In the *Mills II* opinion's conclusion, the Fifth Circuit majority expressed a responsibility to solidify the geographic boundary for §1333(b) coverage as Justice Davis writes, "Given that Congress intended to establish a bright-line geographic for §1333(b) coverage, we now draw that

[122] *Id.*
[123] *Id.* at 360.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id*.
[128] *Id*.
[129] *Id.* at 362.
[130] *Id*.

line."[131] Reversing course from its *Mills I* decision, the Fifth Circuit in *Mills II* imposed a situs requirement for LHWCA coverage as extended to §1333(b) of OCSLA; holding that for OCSLA coverage to apply, the employee must suffer injury or death on an OCS platform or the waters above the OCS and also satisfy the court's previous "but for" status test.[132]

The *Mills II* holding is significant because the Fifth Circuit was the only appellate court to interpret Congress's intent and underlying purpose when legislating OCSLA in 1953 as imposing a situs requirement that also applied to §1333(b).

D. The Ninth Circuit: The "Substantial Nexus" Test

In 2010, the United States Court of Appeals for the Ninth Circuit, in *Valladolid v. Pacific Operations Offshore LLP*, rejected the Fifth Circuit's "situs of injury" requirement and held the Third Circuit's "but-for" test to be inapplicable.[133] Most significantly, in *Valladolid I*, the Ninth Circuit created its analysis of §1333(b), the substantial nexus test, which the Supreme Court later adopted in *Valladolid II* in 2012.[134] However, the standard has since plagued the legal community with its indeterminate nature and has become, as Justice Scalia coined it in his concurring opinion, "the devil of the Ninth Circuit's imagining."[135]

In this case, the worker Juan Valladolid worked for Pacific Operations Offshore as a laborer on one of Pacific's drilling platforms on the OCS off California's coast.[136] While employed by Pacific Operations, Mr. Valladolid spent 98% of his working time on the OCS performing maintenance and repairs duties.[137] Mr. Valladolid also worked at Pacific's onshore facility in California, and one of his duties at the facility included using a forklift to consolidate the scrap metal dropped off from Pacific's OCS platforms so that a scrap metal vendor could haul it away from the facility.[138] Pacific requested that Mr. Valladolid perform the task once every two years.[139] He died on land performing the task when a forklift crushed him.[140] Luisa Valladolid, the decedent's widow, received benefits under the state workers' compensation scheme, yet she also filed a claim for benefits under the LHWCA as extended to outer continental shelf workers in OCSLA.[141]

Upon review, an ALJ denied the worker's OCSLA claims due to his death not occurring on the OCS and therefore not meeting the situs of injury requirement.[142] The BRB upheld the ALJ's decision.[143] After petitioning for review, the Ninth Circuit rejected the BRB's situs of injury requirement regarding the applicability of §1333(b) of OCSLA and created a new analysis called the "substantial nexus" test.[144] The Ninth Circuit held that §1333(b) of OCSLA "applies to any

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[131] *Id*.
[132] *Id.*
[133] Valladolid v. Pacific Operations Offshore, LLP, 604, F.3d 1126 (9th Cir. Ct. App. 5/13/2010). [Herein *Valladolid I*]
[134] *See Valladolid I* 604, F.3d 1126, *see Valladolid II*, 132 S. Ct. 680 (2012).
[135] *Valladolid II*, 132 S. Ct. 680, concurring opinion.
[136] *Valladolid I*, 604, F.3d 1126 at 1129.
[137] *Id.*
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.* at 1129-1130.
[143] *Id*. at 1130.
[144] *Id*. at 1139.

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."[145]

To satisfy the test, the court established that a claimant must demonstrate a *direct connection* between the injured employee's work and its furtherance of outer continental shelf operations.[146] Ultimately, the Ninth Circuit remanded the question of OCSLA coverage back to the BRB to analyze the claim using the newfound "substantial nexus test."[147] Most significantly, with *Valladolid I*, the Ninth Circuit created a new standard to be applied to OCSLA claims that fell somewhere in the middle between the "but for" and "situs requirement," and that new standard would go on, for better or for worse, to play a significant role in shaping the future of OCSLA benefits claims.

E. The Three Circuit Split and The Supreme Court

Three courts of appeals, whose jurisdictions make up most of the United States' coastline and thereby see most OCSLA benefits claims, were utterly divided on interpreting the "result of [OCS] operations" requirement of OCSLA. Three different circuit courts of appeals, each applying a different test, also presented difficulties for ALJs and the BRBs. As matters stood, a worker's right to OCLSA compensation benefits for an injury occurring on land depended on the circuit in which the claim arose. To settle the dispute between the circuits, the United States Supreme Court granted the petitioners in *Valladolid I* certiorari and, in 2012, with *Valladolid II*'s holding it adopted the "substantial nexus" standard by affirming the Ninth Circuit's ruling in *Valladolid I*.[148]

In deciding *Valladolid II*, the Supreme Court discovered nothing in the statutory language of §1333(b) to suggest a situs requirement for the worker's injury or any Congressional intent for a situs of injury requirement.[149] With haste, the Supreme Court in *Valladolid II* rejected the Fifth Circuit's "situs of injury" test as applied in *Mills II*[150] while it also disagreed with the Third Circuit's causation-driven "but for" test.[151] The Supreme Court found the Third Circuit's "but for" test too open-ended in its interpretation of the scope of 1333(b)'s coverage.[152] Moreover, the Supreme Court astutely reasoned that there existed a possibility in which the "but for" test may be interpreted too broadly and consequently cover injured shoreside employees whose jobs have no connection with extractive purposes on the OCS.[153] Considering those factors, the Supreme Court opinion, written by Justice Thomas, states,[154]

> Accordingly, we conclude that the Ninth Circuit's 'substantial nexus' test is more faithful to the text of §1333(b). We understand the Ninth Circuit's test to require the injured employee to establish a significant causal link between the injury that he suffered and on his employer's OCS operations conducted for the purpose of extracting natural resources from the OCS.

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[145] *Id*. at 1142.
[146] *Id*. at 1139.
[147] *Id*. at 1142.
[148] See *Valladolid II*, 132 S. Ct. 680.
[149] *Id.* at 215.
[150] *Id.* at 214.
[151] *Id.* at 221.
[152] *Id.*
[153] *Id.*
[154] *Id.* at 222.

With one swoop, in *Valladolid II*, the Supreme Court solidified the substantial nexus test as a determinative factor in future OCSLA claims by affirming the Ninth Circuit's judgment.

F. The Supreme Court's Reasoning in *Valladolid II*

The Supreme Court boiled down the issue surrounding the scope of coverage in *Valladolid II* as follows:

> (1) The parties consented that §1333(b) covers employees injured while on the OCS for extractive purposes, and
>
> (2) the parties disagreed on whether §1333(b) covers employees involved in extractive purposes but injured beyond the OCS.[155]

To settle the dispute, in *Valladolid II* and, more importantly, across three Circuit Courts of Appeal, the Supreme Court focused its attention on the meaning of the phrase "*any injury occurring as the result of operations conducted on the outer Continental Shelf*" in §1333(b).[156] To reach its conclusion, the Supreme Court found:

> (1) the statutory language of §1333(b) does not suggest a situs of injury requirement[157] and,
>
> (2) it rejected the notion that Congress intended §1333(b) to geographically limit the extension of LHWCA coverage to injuries occurring on the OCS[158], and lastly
>
> (3) found that Congress did not intend for the scope of §1333(b)'s coverage to be limited to only geographic areas where state workers' compensation does not apply.[159]

To start, the Supreme Court slashed the situs of injury requirement by simply explaining that §1333(b)'s plain language does not require that the employee's injury must occur on the OCS.[160] To support its reasoning, the Supreme Court provided that the only two requirements in §1333(b) are (1) that the employer's extractive operations occur on the OCS and (2) that the employee's death or injury occurs "as a result of" those operations."[161] Following that contention, the Supreme Court tossed aside Pacific's argument that Congress intended §1333(b) to be a geographical barrier limiting coverage to only injuries occurring on the OCS by arguing that if Congress intended for such a boundary, it would have removed the phrase "*as the result of operations conducted*" from the statute when it enacted it.[162]

Lastly, the Supreme Court also dismissed the idea that with OCSLA, Congress intended to create a federal compensation program that eliminated any overlap with state compensation programs.[163] To the Supreme Court, nothing in the text's statutory language prevents injured OCS

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[155] *Id.* at 212-213.
[156] *Id.* at 213.
[157] *Id.* at 215.
[158] *Id.*
[159] *Id.* at 218.
[160] *Id.* at 215.
[161] *Id.*
[162] *Id.*
[163] *Id.* 218-219.

workers from being eligible for both state and federal compensation benefits.[164] To support the notion that injured workers may seek coverage under both federal and state compensation schemes, the Supreme Court cited § 903(e) of the LHWCA, which reads as follows: "Notwithstanding any other provision of law, any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under this chapter pursuant to any other workers' compensation law or [the Jones Act] shall be credited against any liability imposed by [the LHWCA]."[165] Given the textual language of §903(e), the Supreme Court reasoned that it does not appear that Congress originally intended to limit OCSLA coverage to only areas where state workers' compensation programs did not apply.[166]

G. Justice Scalia and "The Devil of the Ninth Circuit's Imaginings"

In his concurring opinion, Justice Scalia expressed his fellow Justices' endorsement of the "substantial nexus" test.[167] In Justice Scalia's eyes, the "substantial nexus" test lacked significant legal meaning or "pedigree" in context to OCSLA compensation claims.[168] Justice Scalia may have had a point. From 1963 to 2015, the term "substantial nexus" had only been present in 34 Supreme Court cases, in which most of the cases discuss how the substantial nexus test may be applied to state and city tax codes.[169] In other words, the Supreme Court rarely had, if ever, applied the substantial nexus test to a worker's compensation claim before *Valladolid II*.

Justice Scalia argued that the Supreme Court ought to have adopted the more familiar "proximate cause" standard rather than "substantial nexus" writing, "But if we must adopt an indeterminate standard (and the statute's 'as the result of' language leaves us no choice) I prefer the devil we know to the devil of the Ninth Circuit's imagining."[170] Essentially, Justice Scalia expounded on the notion that although the "proximate cause" standard is imperfect, it provides courts with more familiar vocabulary and historical precedents than a new "*tertium quid*" of causality. Thus, Justice Scalia reasoned a proximate cause standard to be a more appropriate standard to be applied to "*the resulting of*" §1333(b) rather than the Ninth Court's embryotic standard--the substantial nexus test.[171]

All future OCSLA claims post-*Valladolid II* struggle with the enigma that is the substantial nexus standard, and thereby the remainder of this comment will exhibit how not only the Fifth Circuit interpreted the standard in *Mays v. Chevron Pipe Line Co.* but also how the ALJ and BRB have come to analysis OCSLA claims. By analyzing how substantial nexus is interpreted in the following cases, one may conclude that amending legislation may pose the best solution in this matter. Justice Thomas may have inadvertently hit the nail on the head in the *Valladolid II* opinion when he cited the Supreme Court's language from *Herb's Welding* about policy issues concerning the scope of the Act's coverage, citing, "[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."[172]

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[164] *Id.* 218.
[165] *Id*. 218-219, citing 33 U.S.C. §903(e).
[166] *Valladolid II*, 132 S. Ct. 680 at 219.
[167] *Id.* at 223.
[168] *Id.*
[169] Matthew H. Ammerman, *Octopus Arms: The Reach of OCSLA After Valladolid*, pg. 7
[170] *Valladolid II*, 132 S. Ct. 680 at 223.
[171] *Id.* at 226.
[172] *Id.* at 220, citing Herb's Welding, Inc. v. Gray, 470 U.S 414 at 427 (1985).

V. Post-Valladolid II: Mays v. Chevron Pipe Line Co.

A. Background

In 2016, Peggy Mays sued the defendant Chevron Pipe Line (CPL) in Louisiana District Court in tort for damages arising from a workplace accident that resulted in James Mays' death.[173] The worker, Mr. Mays, was employed by Furmanite America (Furmanite), which contracted with CPL to provide valve maintenance services for CPL's onshore and offshore facilities.[174] In September of 2014, Furmanite ordered Mr. Mays to the Lighthouse Point platform, a CPL-operated platform located within state territorial waters, to "grease valves as needed."[175] After performing the job, the crew and Mr. Mays attempted to close the valve for an upcoming job.[176] As the crew tried to close the valve manually, the manual gear operator used to help close the valve broke.[177] A few days later, Mr. Mays returned to the platform to help a crew remove the valve's broken gear operator.[178] Upon removing the gear operator, the crew then began removing the valve's mounting or cover plate.[179] As the crew removed the last bolt from the plate, a sudden pressure breach caused the cover plate and valve stem to blast off and strike Mr. Mays in the head and kill him.[180]

B. District Court's Analysis

Pushing aside making a legal determination on CPL's argument that for an employee to meet the substantial nexus test, the court must look at the employee's "direct employer," the District Court ruled that under the facts presented, Mr. Mays was not covered by the LHWCA at the time of his death because there was no substantial nexus between his death and CPL's extractive operations on the OCS.[181] Using the Supreme Court's substantial nexus inquiry from *Valladolid II*, the District Court reasoned that there must be a causal link between Mr. Mays' injury and CPL's OCS operations.[182] With that in mind, in the court's opinion, Judge Doherty discussed the lack of significant connectivity between Mr. Mays' injury while removing a valve that was part of Chevron's pipeline used to transport natural gas from the OCS and state waters on a platform in state waters and CPL's extractive purposes on the OCS, writing, "To accept [Mr. Mays'] argument would…allow a random mechanic who might be repairing a third party transport truck on land, used to transport product originating from an OCS platform, to claim longshoreman status—clearly not the intention of the Supreme Court."[183] In sum, the District Court granted CPL's motion to seek dismissal of the claims brought by the plaintiffs.[184]

C. Reconsideration

Accordingly, Mr. Mays' beneficiaries filed a motion for reconsideration with the District Court arguing that "there was a substantial nexus between defendant Chevron Pipe Line

[173] Mays v. Chevron Pipe Line Co., 163 F. Supp. 3d 362, 363 (2016).
[174] *Id.*
[175] 2019 WL 6456915 (C.A.5) (Appellate Brief) at 13.
[176] *Id.*
[177] *Id.*
[178] *Id.* at 14
[179] *Id.*
[180] *Mays v. Chevron Pipe Line Co.*, 163 F. Supp. 3d at 363.
[181] *Id.* at 370.
[182] *Id.*
[183] *Id.* at 371.
[184] *Id.* at 372.

Company's OCS operations and decedent's injury and death" and soon after the court granted the plaintiff's motion.[185] During reconsideration, the plaintiffs expounded on certain facts surrounding the death of Mr. Mays and CPL's pipeline.[186] Chiefly, the plaintiffs contended that the natural gas transported by the OCS pipeline was a substantial factor in the pressurized explosion that led to Mr. Mays' death.[187] To support their argument, the plaintiffs presented evidence from depositions from a CPL pipeline operator and the testimony of an engineering expert to conclude that natural gas production from two platforms located on the OCS had to be shut down to stop the release of pressure through the valve involved in Mr. May's injury on territorial waters.[188]

Upon reconsideration, the court reversed its earlier decision and consequently denied CPL's motion for summary judgment because it found that the plaintiffs presented sufficient evidence to raise an issue of material fact for trial. Thereby the trial would mainly deal with whether there was a substantial nexus between CPL's OCS operations and the employee's death because CPL's pipeline was transporting pressurized natural gas from the OCS through the valve on the Lighthouse platform at the time of the explosion and Mr. May's subsequent death.[189]

D. *Mays* and the Fifth Circuit Court of Appeals

After a four-day trial, a jury found that CPL's OCS operations caused Mr. Mays' death and thereby returned a verdict in favor of Mr. Mays' benefactors.[190] The jury found CPL to be 70% at fault and awarded Mr. Mays' family $2,942,549.79.[191] On appeal to the Fifth Circuit, CPL mainly argued that the District Court wrongly interpreted and applied the Supreme Court's holding in *Valladolid II* by instructing the jury to determine whether there was a substantial nexus between Mr. Mays' death and CPL's OCS operations rather than Furmanite's OCS operations.[192] Additionally, CPL contended that, even if CPL's OCS activities were to be the focus of the analysis, the link between those operations and Mr. Mays' death is not significant enough to meet the substantial nexus standard.[193]

In *Valladolid II*, the Supreme Court held that an employee seeking LHWCA under §1333(b) of OCSLA must "establish a significant causal link between the injury that he suffered and *his employer's* on-OCS extractive Operations."[194] On appeal, CPL sought to have the "*his employer's*" requirement of the substantial nexus test be interpreted by the Fifth Circuit as Mr. Mays' direct employer (i.e., a subcontractor), Furmanite, instead of his indirect employer (i.e., contractor), CPL.[195] Under CPL's interpretation of the substantial nexus test, Mr. Mays would not be covered by the LHWCA via §1333(b) of OCSLA because Furmanite, his direct employer, had no operations on the OCS and thereby CPL was entitled to judgment as a matter of law.[196]

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[185] Mays v. Chevron Pipe Line Co., 2017 WL 2196093, *2 (2017).
[186] *Id.* at *4.
[187] *Id.*
[188] *Id.*
[189] *Id.* at *5.
[190] Mays v. Chevron Pipe Line Co., 2019 WL 2517864, *1 (2019).
[191] *Id.* at *1.
[192] Mays v. Chevron Pipe Line Co., 968 F. 3d 442 at 444.
[193] *Id.* at 451.
[194] *Valladolid II*, 132 S. Ct. 680 at 222.
[195] *Mays*, 968 F. 3d 442 at 447.
[196] 2019 WL 6839186 (C.A.5) (Appellate Brief) at *5.

Resoundingly, the Fifth Circuit rejected CPL's notion that the "*his employer's*" language of the substantial nexus test in *Valladolid II*'s holding suggests that the Supreme Court intended for substantial nexus to apply only to direct employers of the injured employee.[197] Unlike in *Mays*, the employee benefits claim in *Valladolid II* only dealt with a direct employer.[198] So, the Fifth Court in *Mays* reasoned that the Supreme Court's *Valladolid II* decision did not attempt to comment on who may fall under the term "employer" under the OCSLA.[199]

To further support its argument, the court pointed to a portion of the *Valladolid II* holding in which the Supreme Court phrased the nexus test without using the term "employer."[200] To hammer the final nail into the casket, the court left behind the nexus test language and picked up the plain language of §1333(b) of OCSLA, which mentions nothing of restricting the operations conducted on the OCS to only "direct employers" of the injured employee.[201] Since CPL's direct employer argument erroneously hinged on *Valladolid II*'s substantial nexus and not on whether CPL qualified as an "employer" under the LHWCA, the Fifth Circuit decided to "express no view on whether Chevron is Mays' 'employer' under the LHWCA, as extended by OCSLA."[202] Weighing these considerations, the Fifth Circuit judges rejected CPL's argument that the District Court erred by instructing the jury to consider CPL's OCS operations pertaining to the substantial nexus requirement.[203]

In the last gasp effort, CPL then attempted to argue that even under the District Court's interpretation of the substantial nexus test, the link between Mr. Mays' work/injury and CPL's on OCS operations was so "indirect" that it failed to satisfy the substantial nexus requirement.[204] The specific work that Mr. Mays' employer asked him to perform was to service and repair facilities located within state territorial waters.[205] In performing these services, Mr. Mills died from pressurized blast caused by natural gas flowing from both the OCS and state territorial waters.[206] Although the appellees cited the pressurized natural gas released from the OCS as a substantial factor in the valve exploding and consequently Mr. Mays' death, the appellees did not attempt to distinguish the gas distribution volume from any of the three pipelines at the time of the explosion.[207] One of the three total pipelines shut down because of the Lighthouse Point explosion was located on state territorial waters.[208]It is plausible that the blast's predominant source may have stemmed from natural gas released from territorial waters.

Try as CPL might, the Fifth Circuit did not accept CPL's argument that the jury in the District Court relied too heavily on specific facts such as how much gas released from the valve came from the OCS when a facility on territorial seas also had to be turned off after the explosion involving Mr. Mays.[209] CPL attempted to frame its argument as a legal challenge, but, in reality,

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[197] *Mays*, 968 F. 3d 442 at 448.
[198] *Id.*
[199] *Id.*
[200] *Id.,* quoting *Valladolid II*, 606 F.3d at 1139.
[201] *Id.* at 449.
[202] *Id.* at 450.
[203] *Id*. at 451.
[204] *Id*.
[205] 2019 WL 6839186 (C.A.5) (Appellate Brief) at *18.
[206] *Id*.
[207] *Id*.
[208] *Id*. at *19.
[209] *Mays*, 968 F. 3d 442 at 451.

it was a challenge on the jury's factual finding as to whether "a significant causal link" existed between Mr. Mays' death and CPL's on-OCS extractive operations.[210] To overcome the jury's finding, CPL needed to show that the evidence's overwhelming weight is in its favor to the degree that a jury would have to be irrational to find otherwise.[211]

The burden proved too difficult to overturn, as the Fifth Circuit rejected CPL's argument that evidence connecting Mr. Mays' death and its OCS operations failed to satisfy the substantial nexus test.[212] To the judges hearing the *Mays* case on the Fifth Circuit, the jury observed both ample evidence and expert testimony in the District Court trial to make an inference on the whole of the evidence that there was a significant causal link between Mays' death and CPL's OCS activities.[213] Simply put, CPL did not offer a sufficient explanation as to why the jury's findings were so illogical in the face of all the evidence, and as a result, the court did not change the jury's finding on the issue.[214] Accordingly, the Fifth Circuit affirmed the judgment of the District Court.[215]

With *Mays*, the far-reaching implications of *Valladolid II* are apparent as the court found that OCSLA covered a non-OCS employee whose injuries occurred in state territorial water because pressurized water that may have come from the OCS, state waters, or both caused a valve that he was working on to explode and strike him dead. The *Mays* decision marks how lawyers and judges struggle to apply substantial nexus through the entire claims process and how the difficulties arguably led the Fifth Circuit to a holding that may be aligned with Supreme Court precedent but not the legislative intent behind OCSLA. All to the determent of offshore contractors and subcontractors.

VI. Conclusion: What Comes Next?

As recent as 2018, in *Spain v. Expeditors & Production Service Company, Inc.*, both the ALJ and BRB found that the LHWCA, as extended by OCSLA, covered an employee injured after falling in a wet hallway within on-land living quarters.[216] The BRB concurred with the ALJ's findings regarding the claim.[217] Both found that although the employee worked on land and not the OCS, the employee's work, supervising the loading and unloading of vessels that transported equipment to and from OCS platforms, was substantially related to the extractive operations on the OCS.

Until Congress amends §1333(b) by adding a situs of injury requirement for recovery, future OCSLA benefits claims will continue to have absurd outcomes. For example, cases such as *Mays* and *Spain* in which courts found the claimants covered under OCSLA despite their work being loosely related to operations on the OCS and their injuries occurring in an area already covered by a state workers' compensation scheme. Without a situs of injury requirement in §1333(b), the substantial nexus standard will remain unchecked and allow for certain claimants to recover workers compensation benefits under LHWCA via OCSLA despite contradicting the

[210] *Id.*
[211] *Id.*
[212] *Id.* at 451-452.
[213] *Id.* at 451.
[214] *Id.* at 453.
[215] *Mays*, 968 F.3d 442.
[216] Spain v. Expeditors & Production Service Company, Inc., BRB No.18-0428 (December 11, 2018).
[217] *Id*.

congressional intent of OCSLA as a whole. It is in Congress's hands to issue the rise of the situs requirement and subsequent fall of the substantial nexus standard.