BRB Nos. 91-1746
and 93-0975

LUIS C. QUINTANILLA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NATIONAL STEEL & SHIPBUILDING COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits, Decision and Order on Reconsideration, and Decision and Order Granting Modification of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Charles L. Stott (Law Offices of Preston Easley), National City, California, for claimant.

Roy D. Axelrod (Littler, Mendelson, Fastiff, Tichy & Mathiason), San Diego, California, for self-insured employer.

Before: BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, Decision and Order on Reconsideration, and the Decision and Order Granting Modification (90-LHC-1912) of Administrative Law Judge Thomas Schneider 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).[1] We must affirm the findings of fact and conclusions of law of the administrative law judge

[1]Employer, by letter dated July 30, 1996, has moved the Board to retain jurisdiction over this appeal for the additional 60-day period provided in P.L. 104-134. In view of our decision in this

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 suffered an injury when, shortly after leaving work, he fell on an eye-bolt in an employer-managed parking lot he was using as a short-cut as he headed toward the San Diego Trolley to go home. As a result of the fall, he broke a bone in his hand. Claimant filed a claim for benefits under the Act, and employer voluntarily paid benefits for various periods of temporary total disability.

After a formal hearing, the administrative law judge awarded permanent total disability benefits, finding that claimant suffered an injury within the scope of his employment and that the injury occurred on a covered situs. *See* 33 U.S.C. §§902(3), 903(a). The administrative law judge determined that the broken bone in claimant's hand resulted in a shoulder injury, which then rendered him permanently and totally disabled. Decision and Order at 5. The administrative law judge also granted employer relief from continuing compensation liability pursuant to Section 8(f), 33 U.S.C. §908(f), and found that claimant reached maximum medical improvement on November 2, 1989. Decision and Order at 6. On employer's motion for reconsideration, the administrative law judge ruled that employer is entitled to a credit in the amount of $5,576.14, claimant's net recovery in a related third-party action. Employer appealed the award to the Board. While this appeal was pending, employer moved for modification, 33 U.S.C. §922, and employer's appeal was dismissed without prejudice, subject to reinstatement. *Quintanilla v. National Steel & Shipbuilding Co.*, BRB No. 91-1746 (Mar. 17, 1992)(Order).

On December 29, 1992, the administrative law judge granted employer's motion for modification, finding that because employer established the availability of suitable alternate employment, claimant was no longer totally disabled. The administrative law judge thus ruled that claimant suffered from a permanent partial disability from September 27, 1991, based on a loss of wage-earning capacity in the amount of $111.75 per week. Employer appeals from this latter decision, BRB No. 93-0975 and requests reinstatement of its earlier appeal, BRB No. 91-1746. Employer's contentions of error refer primarily to the administrative law judge's initial decision.

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case, we deny this request as moot. In addition, by Order dated May 23, 1996, the Board directed counsel for the employer to forward copies of Employer's Exhibits 1 through 42. The Board has received exhibits 1 through 41 from employer, and Employer's Exhibit 42 from the district director. The administrative record on appeal is now complete.

I. Coverage

On appeal, employer initially contends that claimant's injury falls outside of the Act's coverage. Employer specifically avers that the parking lot on which claimant was injured constitutes neither a maritime situs nor an adjoining area within the scope of Section 3(a), 33 U.S.C. §903(a). Employer further asserts that claimant was injured outside the scope of his employment.

Unless the injury is actually on navigable waters so that coverage is established, *see Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 323-24, 15 BRBS 62, 80-81 (CRT) (1983), a claimant must satisfy both the "status" requirement of Section 2(3) and the "situs" requirement of Section 3(a) to be covered under the Act. *See P.C. Pfeiffer Co., Inc. v. Ford*, 444 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); *see also Crapanzano v. Rice Mohawk, U.S. Construction Co. Ltd.*, 30 BRBS 81, 82 (1996).

Employer does not dispute claimant's status under Section 2(3), but contends that the parking lot on which claimant was injured does not qualify as a maritime situs and is not particularly suited for maritime use. Employer asserts that the lot does not perform a maritime function, is not an enumerated adjoining area as set forth in Section 3(a), 33 U.S.C. §903(a), does not qualify as an exclusively maritime area, and at the time of injury claimant was "not exposed to any hazards uniquely inherent in the ship repair industry."[2] Er. Br. at 16.

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). Accordingly, coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *See Melerine v. Harbor Construction Co.*, 26 BRBS 97 (1992); *Alford v. MP Industries of Florida*, 16 BRBS 261 (1984). If the general area in which the injury occurs is a "maritime area," then the requisite maritime nexus has been established. *Hagenzeiker v. Norton Lilly & Co.*, 22 BRBS 313, 314 (1989).

Because the administrative law judge's finding that NASSCO is in the business of shipbuilding and repair, the sole issue with respect to situs is whether the employer-controlled parking lot, *see* Tr. at 40, qualifies as a covered situs. An employee's activities on the business premises generally are covered. *See Alston v. Safeway Stores, Inc.*, 19 BRBS 86 (1986). Employer's premises include its parking lot. *Alston*, 19 BRBS at 88 n.1; *see generally Perkins v. Marine Terminals Corp.*, 673 F.2d 1097, 1102, 14 BRBS 771, 773-74 (9th Cir. 1982). In this case, the administrative law judge found that the lot is part of employer's premises, and that it was expressly

[2]Employer does not argue that the actual "fenced-in" NASSCO yard where claimant worked was not a covered situs. Indeed, the administrative law judge took official notice that NASSCO is in the business of building and repairing vessels. Decision and Order at 4; *see* 29 C.F.R. §18.201.

reserved for parking by employer's employees. Decision and Order at 3. *Cf. Harris v. England Air Force Base*, 23 BRBS 175 (1990); *Cantrell v. Base-Restaurant, Wright Patterson Air Force Base*, 22 BRBS 372 (1989)(injury on parking lot on Air Force Base did not occur on premises of employer, a separate entity operating on nonappropriated funds). Although employer points out that the lot is owned by the railroad which operates the trolley, *see* Er. Exs. 12, 13, the company submitted a video tape of the lot with a sign which read:

> NASSCO Lot #6, NASSCO parking only TOW AWAY ... The company will not be responsible for loss or damage to cars parked on company property.

Er. Ex. 42; *see* Cl. Br. at 5. The location of the parking lot, which was across a public street outside of NASSCO's fenced-in area, would not require the administrative law judge to find that the lot is excluded from employer's premises. *Cf. Hagenzeiker*, 22 BRBS at 315 (injury on public roads within port complex held on a covered situs). Moreover, the administrative law judge noted that claimant testified that he patrolled the parking lot as part of his light duty work for employer. Decision and Order at 3. Inasmuch as the administrative law judge's findings on this issue are supported by substantial evidence and accord with applicable law, we affirm the administrative law judge's finding that claimant was injured on a covered situs because the lot is part of employer's shipyard premises.

Employer also contends that claimant's injury occurred outside of the scope of his employment because the injury occurred at a time when claimant was not at work and at a place where his work did not require him to go. *See* 33 U.S.C. §902(2). Employer emphasizes that claimant had clocked out from work 15 minutes before the injury, and had elected to take a short cut through Parking Lot No. 6 on his way to the San Diego Trolley, instead of using the public sidewalk which led to the trolley station.

Employer's argument is without merit. It is well-established that for an injury to be considered to arise in the course of employment, it must have occurred within the time and space boundaries of the employment and in the course of an activity whose purpose is related to the employment pursuant to Section 2(2) of the Act, 33 U.S.C. §902(2). *See, e.g., Wilson v. Washington Metropolitan Area Transit Authority*, 16 BRBS 73, 75 (1984). Generally, injuries sustained by employees on their way to or from work are not compensable as outside the scope of employment. *See, e.g., Sawyer v. Tideland Welding Service*, 16 BRBS 344, 345 (1984). Despite this "coming and going rule," employees are provided coverage for a reasonable period of time after work to leave the premises. *Alston*, 19 BRBS at 88.

Initially, we agree with claimant that the "coming and going rule" does not apply in any event because the injury occurred on employer's premises. *See Alston*, 19 BRBS at 88. Furthermore, the parking lot is controlled by employer, a fact cited by the administrative law judge in favor of coverage in this instance because it demonstrates employer's control of that part of the journey where claimant was injured. *See Cardillo v. Liberty Mutual Insurance Co.*, 330 U.S. 469, 479, 67 S.Ct. 801, 807-808 (1947); *see also Perkins*, 673 F.2d at 1102, 14 BRBS at 774. Finally, the

Section 20(a) presumption applies to this issue, and employer on this record has failed to introduce specific and comprehensive evidence which rebuts this presumption. *Mulvaney v. Bethlehem Steel Corp.*, 14 BRBS 593 (1981). In view of the above, we likewise affirm the administrative law judge's conclusion that claimant's injury occurred within the scope of his employment, and affirm the administrative law judge's finding of coverage under the Act.

II. Disability

Employer argues that the administrative law judge's findings are premised on the truth of claimant's testimony which is inherently incredible. Specifically, employer contends that the administrative law judge's "implied" reliance on claimant's testimony is "patently unreasonable." Employer maintains that claimant's testimony and statements to physicians and vocational counselors were deceptive, and that the administrative law judge's crediting of the expert opinions which were derived from these falsehoods is error.[3] Employer, citing *U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982), asserts that because a claim under the Longshore Act must allege a specific work injury, the administrative law judge erred in finding claimant's shoulder impairment compensable since it represents a separate injury for which no "claim" was filed. For that reason employer argues that the shoulder impairment was therefore not properly before the administrative law judge. Employer argues that the administrative law judge erred in finding a shoulder impairment, because there is no objective medical evidence to support this finding. It is based solely on complaints from the claimant. Furthermore, citing Dr. Dickinson's deposition testimony, employer implies that the shoulder injury, impingement syndrome, could not be due to the work injury because claimant did not complain of it until two years after the work injury, and that the doctor only related the shoulder impairment to the work injury because he relied upon claimant's statements. Employer contends that as the evidence fails to establish claimant has a shoulder impairment related to his hand injury, claimant is limited to an award under the schedule.

We reject employer's argument that the administrative law judge erred by entering an award based on claimant's shoulder impairment. Claimant satisfied the requirements of *U.S. Industries* by asserting before the administrative law judge that his fall in Parking Lot No. 6 resulted in an injury to his left hand, arm and shoulder, and by claiming before the administrative law judge that he is totally disabled. *See Dangerfield v. Todd Pacific Shipyards Corp.*, 22 BRBS 104, 107 (1989); *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 96 (1988). Accordingly, we reject employer's argument that any award based on the shoulder impairment is barred under *U.S. Industries*. *See Dangerfield*, 22 BRBS at 107; *see also Cairns v. Matson Terminals, Inc.*, 21 BRBS 252, 255-256 (1988).

Moreover, although the administrative law judge did not follow the prescribed analysis for the application of the Section 20(a) presumption to claimant's shoulder injury, this error is harmless

[3]Employer gives examples of claimant's varying testimony regarding, *inter alia*, his physical symptoms, how many children he has, whether he is right or left-handed, and how many years of school he completed.

to the extent that the administrative law judge reviewed the evidence pertinent to causation, *i.e.*, the opinions of Dr. Dickinson and Dr. Schwab, and reasonably concluded that the initial hand injury resulted in the consequential shoulder disability. Decision and Order at 5. While Dr. Dickinson does ascribe some of the shoulder condition to post-injury sandblasting work, he nevertheless attributes some of the shoulder impairment to claimant's 1987 fall on his left hand. Cl. Ex. 13 at 15-16. Dr. Dickinson explained that the delayed onset of shoulder pain could be due to the fact that claimant was not working for a period of time after he broke his hand, and the shoulder did not become symptomatic until claimant attempted to return to his sandblasting duties. Although the administrative law judge's discussion of this issue is brief, *see generally Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 14 BRBS 538 (2d Cir. 1982), we conclude, based on the context of the Decision and Order as a whole and the administrative law judge's discussion of the evidence of record, *see Sykes v. Director, OWCP*, 812 F.2d 890, 893 (4th Cir. 1987); *see generally Bowman Transportation, Inc. v. Arkansas-Best Freight System*, 419 U.S. 281, 285 (1974), that the administrative law judge's reliance on the opinion of Dr. Dickinson is within his discretion as the fact-finder, notwithstanding the inconsistencies in claimant's recitation of his symptoms to the physicians.[4] As claimant therefore has a shoulder impairment related to the work injury, claimant's recovery is not limited to the schedule. We therefore affirm the award of benefits as supported by substantial evidence based on the record as a whole.

[4]The administrative law judge gave less weight to the opinion of Dr. Schwab that all of claimant's complaints are due to the injuries preceding the 1987 work accident, as claimant was capable of working before this incident.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits, Decision and Order on Reconsideration, and Order Granting Modification are affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge