BRB No. 92-1720

CHRISTOPHER S. SIDWELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EXPRESS CONTAINER SERVICES,	)	DATE ISSUED:
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant.

Thomas J. Duff and F. Nash Bilisoly (Vandeventer, Black, Meredith & Martin), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (91-LHC-0242) of Administrative Law Judge Richard K. Malamphy 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc*., 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sustained an injury on June 11, 1990, while working for employer as a container mechanic at its Chautauqua facility in Portsmouth, Virginia. Claimant worked for employer in this capacity for 14 years. Employer is in the business of repairing cargo containers and the chassis used to carry them. Employer voluntarily paid claimant temporary total disability benefits under the Virginia Workers' Compensation Act from June 12, 1990, through September 14, 1990, as well as medical benefits. Claimant sought compensation under the Longshore Act.

Employer's facility was previously located on Hill Avenue, next to the gate of Portsmouth Marine Terminals, in Portsmouth, Virginia, where vessels are loaded and unloaded from the Elizabeth River. In 1985, however, the Virginia Port Authority expanded the terminal and purchased employer's Hill Street location. At that time, employer relocated to its present Chautauqua Avenue location, eight-tenths of a mile from the terminal. The new location is surrounded by various businesses, including a sheet metal shop, a paint contractor, a row of houses, an engraving shop, a heating and air-conditioning contractor, a gas station, a fire station, a container yard, a Nissan-owned storage area, a foundry, a wholesale meat distributor, a painting and sandblasting contractor, a railroad yard, and a large residential area across the highway. The new site is located in an area zoned M-2, heavy industrial.

Employer's president, Wayne Matthews, testified that his company contracts directly with steamship lines and does not have any agreement with the terminal itself or with the Virginia Port Authority. He related that approximately 90 percent of the containers and chassis arrived at the site via inland roads, while the remainder come directly from the terminal. Once the equipment is checked and repaired, employer notifies the steamship company and a carrier picks it up. Employer also performs minor repairs at the terminal site using mobile trucks.[1] Employees do not normally alternate between the terminal and Chautauqua sites; claimant worked at the latter location. Until the beginning of 1990 shipside work at the terminal was available on weekends to all mechanics as overtime on a rotating basis; subsequently, however, overtime work is available to mechanics at their usual place of work.

The administrative law judge found that claimant met the status test of Section 2(3) of the Act, 33 U.S.C. §902(3), since maintenance and repair is essential to the continued use of containers in longshoring operations. The administrative law judge determined, however, that the situs requirement of Section 3(a) of the Act, 33 U.S.C. §903(a), had not been met, reasoning that employer's Chautauqua site did not qualify as an "adjoining area" under the "functional relationship" test set forth in *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978).

On appeal, claimant argues that the administrative law judge erred in finding that his injury did not occur on a covered maritime situs. Claimant asserts that the Act must be liberally construed and that the 1972 Amendments indicate that an expansive view of coverage should be taken. Employer responds, urging that the administrative law judge's finding that the Chautauqua facility is not a covered situs be affirmed. In the alternative, employer argues that claimant did not meet the status test, as the vast majority of container and chassis repair performed by employer is done in anticipation of land rather than maritime transportation.

To be covered under the Act, claimant must satisfy both the "status" requirement of Section 2(3) and the "situs" requirement of Section 3(a). *See P.C. Pfeiffer Co., Inc. v. Ford*, 444

[1]Minor repairs were identified as those under $300, involving changing a tire, fixing a light or repairing a mud flap. Tr. at 35.

U.S. 69, 74, 11 BRBS 320, 322 (1979); *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 264, 6 BRBS 150, 159 (1977). The status inquiry under Section 2(3) involves an analysis of the employee's overall employment duties. *Id.* The situs requirement of Section 3(a) covers employees injured in specified locations.

Section 3(a) provides coverage for disability resulting 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) (1988). An injury not occurring on one of the enumerated locations is covered under the Act only if the location of the injury is an "adjoining area" under Section 3(a). *See Herron*, 568 F.2d at 140, 7 BRBS at 411; *Felt v. San Pedro Tomco*, 25 BRBS 362 (1962)(Stage, C.J., concurring and dissenting). Claimant contends on appeal in this case that employer's Chautauqua facility was an "adjoining area," arguing that the United States Supreme Court has held that the Act must be liberally construed in favor of the injured employee. Claimant further asserts that the various courts of appeals which have considered this issue have held that situs includes far more than those locations along the water's edge.

Initially, claimant asserts that the administrative law judge erred in analyzing whether employer's Chautauqua location is an "adjoining area" under the "functional relationship" test set forth in *Herron*, 568 F.2d at 139, 7 BRBS at 411. Claimant contends that this issue should have been analyzed 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 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981), *aff'g on recon. en banc*, 554 F.2d 245, 6 BRBS 265 (5th Cir. 1977). We do not agree that *Winchester* necessarily leads to a different result than the test set forth in *Herron*. Both cases recognize that situs does not turn on physical contiguity to water but is defined by function. The "area" must be one "customarily used by an employer in loading, unloading,..." 33 U.S.C. §903(a). In *Humphries v. Director, OWCP*, 834 F.2d 372, 20 BRBS 17 (CRT) (4th Cir. 1987), *cert. denied*, 108 S.Ct. 1585 (1988), moreover, the United States Court of Appeals for the Fourth Circuit, within whose appellate jurisdiction this case arises, discussed both *Winchester* and *Herron*. The court characterized the Fifth Circuit's decision in *Winchester* as "an opinion which struggled bravely with the issue, [but] ended up with little more than a litany of factors which are not conclusive in a situs determination.... " *Humphries*, 834 F.2d at 374, 20 BRBS at 22 (CRT). The *Humphries* court, however, cited the "functional relationship" test set forth in *Herron* with approval, recognizing that it appeared to be "a more practical approach." *Id.*[2]

[2]In *Humphries v. Director, OWCP*, 834 F.2d 372, 20 BRBS 17 (CRT) (4th Cir. 1987), *cert. denied*, 108 S.Ct. 1585 (1988), claimant was struck by a car and was seriously injured coming from a restaurant "well over a mile from the terminal, along a public highway which did not connect any portions of employer's operations or traverse continuous or contiguous terminal areas." *Id.*, 834 F.2d at 838, 20 BRBS at 24 (CRT). The restaurant was separated from the river and the nearest maritime terminal by a residential neighborhood. The court held that while a broad interpretation of the maritime situs requirement is warranted on statutory and policy grounds, the facts in this case "militate against any description of the accident scene as a maritime situs." *Id.* The court stated that the restaurant was not an "integral part" of the terminal. *Id.*

Factors to be considered in determining whether a site is an "adjoining area" under the *Herron* test include: the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all the circumstances in the case. *See Herron*, 568 F.2d at 139, 7 BRBS at 411. In *Davis v. Doran Company of California*, 20 BRBS 121 (1987), *aff'd mem.*, No. 88-3505, 22 BRBS 3 (CRT)(4th Cir. 1989)(unpublished), the Board applied the *Herron* analysis and held that the place of business of the employer, who was engaged in the business of repairing marine propellers, did not meet the situs test. The facility did not front on water, was one mile by air and two miles by street from water, and was in an area not essentially maritime, as indicated by the presence of a bottling company, a linen service, an auto body shop, a public park, office buildings and residential houses in the area. The Board noted that the site was not chosen for its proximity to navigable waters and that such was merely fortuitous. The decision of the Board was affirmed by the Fourth Circuit in an unpublished opinion.

Applying the "functional relationship" criteria, the administrative law judge in the present case properly found that employer's Chautauqua facility is not an "adjoining area." The administrative law judge found that due to the mobile nature of containers and chassis, employer's business did not require a site particularly suited to maritime purposes.[3] The administrative law judge noted that 90 percent of the equipment brought into employer's facility came from interstate or other inland roads, thereby obviating the need for proximity to the terminal. The administrative law judge further determined that neither the adjoining properties nor those en route to the terminal were primarily devoted to maritime commerce; he found that the zoning was primarily residential and that with the exception of another container yard, the businesses present consisted of a wide variety of light commercial and non-maritime industrial uses. In addition, the administrative law judge noted that while the gates of the terminal are eight-tenths of a mile from employer's facility, and the waterway beyond that, employer's site does not border any shipyard, railway, marine terminal or other facility used for loading or unloading of ships, vessels, or marine cargo. Decision and Order at 6. Finally, the administrative law judge determined that employer's location had not been chosen because of maritime concerns but simply because the City of Portsmouth offered employer low-rate industrial revenue financing. The administrative law judge inferred that since employer looked at different sites, including some in Chesapeake, geographical proximity to the terminal was not a primary concern.

Claimant argues that employer's facility is a covered situs as employer relocated only due to the expansion of the port, it remained in the same maritime business and chose a site near the terminal, and the new location was more spacious and efficient, thereby improving employer's

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[3]Although the administrative law judge cited *Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982), it is the Board's decision which was affirmed by *Motoviloff*, *Bennett v. Matson Terminals, Inc.*, 14 BRBS 526, 530 (1981)(Miller, J., dissenting), that contains the rationale supporting the administrative law judge's statement.

maritime business. The administrative law judge reasonably found that the nature of employer's business did not require that the site be particularly well-suited for maritime purposes. Moreover, while claimant argues that the new site was the closest to the port available at the time of relocation, the administrative law judge in this case reasonably concluded that employer had chosen the Chautauqua site for economic reasons. The administrative law judge's finding is supported in the record by the testimony of Wayne Matthews, employer's president. Although Mr. Matthews testified that the Chautauqua site was the closest site to the terminal available at the time of the relocation, he also stated that the site had been chosen because of the favorable financing offered by the City of Portsmouth. Tr. at 45-46.

Claimant's argument that since employer's overall work activities have not changed since it moved from the terminal, workers such as claimant who are engaged in maritime employment remain covered by Section 3(a), also must fail.[4] Claimant's argument confuses the determination of status with that of situs. The breadth of the requirements of claimant's employment does not enlarge situs under the Act; thus, an employee injured while working off a covered situs is not covered by the Act even if within the course of maritime employment. *See Eckhoff v. Dog River Marina and Boat Works, Inc.*, 28 BRBS 51 (1994); *Cabaleiro v. Bay Refractory Co, Inc.*, 27 BRBS 72 (1993). Moreover, the fact that a site is used for a maritime purpose does not automatically bring it within the coverage of Section 3(a); rather, the situs inquiry looks to the relationship of the place of injury with navigable waters. *See Anastasio v. A.G. Ship Maintenance*, 24 BRBS 6 (1990); *Lasofsky v. Arthur J. Tickle Engineering Works, Inc.*, 20 BRBS 58 (1987), *aff'd*, 853 F.2d 919 (3d Cir. 1988) (table); *Davis,* 20 BRBS at 125; *see also Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 426-27, 17 BRBS 78, 83-84 (CRT)(1985); *Caputo,* 432 U.S. at 249, 6 BRBS at 150. While claimant also contends that mobile trucks were dispatched to the terminal to perform minor shipside repairs, the record indicates that claimant worked only at the Chautauqua site, and it is undisputed that his accident occurred there.

As coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury, we reject claimant's arguments that performing maritime work converts a site to an area covered by the Act.[5] As the administrative law judge properly applied the "functional

[4]In *Sea-Land Service, Inc. v. Director, OWCP [Johns]*, 540 F.2d 629, 4 BRBS 289 (3d Cir. 1976), the Third Circuit, employing a similar analysis to that suggested by the claimant virtually eliminated the situs requirement. In *Humphries v. Director, OWCP*, 834 F.2d 372, 20 BRBS 17 (CRT) (4th Cir. 1987), *cert. denied*, 485 U.S. 1028 (1988), the Fourth Circuit characterized the *Sea-Land* approach as unacceptable.

[5]As the administrative law judge's finding that claimant's injury did not occur on a covered situs is dispositive, we need not address employer's argument that claimant did not have status under the Act. We note, however, that employer's argument that claimant was not engaged in maritime employment because repair of the vast majority of containers and chassis at employer's facility was done in anticipation of land and not maritime transportation, is without merit. It is well settled that container repair is covered employment, as it involves an integral part of an ongoing longshore operation. *See, e.g., Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1988), *aff'd*, 904

relationship" test, and his conclusions are rational, supported by substantial evidence of record and in accordance with law, his determination that claimant's injury did not occur on a covered situs is affirmed. *Accord Lasofsky,* 20 BRBS at 60; *Bennett v. Matson Terminals, Inc.*, 14 BRBS 526 (1981), *aff'd sub nom. Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982). The administrative law judge's denial of the claim is therefore affirmed.

F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990); *Caldwell v. Oceanic Container Service, Inc.*, 13 BRBS 153 (1980); *Insinna v. Sea-Land Service, Inc.*, 12 BRBS 772 (1980); *Cabezas v. Oceanic Container Service, Inc.*, 11 BRBS 279 (1979).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge