

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 18-0258

LEVI CHURCH)	
)	
Claimant-Petitioner)	
)	
v.)	DATE ISSUED: 04/24/2019
)	
HUNTINGTON INGALLS,)	
INCORPORATED - PASCAGOULA)	
OPERATIONS)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer’s Motion for Summary Decision and the Order Denying Claimant’s Motion for Reconsideration of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Kristopher W. Carter (Carter & Jordan, PLLC), Ocean Springs, Mississippi, for claimant.

Donald P. Moore (Franke & Salloum, PLLC), Gulfport, Mississippi, for self-insured employer.

Before: BUZZARD, GILLIGAN and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Granting Employer’s Motion for Summary Decision and the Order Denying Claimant’s Motion for Reconsideration (2017-LHC-01652) of Administrative Law Judge Larry W. Price rendered on a claim filed pursuant to the Longshore and Harbor Workers’ Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge’s findings of fact and

conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The relevant facts of this case are not in dispute. Claimant works for employer at its Pascagoula, Mississippi, shipyard as a blaster/painter. On January 23, 2017, he stepped in a pothole in employer’s parking lot while walking from his car to the production security gate prior to the start of his work day. The parking lot is within the boundaries of the shipyard, but separated from the production areas by fencing and a security gate. No shipbuilding, loading, unloading, repairing or shipbreaking is performed in the lot. The parties agree, however, that the shipyard and parking lot have a geographical nexus with navigable water.

Claimant alleged injuries to his right hip and leg and sought benefits under the Act. Employer paid benefits under the Mississippi Workers’ Compensation Act but disputed coverage under the Longshore Act.

Employer filed a motion for summary decision with the administrative law judge, contending claimant’s injury did not occur on a covered situs because the parking lot does not meet the functional requirement of Section 3(a), 33 U.S.C. §903(a). The administrative law judge agreed with employer, relying on *BPU Mgmt., Inc./Sherwin Alumina Co. v. Director, OWCP*, 732 F.3d 457, 47 BRBS 39(CRT) (5th Cir. 2013) (mixed-use facility’s underground tunnel does not satisfy functional component and is not covered), and distinguishing *Williams v. Northrop Grumman Shipbuilding, Inc.*, 45 BRBS 57 (2011) (injury in parking lot within employer’s shipyard covered because entire shipyard is adjoining area), a case arising in a different jurisdiction. Decision and Order at 3. He granted employer’s motion for summary decision and denied the claim for benefits. *Id.* The administrative law judge also denied claimant’s motion for reconsideration. Claimant appeals, and employer responds, urging affirmance.

Claimant contends the administrative law judge erred in finding he was not injured on a covered situs because, as in *Williams*, entire shipyards, including parking lots therein, are covered and meet the functional nexus requirement. He contends it is erroneous to address internal parking lots separately from the shipyard. Employer asserts the administrative law judge correctly found the parking lot does not satisfy the Act’s situs requirement because it does not meet the functional component, as no ship-related work occurs there.

We agree with claimant and reverse the administrative law judge’s decision granting employer’s motion for summary decision. *See generally Wilson v. Boeing Co.*, 52 BRBS 7 (2018); *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006).

To be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States or on a landward area covered by Section 3(a), and that his work is maritime in nature pursuant to Section 2(3). 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, a claimant must satisfy both the “situs” and the “status” requirements of the Act. *Id.*; *see also Coastal Prod. Serv., Inc., v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), *reh’g denied*, 567 F.3d 752 (5th Cir. 2009); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (en banc). The parties here dispute only situs.

Section 3(a) of the Act states:

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a). If an injury occurs on a non-enumerated site, it can be covered only if it qualifies as an “other adjoining area.” *Id.*; *Hudson*, 555 F.3d 426, 42 BRBS 68(CRT).

A “shipyard” is not an enumerated situs, so we must address it as an “adjoining area.” Similar to the enumerated sites,¹ an adjoining area must be: “a discrete structure or facility, the very *raison d’etre* of which is its use in connection with navigable waters. Therefore, in order for an area to constitute an ‘other area’ under the statute, it must be a discrete shoreside structure or facility.” *New Orleans Depot Services, Inc. v. Director, OWCP [Zepeda]*, 718 F.3d 384, 392, 47 BRBS 5, 10(CRT) (5th Cir. 2013) (en banc), *overruling in part Textports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (en banc), *cert. denied*, 452 U.S. 905 (1981) (quoting *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 1139, 29 BRBS 138, 143(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996)). The Fifth Circuit has held that a site is an “other

¹ The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has stated that the sites enumerated in Section 3(a) “are all land-based structures or areas which adjoin navigable waters and are typically used in maritime activities.” *Thibodeaux v. Grasso Prod. Mgmt., Inc.*, 370 F.3d 486, 490, 38 BRBS 13, 16(CRT) (5th Cir. 2004). Shipyards generally fit this description.

adjoining area” if it satisfies a two-part test: it must border on, or be contiguous with, navigable waters (geographic component), and it must be customarily used for maritime activities (functional component). *Zepeda*, 718 F.3d 384, 47 BRBS 5(CRT);² *see also BPU Mgmt.*, 732 F.3d 457, 47 BRBS 39(CRT); *Sidwell*, 71 F.3d 1134, 29 BRBS 138(CRT).

While coverage boundaries are necessary,³ the Fifth Circuit has declined to define areas by fence lines because they are subject to manipulation. *Hudson*, 555 F.3d at 433, 42 BRBS at 71-72(CRT); *see Spain v. Expeditors & Prod. Service Co., Inc.*, 52 BRBS 73 (2018).⁴ Instead, the test is whether the injury occurred within a contiguous shipbuilding area adjoining navigable water. *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 6 BRBS 229 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977);⁵ *see also Caputo*, 432 U.S. 249, 6 BRBS 150; *Spain*, 52 BRBS 73; *Uresti v. Port Container Industries, Inc.*, 33 BRBS 215 (Brown, J., dissenting), *aff'd on recon.*, 34 BRBS 127 (2000) (Brown, J., dissenting). “[I]t is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which a claimant is injured.” *Zepeda*, 718 F.3d at 391-392, 47 BRBS at 10-11(CRT). Thus, not “every square inch” of a maritime facility must be used for maritime purposes, *Hudson*, 555 F.3d at 433, 42 BRBS at 71-72(CRT); *Sidwell*, 71 F.3d at 1134, 29 BRBS 138(CRT), and an injury on a part not used for maritime purposes does not preclude coverage:

² The Fifth Circuit adopted the United States Court of Appeals for the Fourth Circuit’s strict approach that an “adjoining” area must border on or touch navigable waters, holding it is not sufficient to be “in the vicinity of” or “neighboring” navigable waters. *Zepeda*, 718 F.3d 384, 47 BRBS 5(CRT); *Sidwell*, 71 F.3d 1134, 29 BRBS 138(CRT).

³ *Herb’s Welding, Inc. v. Gray*, 470 U.S. 414, 426-427, 17 BRBS 78, 84(CRT) (1985) (“statute draws a clear geographical boundary”); *Sidwell*, 71 F.3d at 1140, 29 BRBS at 144(CRT).

⁴ The Board affirmed the administrative law judge’s finding that the living quarters at Port Fourchon, Louisiana, separated from maritime operations by a fence, are covered as within the boundaries of a marine terminal, an enumerated site. *Spain*, 52 BRBS at 75-76.

⁵ Physical distance from the water is irrelevant because the site of the injury is “within the contiguous shipbuilding area which adjoins the water. Alabama Dry Dock’s shipyard adjoins the water. The lot [where the injury occurred] was part of the shipyard, and was not separated from the waters by facilities not used for shipbuilding.” *Kininess*, 554 F.2d at 178, 6 BRBS at 230.

Winchester does not require every square inch of an area “generally” used for loading and unloading to be so used. If it did, we would have a game of hopscotch: The bathrooms in an otherwise “adjoining area” would not be covered, nor would be pavement that although clearly within the area, had not been walked on by stevedores loading and unloading a vessel.

Hudson, 555 F.3d at 435, 42 BRBS at 73(CRT). Similarly, the Fourth Circuit has held:

[I]t is not unusual for marine terminals to cover many hundreds of acres. Such terminals are covered in their entirety. It is not necessary that the precise location of an injury be used for loading and unloading operations . . . ; it suffices that the overall area which includes the location is part of a terminal adjoining water.

Sidwell, 71 F.3d at 1140 n.11, 29 BRBS at 144 n.11(CRT). And the Board has agreed:

[T]o look to the function of the warehouse alone is to narrowly construe the term “area,” and the Fifth Circuit has declined to do so. Employer cannot escape the fact that the building is in the Port of Houston, and the function of the port, necessarily, involves the movement of cargo.

Uresti, 34 BRBS at 130. Thus, a shipyard adjacent to navigable waters with an overall function to build ships is an “adjoining area.” See, e.g., *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980); *Kininess*, 554 F.2d 176, 6 BRBS 229; *Williams*, 45 BRBS 57; *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990).

As the entire shipyard is covered, we reject the assertion that the parking lot lacks a functional nexus to navigable waters merely because it is separated from shipbuilding operations by a fence. *Spain*, 52 BRBS at 75; *Williams*, 45 BRBS 57.⁶ Rather, the parking

⁶ We agree with claimant that this case is analogous to *Williams*, 45 BRBS 57. In *Williams*, after finishing his shift at the Newport News shipyard, the claimant fell and injured his shoulder in the parking lot, within the premises of the employer’s shipyard but separated from the production areas by a fence and a security turnstile. The employer owned and operated the parking lot; employees used it. Relying on *Sidwell*, the Board reversed the administrative law judge’s denial of benefits. The Board stated that the injury occurred “in a shipbuilding area contiguous to navigable waters” and the presence of a fence and security gate did not change the fact that the injury occurred on the employer’s

lot is a covered situs by virtue of its location within the boundaries of employer's shipyard, a covered adjoining area, and it is unnecessary to address its function separately.⁷ *Id.*; see also *Hudson*, 555 F.3d at 435, 42 BRBS at 73(CRT); *Sidwell*, 71 F.3d at 1140 n.11, 29 BRBS at 144 n.11(CRT); *Kininess*, 554 F.2d at 178, 6 BRBS at 230; *Uresti*, 34 BRBS at 130. The administrative law judge's decision incorrectly divides the shipyard into areas and addresses function based on fence lines. We therefore reverse his finding that claimant's injury did not occur on a covered situs.⁸

shipyard. *Williams*, 45 BRBS at 58. As Fourth and Fifth Circuit "adjoining area" law is now congruent, *Williams* guides our decision in this case.

⁷ This case differs from those involving injuries on employers' properties separate from their shipyards. *Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31 BRBS 199(CRT) (5th Cir. 1998) (parking lot at heliport); *McCormick v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 207 (1998) (warehouse separated from shipyard by public roads and security fence); *Griffin v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 87 (1998) (parking lot separated from shipyard by public road and security fence); *Kerby v. Se. Pub. Serv. Auth.*, 31 BRBS 6 (1997), *aff'd mem.*, 135 F.3d 770 (4th Cir.), *cert. denied*, 525 U.S. 816 (1998) (power plant separated from shipyard by private railroad and security fences). It is also distinguishable from cases where no maritime activity occurs on property adjacent to navigable water. See *R.V. [Villaverde] v. J. D'Annunzio & Sons*, 42 BRBS 63 (2008), *aff'd sub nom. Villaverde v. Director, OWCP*, 335 F. App'x 79 (2d Cir. 2009).

⁸ Contrary to employer's argument, this case is distinguishable from mixed-use cases like *BPU Mgmt.* In cases involving mixed-use facilities adjoining navigable waters, injuries are compensable only if they occurred on a covered part of the facility; the facility's areas are addressed in terms of their use, and not all mixed-use facilities adjacent to navigable water are covered in their entirety. *BPU Mgmt.*, 732 F.3d 457, 47 BRBS 39(CRT) (ore processing facility next to navigable waters; injury in underground cross-tunnel not covered); *Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002) (gypsum products plant next to navigable waters; injury in sheet rock production department not on covered situs); *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998) (steel manufacturing plant next to navigable water; injury loading a truck in shipping bay, preceding product's entry into maritime commerce, not on covered situs). A shipyard is not a mixed-use facility; therefore, the administrative law judge's reliance on *BPU Mgmt.* is misplaced.

Accordingly, we reverse the administrative law judge's Decision and Order granting employer's motion for summary decision and his Order denying claimant's motion for reconsideration and remand this case to the administrative law judge for further proceedings to address all remaining issues.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

RYAN GILLIGAN
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge