BRB No. 97-1406

JAMES LEE STROUP	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:_____
	)	
v.	)	
	)	
BAYOU STEEL CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Lloyd N. Frischhertz (Seelig, Cossé, Frischhertz & Poulliard), New Orleans, Louisiana, for claimant.

Leon A. Aucoin, Metairie, Louisiana, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-2559) of Administrative Law Judge Lee J. Romero, Jr., 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). 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).

Claimant worked as a materials handler in employer's shipping bay. On May 14, 1994, he and other employees were loading steel flat bars on a truck destined for a barge. Claimant was injured when he fell approximately 10 feet to the ground below, landing on his back on top of loose pieces of steel. Jt. Ex. 1; Tr. at 54-57,

164-165. Claimant has not worked since this accident, and he filed a claim for permanent total disability benefits. Tr. at 48.

Unresolved issues before the administrative law judge included coverage under the Act, the nature and extent of claimant's disability, the date on which maximum medical improvement occurred, and claimant's average weekly wage. The administrative law judge determined that claimant's injury did not occur on a covered situs and, consequently, he declined to address the remaining issues. Decision and Order at 9. The administrative law judge found that under the decision of the United States Court of Appeals for the Fifth Circuit in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981), claimant's injury did not occur within the confines of an "adjoining area" under Section 3(a) of the Act because the warehouse bay is separated geographically and functionally from employer's loading docks on the river. 33 U.S.C. §903(a); Decision and Order at 7-9. Claimant appeals the administrative law judge's decision, and employer responds, urging affirmance.

Employer is a steel fabrication company. Barges transport scrap metal to the facility, and finished products are transported away via barges, railways and customer trucks. Trucks are used to carry the out-going products to the barges and the railways.[1] Cl. Ex. 12; Tr. at 166-168, 175. The process by which the finished products leave employer's facility begins in the warehouse shipping bay. After the steel is received from the mill, it is stacked and prepared for departure. The shipping department supervisor, Mr. Hunnicutt, assigns some employees to load the trucks and others, if there are vacancies, to load the barges. Tr. at 129, 157, 182-183. Crewmen in the shipping bay load the trucks: either customer trucks which transport steel via roadway to its destination or contractor trucks which carry the steel to the barges or to the railcars on employer's facility. Tr. at 66, 182. If the truck is destined for a barge or a railcar, it is unloaded by crane and then it returns to the shipping bay for additional cargo. Mr. Hunnicutt stated that the priority for loading trucks is: customer trucks, trucks destined for barges, and then trucks destined for

[1]According to employer's records, approximately 63.5 percent of the steel was shipped by barge between May 1993 and May 1994, the period during which claimant was employed. Employer and another company, Massey, both had cranes for loading barges on the docks. According to claimant, there were barges to load approximately 90 percent of the time, but the barges docked at Massey's dock more frequently than at employer's dock. Tr. at 93-94. Massey employees loaded barges at their dock, and contractors or employer's employees loaded barges at employer's dock. Tr. at 55, 162-163, 171.

the rails.[2] Tr. at 173. The shipping bay where claimant was working at the time of his injury is approximately ¼ to ½ mile from the docks and the Mississippi River. Further, the "A" bay is separated from the River by a public road and a levee and is located in a building which also houses the melt shop, the roll mill, and another shipping bay. Cl. Ex. 10. The building containing the shipping bay is the same as the one which was at issue in *Melerine v. Harbor Construction Co.*, 26 BRBS 97 (1992). The injury in this case occurred on the opposite side of the wall from the injury in *Melerine*; *i.e.*, in *Melerine*, the injury occurred in the mill shop while the injury here occurred in "A" Bay.

To be covered under the Act, a claimant must meet both the status requirement of Section 2(3) and the situs requirement of Section 3(a). 33 U.S.C. §§902(3), 903(a); *see, e.g., Arjona v. Interport Maintenance Co.,* 31 BRBS 86 (1997). At issue in this case is only whether claimant's injury occurred on a covered situs. Section 3(a) 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).

[2]Just prior to his injury, claimant had been loading a truck destined for a railcar. However, a barge arrived, and Mr. Hunnicutt shut down rail loading and commenced loading a truck for the barge. Claimant was injured while loading the barge-bound truck. Tr. at 54, 160-161, 189.

33 U.S.C. §903(a) (1994). Coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *Melerine*, 26 BRBS at 97. To be considered a covered situs, a site must have a maritime nexus, but it need not be used exclusively or primarily for maritime purposes. *See Winchester*, 632 F.2d at 504, 12 BRBS at 719; *Melerine*, 26 BRBS at 97. The case at bar arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, which has adopted a broad view of the situs test, refusing to restrict the test by fence lines or other boundaries. *See Sisson v. Davis & Sons, Inc.,* 131 F.3d 555, 31 BRBS 199 (CRT)(5th Cir. 1998). Specifically, the court stated that the perimeter of an "area" is to be defined by function and that the character of surrounding properties is but one factor to be considered. Thus, an area can be considered an "adjoining area" within the meaning of the Act if it is in the vicinity of navigable waters, or in a neighboring area, and it is customarily used for maritime activity. *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729; *see also Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). Using these guidelines, the Fifth Circuit has held that an administrative law judge properly found that a gear room located five blocks from the nearest dock constituted a covered situs because it was in the vicinity of the navigable waterway, it was as close to the docks as feasible, and it had a nexus to maritime activity in that it was used to store gear which was used in the loading process.[3] *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-

[3]Unlike the United States Courts of Appeals for the Fifth and Ninth Circuits, the United States Court of Appeals for the Fourth Circuit has strictly construed the situs requirement. In *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29

729.

BRBS 138 (CRT) (4th Cir. 1995), *cert. denied*, 116 S.Ct. 2570 (1996), the Fourth Circuit held that, in order to constitute a covered situs under the Act, the site must actually adjoin navigable waters; *i.e.*, it must be contiguous to and actually touch the navigable water. With regard to "other adjoining areas," the court stated that non-enumerated areas must be similar to the enumerated ones and must be customarily used for maritime activity. Thus, the *raison d'etre* for the facility or structure must be for use in connection with the navigable waters. *Id.*, 71 F.3d at 1138-1139, 29 BRBS at 142-144 (CRT); *see also Parker v. Director, OWCP,* 75 F.3d 929, 30 BRBS 10 (CRT)(4th Cir. 1998), *cert. denied,* 117 S.Ct. 58 (1996). Following its decision in *Sidwell,* the Fourth Circuit recently held that an injury sustained in a steel fabrication plant by an employee fabricating steel for an inland bridge did not occur on a covered situs. It held that the steel plant, located 1000 feet from the river, did not meet the *Sidwell* test, as the facility, although located on a site contiguous to the Elizabeth River, was used for fabricating steel and lacked a meaningful connection to navigable water. *Jonathan Corp. v. Brickhouse*, 142 F.3d. 217 (4th Cir. 1998).

In this case, the administrative law judge found that claimant's injury occurred in "A" Bay, next to the wall that separates the steel mill from the warehouse bays and that a public road and a levee separate the building from the Mississippi River. Decision and Order at 7. Because the building is not an enumerated situs, the administrative law judge set forth the question of whether it constitutes an "adjoining area" under the Act. He stated that the warehouse has a remote nexus to the water because 63.5 percent of the finished product is shipped by barge, but he found this fact is not dispositive of the issue as the steel also is transported by other means from the plant. Thus, he stated that the fact that the steel moves in maritime commerce does not automatically require a finding of maritime activity. *Id.* Consequently, he rejected claimant's assertion that the shipping bay is an adjoining area because it is an integral part of the loading process. Using the Fifth Circuit's holding in *Winchester* that the crucial factor is function, the administrative law judge held that the shipping bays where claimant was injured in this case are separate from the loading docks on the river both geographically (a levee and a public road separate the two) and functionally (one is used for loading barges and the other is used for storage and loading trucks).[4] Decision and Order at 8. Finally, the administrative law judge stated that, even assuming *arguendo,* that claimant satisfied the status requirement, it is not "automatic" that situs follows.[5] In summary, the administrative law judge held: 1) the functions of "A" Bay are storage of steel and loading of trucks; 2) there is nothing inherently maritime about loading trucks; 3) there is no evidence that the steel produced at the plant is used in shipbuilding; and 4) there is no significant nexus between "A" Bay and the waterfront. Decision and Order at 9. Therefore, he concluded that the "A" Bay, which is in the same building as the steel mill in *Melerine*, is not a covered situs.

Claimant contends the administrative law judge erred in finding that the warehouse bay in which he was injured is not a covered situs. He avers that the

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[4]The administrative law judge noted that employer's ownership of the entire facility -- buildings and docks -- is not dispositive of the issue, citing *Kerby v. Southeastern Public Service Auth.*, 31 BRBS 6, 10 (1997), *aff'd mem.*, 135 F.3d 770 (4th Cir. 1998) (table). Decision and Order at 8. *See also Melerine,* 26 BRBS at 101.

[5]Claimant testified that he regularly worked on the barges at the docks. He stated that he loaded barges, he hooked up hatch covers, and he "drafted" barges (checked the level of the barge in the water). He also laid dunnage and followed the stow plan. Tr. at 66-69, 71, 74-75, 77-78, 95, 131, 144. Most of claimant's testimony was corroborated by his supervisor and a co-worker. Tr. at 163, 170-171, 183, 192.

administrative law judge ignored the broad guidelines set forth by the Fifth Circuit in *Winchester* and that he improperly relied on the Board's decision in *Melerine* and failed to distinguish between the loading function of the warehouse bays and the manufacturing function of the steel mill. Employer disagrees and argues that the administrative law judge correctly applied both *Winchester* and *Melerine*. For the reasons set forth herein, we reject claimant's arguments, and we hold that the administrative law judge properly applied *Winchester* and *Melerine* to conclude that claimant was not injured on a covered situs.

Under *Winchester*, the definition of "adjoining area" is a broad one. It includes those areas in the vicinity of navigable waters which are used for maritime activity. *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729. Thus, the geography and the function of an area are of utmost importance. The Board applied the Fifth Circuit's rule in its decision in *Melerine*. In that case, a claimant was injured while he was working in Bayou Steel's mill, installing a plenum (a container that catches dust from a bag house and leads it out of the mill). *Melerine*, 26 BRBS at 98. The Board affirmed the administrative law judge's determination that the steel mill is not a covered situs under the Act. The Board stated that the steel mill is not used for any maritime activity, thereby distinguishing it from *Winchester*, and that the only nexus between the mill and the water is that Bayou Steel ships products and receives materials by water. The dock whereon this activity occurs is separate and distinct from the mill, and no part of the mill is used in the loading or unloading of vessels. *Id.* at 100-101. Accordingly, the Board held that the steel mill is not used for traditional maritime activity and is not a covered situs.[6] *Id.* at 102.

In finding that claimant was not injured on a covered situs in the instant case, the administrative law judge clearly considered both the geographic and the functional aspects of the areas and noted differences between employer's docks and its warehouse shipping bays. Addressing first the geographic aspect, he stated that the docks are on the navigable Mississippi River while the shipping bays are in a warehouse ¼ to ½ mile from the River, separated therefrom by a levee and a public

[6]The Board distinguished this case from *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 12 BRBS 808 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981), wherein the court found that a site which was used by a manufacturing concern shipping its products by water was a covered situs. In that case, the same site contained both loading equipment and manufacturing machinery. Thus, the Board stated that while a site which had mixed maritime and non-maritime functions may be a covered "adjoining area," a site "devoted entirely to non-maritime manufacturing uses" is not. *Melerine*, 26 BRBS at 101.

road.[7] Although a covered area need not be a prescribed distance from a navigable waterway, *Short v. Sea Train Shipbuilding Corp.*, 9 BRBS 166 (1978), we agree with the administrative law judge's determination that the loading docks and the shipping bays are geographically separate. *Melerine*, 26 BRBS at 101; *Short*, 9 BRBS at 66.

[7]The presence of a public road is not dispositive of whether the area qualifies as a covered situs. *Triguero v. Consolidated Rail Corp.*, 932 F.2d 95 (2d Cir. 1991); *Sawyer v. Tideland Welding Service*, 16 BRBS 344 (1984).

The administrative law judge found that employer's loading dock and shipping bays serve "completely distinct function[s]." Specifically, he held that the loading dock is used to load barges while the shipping bay is used for storage and the loading of trucks, and he stated, "there is nothing inherently maritime about storing and loading steel onto trucks, and these are not traditional maritime activities that technology has moved ashore." Decision and Order at 9. On appeal, claimant makes two arguments on this aspect of the issue. First, he argues that the loading function of the shipping bay is integral to the overall loading process, so the shipping bay should be considered an "adjoining area." Secondly, he avers that the administrative law judge misapplied *Melerine* in that he failed to distinguish between the manufacturing function of the steel mill in *Melerine* and the loading function of the shipping bay at issue herein. We reject claimant's arguments.[8]

Initially, claimant argues that the shipping bays should be considered "an adjoining area" as work therein (loading trucks) is integral to work on the docks (loading barges). Claimant cites *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979), for the purpose of showing that a worker who handles cargo between sea and land transportation is engaged in maritime employment, and he considers it relevant to show that maritime activity occurred in "A" and "B" bays. *See also Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977) (Court held that worker injured while loading cargo discharged from ships onto consignee's truck in terminal is involved in maritime employment); *Handcor, Inc. v. Director, OWCP*, 568 F.2d 143, 7 BRBS 413 (9th Cir. 1978) (member of stuffing gang, loading cargo into containers at warehouse, had necessary status). However, *Ford, Handcor*, and *Caputo* can be distinguished from the instant case because in those cases, the claimants were all injured while working in port or terminal facilities, the function of which is maritime. Here, however, claimant was working in the warehouse of a steel production plant. *See Melerine*, 26 BRBS at 97. Although part of employer's facility is used for loading barges, and loading barges is a maritime

[8]We also reject claimant's allegation that the the administrative law judge improperly segregated between specific parts of the loading process, thereby reviving the "point of rest" theory (denoting the line between stevedoring and terminal functions) which was rejected by the Supreme Court in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). *See also Childs v. Western Rim Co.*, 27 BRBS 208 (1993). Although claimant loaded trucks for transport out of the plant, the administrative law judge correctly noted that loading trucks is not a stevedoring function which moved ashore. Rather, in this case, the product had not even reached the shore to be loaded onto a barge when claimant was injured, so it cannot be said that the product was in maritime commerce and then reached a "point of rest."

activity, *see generally Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 13 BRBS 1048 (5th Cir. 1981), *cert. denied*, 459 U.S. 1169 (1983), the administrative law judge reasoned that employer's purpose is to produce steel and not to move maritime cargo. He acknowledged a maritime nexus in that some of the steel is transported by barge; nevertheless, he stated that the use of river transportation alone does not necessarily render the warehouse's function maritime. He also noted that the job of the crewmen in the shipping bays is to load trucks -- be they contractor trucks destined for barges or railcars or customer trucks destined for the purchaser -- and that there is nothing inherently maritime about loading trucks.

Despite claimant's insistence on distinguishing *Melerine* on the basis of job function, we reject this conclusion. *Melerine* concerned the same steel plant and the same building which are involved in the instant case. Thus, both claimants were injured at a steel mill which is a non-maritime manufacturing operation. That claimant herein was injured in a different part of the building than claimant Melerine does not distinguish the two cases in any legally significant way. Further, although "loading" occurs in the shipping bay where claimant was injured, it is uncontroverted that only trucks are loaded therein. The Board denied situs in *Melerine*, stating "no part of the process of loading or unloading *a vessel* takes place at the mill." *Melerine*, 26 BRBS at 101 (emphasis added). The same statement applies to the instant case: no part of the process of loading or unloading a vessel occurs at the shipping bay where claimant was injured, nor was the site used for intermediate steps in the loading process. The shipping bays are used in the first instance to load trucks which are instruments of land transportation. Additionally, based on their disparate purposes, "it is consistent with *Winchester* to treat the mill [or, here, the warehouse bay] as one functional area and the dock as another." *Melerine*, 26 BRBS at 102. Because *Melerine* involved the same site as the one at issue herein, we hold that *Melerine* is controlling precedent, and the administrative law judge properly applied it to this case. Concurrently, his decision comports with *Winchester*, as the shipping bay where claimant was injured was not customarily used for maritime activities. Based on its function, therefore, the shipping bay in employer's warehouse is not a covered situs, and claimant is not entitled to benefits. *Winchester*, 632 F.2d at 504, 12 BRBS at 719; *Melerine*, 26 BRBS at 97.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief

Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge