BRB No. 96-0472

JEFFREY MORRIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PORTLAND LINES BUREAU	)	DATE ISSUED:
	)	
and	)	
	)	
INDUSTRIAL INDEMNITY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer's Motion for Summary Decision, Denying Claimant's Cross-Motion For Summary Decision and Dismissing Claim for Lack of Jurisdiction of Daniel L. Stewart, Administrative Law Judge, United States Department of Labor.

Robert Pardington (Pozzi Wilson Atchison), Portland, Oregon, for claimant.

Robert E. Babcock (Babcock & Company), Lake Oswego, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Employer's Motion for Summary Decision, Denying Claimant's Cross-Motion For Summary Decision and Dismissing Claim for Lack of Jurisdiction (95-LHC-1950) of Administrative Law Judge Daniel L. Stewart 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 if they 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 was employed as a linesman for employer, and was responsible for tying down and untying ships as they entered and left the harbor. As a condition of his employment as a linesman, claimant was required to be on call twenty-four hours a day, seven days a week. When there was a job to be performed, claimant would be paged by employer and informed of the location of his next job assignment. He was permitted one hour in which to arrive at the job site over public roads via his own automobile. Upon completion of a job, claimant would either return home or would be dispatched to his next job assignment. Pursuant to the applicable labor agreement, claimant was paid for at least two hours per job assignment. Furthermore, claimant received an additional half-hour for travel time to any dock in Vancouver, Washington, plus a travel allowance of $9.70 per job.

On January 8, 1995, claimant sustained injuries in an automobile accident which occurred in the course of his employment. Claimant was in Oregon and was returning home after having completed a job in Vancouver, Washington. The accident arose on a public road approximately thirteen miles from the job site in Vancouver, Washington. After employer's insurance carrier denied coverage under the worker's compensation laws of Oregon, claimant filed a claim under the Act seeking compensation and medical benefits for injuries sustained in the automobile accident.

Prior to setting the case for a formal hearing, the administrative law judge received employer's motion and claimant's cross-motion for summary decision on the issue of whether claimant's accident on a public road fell within the coverage provisions of the Act. *See* 33 U.S.C. §§902(3), 903(a). In his Decision and Order, the administrative law judge concluded that the situs requirement of Section 3(a)[1] of the Act had not been met inasmuch as the place of claimant's injury 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); therefore, he granted employer's motion and dismissed the claim.

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[1]Section 3(a) of the Act provides, in pertinent part, that:

> compensation shall be payable under this Act . . . 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) (1988) (emphasis added). As claimant's injury occurred after September 28, 1984, the amended version of Section 3(a) applies to this case. *See* Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, 98 Stat. 1639, 1640 and 1655, §§3(a) and 28(c).

Claimant appeals, asserting that the administrative law judge erred in finding that he was not injured on a covered situs. Specifically, claimant contends that the administrative law judge, in applying the *Herron* test, failed to adequately appreciate that claimant was always on call, was required to work from his personal automobile pursuant to the dictates of employer, and that driving on public roads was central to claimant's employment. Claimant further avers that coverage under the Act should be accorded throughout a linesman's workday to prevent the linesman from continuously walking in and out of coverage. Employer responds that the administrative law judge properly found that claimant's injury did not occur on a covered situs.

Claimant's argument is without merit. We affirm the administrative law judge's finding that the location where claimant was injured is not a covered situs pursuant to Section 3(a). Claimant's reliance on appeal on evidence that his car is his duty station and that automobile travel on public roads is an integral part of his job as a linesman confuses the determination of course of employment with that of situs. The breadth of the requirements of claimant's employment does not enlarge situs under the Act; an employee injured while working off a covered situs is not covered by Section 3(a) even if within the course of his employment. *See Beachler v. National Lines Bureau, Inc.*, 23 BRBS 438, 440 (1990); *Shippy v. Crowley Maritime Corp.*, 20 BRBS 55 (1987). Rather, coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *See Nelson v. Guy F. Atkinson Construction Co.*, 29 BRBS 39 (1995), *aff'd mem.*, No. 95-70333 (9th Cir. Nov. 13, 1996). The specific employment requirements concerning the use of claimant's car and the use of public roads between his residence and the docks do not automatically bring the location of claimant's injury on a public road within the coverage of Section 3(a); rather, the situs inquiry looks to the relationship of the place of injury to navigable waters. *See generally Brown v. Bath Iron Works Corp.*, 22 BRBS 384, 387 (1989); *Davis v. Doran Co. of California*, 20 BRBS 121, 124-125 (1987), *aff'd mem.*, 865 F.2d 1257 (4th Cir. 1989)(table); *Lasofsky v. Arthur J. Tickle Engineering Works, Inc.*, 20 BRBS 58, 60 (1987), *aff'd mem.*, 853 F.2d 919 (3d Cir. 1988)(table). Moreover, we have previously rejected the argument made by claimant that he should be extended coverage under the Act on the basis that Congress, when amending the Act in 1972, intended to provide uniform coverage to alleviate the problem of employees' walking in and out of coverage. *See Beachler*, 28 BRBS at 440-441; *Shippy*, 20 BRBS at 57; *see also Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 105 S.Ct. 1421, 17 BRBS 78 (CRT) (1985).

The administrative law judge correctly found that an injury to a linesman occurring in travel on a public road to or from a job site would be covered under the Act only if the location of the injury met the *Herron* criteria. *See Herron*, 568 F.2d at 137, 7 BRBS at 409; *Humpries v. Cargill, Inc.*, 19 BRBS 187 (1986), *aff'd*, 834 F.2d 372, 20 BRBS 17 (CRT)(4th Cir. 1987), *cert. denied*, 108 S.Ct. 1585 (1988). Factors to be considered in determining whether a site is an "adjoining area" under this 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, e.g., Anastasio v. A.G. Ship Maintenance*, 24 BRBS 6 (1990); *Humphries*, 19 BRBS at 190. The administrative law judge properly concluded that evidence of record established no nexus between the site of claimant's injury and maritime

commerce pursuant to the *Herron* criteria; therefore, the situs requirement was not satisfied.[2] *See Beachler*, 23 BRBS at 438; *Shippy*, 20 BRBS at 55. Moreover, while the requisite nexus may be established by a showing that the general area in which the injury occurred is a "maritime area," the administrative law judge rationally determined that the evidence in the case at bar establishes that the general area surrounding the intersection in which claimant's automobile accident occurred is not a "maritime area." *Cf. Hagenzeiker v. Norton Lilly & Co.*, 22 BRBS 313 (1989); *Sawyer v. Tideland Welding Service*, 16 BRBS 344 (1984). We thus affirm the administrative law judge's finding that claimant has not satisfied the situs requirement contained in Section 3(a) of the Act.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[2]The administrative law judge correctly noted that the Section 20(a) presumption, *see* 33 U.S.C. §920(a), does not apply to the issue of situs. *See, e.g., Hagenzeiker v. Norton Lilly & Co.*, 22 BRBS 313, 315 n. 3 (1989).