

MICHAEL C. ROPER	)	BRB Nos. 93-0441
	)	and 93-0441A
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
EXPRESS CONTAINER SERVICES	)	DATE ISSUED:
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	
	)	
	)	
HAYWOOD L. KNIGHT	)	BRB No. 94-0521
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EXPRESS CONTAINER SERVICES	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeals of the Orders Granting Motions for Summary Decision of Richard K. Malamphy,  
Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Claimant Roper appeals and employer cross-appeals the Order Granting Employer's Motion for Summary Decision (91-LHC-3021), and claimant Knight appeals the Order Granting Express Container Services, Inc.'s Motion for Summary Decision (93-LHC-799) of Administrative Law Judge Richard K. Malamphy rendered on claims filed pursuant to the provisions of the Longshore

and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).<sup>1</sup> 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 Roper suffered an inguinal hernia in the course and scope of his employment on August 15, 1991. The hernia was surgically repaired and claimant returned to work on October 28, 1991, without residual impairment. Claimant Knight alleged he suffered from carpal tunnel syndrome resulting from a work injury on April 15, 1992. Both claimants sustained their injuries at employer's container repair facility at 809 Chautauqua Avenue in Portsmouth, Virginia.

---

<sup>1</sup>We hereby consolidate for purposes of decision claimant Roper's appeal and employer's cross-appeal, BRB Nos. 93-0441 and 93-0441A, with claimant Knight's appeal, BRB No. 94-0521. 20 C.F.R. §802.104(a).

The administrative law judge found that employer's facility at this location is not a covered situs under the Act, 33 U.S.C. §903(a), citing his own decision in *Sidwell v. Express Container Services*, 26 BRBS 127 (ALJ) (1992). The administrative law judge thus granted employer's motion for summary judgment in each case and denied benefits.<sup>2</sup>

On appeal, claimants contend the administrative law judge erred in finding that employer's facility is not a covered situs. Claimants contend that this repair facility is an "adjoining area" within the meaning of Section 3(a). Employer responds in support of the administrative law judge's decisions. Employer also has filed supplemental authority, which we accept, noting that the Board and the United States Court of Appeals for the Fourth Circuit affirmed the administrative law judge's decision in *Sidwell*. Employer has filed a protective cross-appeal in *Roper*, BRB No. 93-0441A, challenging the administrative law judge's finding that claimant Roper is a maritime employee under Section 2(3), in the event the administrative law judge's situs determination is reversed.

We affirm the administrative law judge's orders granting summary decision. In its decision in *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (CRT)(4th Cir. 1995), *cert. denied*, 64 U.S.L.W. 3855 (U.S. June 24, 1996)(No. 95-1569), the United States Court of Appeals for the Fourth Circuit addressed whether the same facility at issue in these cases constitutes a situs covered under Section 3(a) of the Act.<sup>3</sup> The court affirmed the administrative law judge's finding, and the Board's affirmance thereof, that the location in question is not an "adjoining area" within the meaning of Section 3(a). In so holding, the court rejected the approach to this issue adopted by the United States Court of Appeals for the Ninth Circuit in *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978),<sup>4</sup> and held that an "adjoining area" under

---

<sup>2</sup>The administrative law judge found that claimant Roper's employment satisfies the status requirement of Section 2(3) of the Act, 33 U.S.C. §902(3). He did not address this issue in claimant Knight's case.

<sup>3</sup>Section 3(a) provides that compensation is payable for injuries

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).

<sup>4</sup>In *Herron*, the Ninth Circuit stated a four-part test for analyzing whether a particular site constitutes an adjoining area:

- 1) the particular suitability of the site for the maritime uses referred to in the statute;
- 2) whether adjoining properties are devoted primarily to uses in maritime commerce;

Section 3(a) must be actually contiguous with or otherwise touch navigable waters. To be included under the Act as an "other area," the area must be a discrete shoreside structure or other facility customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel. *Sidwell*, 71 F.3d at 1138-1139, 29 BRBS at 143-145 (CRT). As employer's Chautauqua facility is eight-tenths of a mile from navigable waters, in an area that is not comprised of an entire terminal, it is not an "adjoining area" under Section 3(a) of the Act. *Id.*; see also *Parker v. Director, OWCP*, 75 F.3d 929, 30 BRBS 10 (CRT)(4th Cir. 1996), *pet. for cert. pending*, No. 95-1840. The administrative law judge's findings that claimants were not injured on a covered situs therefore are affirmed.<sup>5</sup>

Accordingly, the administrative law judge's Orders Granting Motions for Summary Decision are affirmed.

SO ORDERED.

JAMES F. BROWN  
Administrative Appeals Judge

NANCY S. DOLDER  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

---

3) the proximity of the site to the waterway; and

4) whether the site is as close to the waterway as is feasible given all of the circumstances in the case.

Both the administrative law judge and the Board in their decisions in *Sidwell* applied these factors in determining that the Chautauqua Avenue facility is not a covered site.

<sup>5</sup>Employer's protective cross-appeal in *Roper*, BRB No. 93-0441A, therefore is moot.