



ADMIRALTY & MARITIME BRIEF

Supreme Court to Decide Whether Longshore Coverage Moves Landward for Offshore Workers

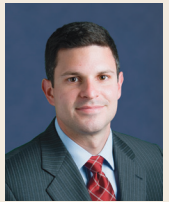
The U.S. Supreme Court granted a writ of certiorari in *Pacific Operators Offshore, LLP v. Valladolid*, 131 S.Ct. 1472 (2011) to resolve a split among the U.S. Circuit Courts of Appeal regarding the issue of whether an outer continental shelf worker who is injured on land may be afforded coverage under the Longshore and Harbor Workers Compensation Act (“LHWCA”), as made applicable by the Outer Continental Shelf Lands Act (“OCSLA”).

Coverage under the LHWCA is limited primarily to two broad categories of workers. First, a worker may be covered “directly” under the provisions of the LHWCA. Such direct coverage is primarily limited to longshore and harbor workers, shipbuilders, and shipbreakers. Second, non-seaman oilfield workers who are engaged in the exploration or development of natural resources on the Outer Continental Shelf (“OCS”) may be entitled to LHWCA benefits by virtue of section 1333(b) of OCSLA. 43 U.S.C. § 1331(b). *Valladolid* deals with this second category of workers.

Section 1333(b) of OCSLA provides that an injured OCS worker who does not qualify as a seaman will be covered by the provisions of the LHWCA if the worker’s injury is “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 ... of the seabed of the [OCS].” There is a split among the circuit courts regarding the question of whether section 1333(b) contains a “situs” requirement. The U.S. Fifth Circuit has answered this question in the affirmative and has refused to extend LHWCA benefits to OCS workers who are not injured on a fixed platform on the OCS or on navigable waters over the OCS. In contrast, the U.S. Third Circuit has construed 1333(b) as containing only a “but for” test – coverage will exist if it can be said that the injury would not have occurred “but for” operations on the shelf. *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805 (3d Cir. 1988). Thus, an employee injured in a car accident on his way to meet a helicopter that would take him to an offshore platform was entitled to recover LHWCA benefits. *Id.* at 806, 811.

As illustrated by *Valladolid*, the Ninth Circuit has adopted the approach of the Third Circuit. *Valladolid* involved the death of Juan Valladolid, a general laborer who was employed by Pacific Operations, a company that operates two drilling platforms located on the outer continental shelf off the coast of California. While Valladolid was primarily stationed on one of these platforms, he was killed on the grounds of Pacific Operations when he was crushed by a forklift. He would not have been injured “but for” oil and gas operations on the OCS.

Citing opinions from the Third Circuit, Valladolid’s widow argued that LHWCA benefits were recoverable under OCSLA. The Administrative Law Judge and Benefits Review Board applied the Fifth Circuit’s situs requirement and held that benefits were not recoverable



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because Valladolid's accident did not occur on an OCS platform or on navigable waters over the OCS. The Ninth Circuit reversed. In doing so, the court held, as a matter of statutory construction, that section 1333(b) of OCSLA does not contain language indicative of a situs requirement.

The Supreme Court has granted a writ of certiorari to address the growing conflict between the federal circuit courts of appeal. If the Supreme Court agrees with the Third and Ninth Circuits, employers who conduct operations on the OCS can anticipate an increase in LHWCA claims by their land-based workers.

A Novel Way to Consider Medicare's Interest in a Jones Act Settlement

The Medicare Secondary Payer Act (MSP) established on December 5, 1980, requires consideration of the interests of Medicare within all settlements involving Medicare beneficiaries. The definition of Medicare Beneficiary includes injured seamen who have been collecting Social Security Disability Benefits. The MSP prevents Medicare from being the primary payer for medical conditions for which a responsible party exists. In a maritime personal injury case, the Jones Act employer is typically designated the "responsible party." As such, Medicare cannot be the primary payor, and its interests should be considered by the parties by making a monetary allowance for the injured seaman's future medical care. The failure to consider Medicare's interests can result in severe consequences for the parties and their counsel. Unfortunately, Medicare does not currently have a policy or procedure in effect for reviewing or providing an opinion regarding the adequacy of the future medical aspect of a liability settlement or recovery of future medical expenses incurred in liability cases. This begs the question: "What can litigants and their attorneys do to protect themselves and Medicare when no policy or procedure exists for reviewing settlements?"

In the matter *Big R Towing, Inc. v. Benoit*, 2011WL 43219 (W.D. La), United States Magistrate Judge Patrick Hanna tackled this very question and provided an interesting solution. He simply ruled that the parties had considered Medicare's interests and issued an order to that effect. In crafting his ruling, Judge first confirmed that Medicare does not currently have a procedure in effect for reviewing the adequacy of the future medical aspect of a liability settlement. He then held that the injured seaman, a Medicare Beneficiary by virtue of the fact he was collecting Social Security Disability Benefits, was aware of his obligation to reimburse Medicare for any payments Medicare made for medical expenses incurred by the injured seaman. Next, Judge Hanna found that there was no evidence that the injured seaman was attempting to maximize other aspects of the settlement to Medicare's detriment. He then ruled that the parties had reasonably considered and protected Medicare's interest in the settlement of this matter and ordered that the sum of \$52,500 be set aside out of settlement proceeds from future medical expenses.

As of the date of this article, Judge Hanna's novel solution of the problem of considering Medicare's interests has not been reviewed. However, it would be advisable to follow his example and involve the Court when settling a Jones Act case involving a Medicare Beneficiary.



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