BRB Nos. 00-696
and 00-696A

ESTHER JONES (widow of CHARLIE JONES)	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
v.	)	
ALUMINUM COMPANY OF AMERICA	)	DATE ISSUED: April 9, 2001
Self-Insured Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Denying Survivor's Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks, Fleming, Gibbons & Kittrell, P.C.), Mobile, Alabama, for claimant.

Gregory C. Buffalow and Kirkland E. Reid (Miller, Hamilton, Snider & Odom, L.L.C.), Mobile, Alabama, for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order on Remand – Denying Survivor's Benefits (1995-LHC-2055) 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 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).

This is the second time this case has come before the Board. Decedent worked for

employer from July 1972 until his illness and death in March 1980 due to carcinoma of the left lung with metastasis to the brain. From July 1972 through November 12, 1978, decedent worked as a millwright welder, and thereafter he worked as a general mechanic. Cl. Exs. 13, 20. His duties as a millwright welder required him to perform cutting, welding, fusing and heating operations to install, maintain, repair and service machinery at employer's plant.[1] Emp. Ex. 12. As a general mechanic, a category to which all the maintenance-type workers were changed in 1978, decedent was required to "construct, install, maintain, repair, and service all types of equipment, machinery, structures, ducting, and piping systems." Emp. Ex. 11. Claimant contends decedent was exposed to asbestos at employer's facility and this exposure contributed to his death due to cancer. Claimant and her five children filed claims for death benefits. Cl. Exs. 2, 7; 33 U.S.C. §909.

In his first decision, the administrative law judge addressed only whether decedent's work for employer satisfied the Act's status requirement, and he found that decedent's job as a millwright welder and general mechanic did not satisfy the Section 2(3), 33 U.S.C. §902(3), status requirement. Specifically, he found that decedent's work maintaining Conveyor B did not constitute "maritime employment" because it was not an integral part of loading or

[1]Employer's facility converts bauxite into calcine alumina, otherwise known as aluminum oxide, which is later used to produce aluminum. Tr. at 37. Shipments of bauxite are unloaded at the State Port Authority docks and placed on Conveyor A, which is owned and maintained by the state of Alabama. Bauxite destined for employer's facility drops from Conveyor A to Conveyor B, which is owned and operated by employer and most of which is on employer's property. From Conveyor B, the bauxite travels to Conveyor C where it then travels to one of two storage buildings. Emp. Ex. 13; Tr. at 33-35. When employer needs the bauxite in the manufacturing process, workers bulldoze it through trap doors in the floor of the buildings which lead to underground conveyor belts. Tr. at 36; *see also Garmon v. Aluminum Company of America - Mobile Works*, 28 BRBS 46 (1994), *aff'd on recon.*, 29 BRBS 15 (1995).

unloading a vessel. Decision and Order at 7. The administrative law judge stated that when the bauxite spilled from Conveyor A to Conveyor B it came into possession of the ultimate user for manufacturing purposes; therefore, it was no longer in the unloading process and service to Conveyor B did not affect the unloading process. Accordingly, he denied benefits.

Claimant appealed, and the Board reversed the administrative law judge's decision. The Board held that decedent's repair work on Conveyors B and C satisfied the status requirement because the conveyors moved shipped, not stored, materials, and were part of the unloading process. Moreover, the Board held that claimant's work on the conveyor belts was a regular, non-discretionary, albeit infrequent, part of his job. Thus, the Board remanded the case for the administrative law judge to address the remaining issues. *Jones v. Aluminum Co. of America*, 31 BRBS 130 (1997).[2]

On remand, the administrative law judge concluded that in 1994, claimant became aware of the possibility that decedent's death was work-related after she received Dr. Lorino's report stating that decedent's death could be due to asbestos exposure. Thus, he found that claimant's claim, filed in 1994, was timely pursuant to Section 13 of the Act, 33 U.S.C. §913. Decision and Order on Remand at 8. The administrative law judge also found by inference from the testimony of Messrs. House, Simon and Howard, that decedent was exposed to asbestos while working for employer. The administrative law judge invoked the Section 20(a), 33 U.S.C. §920(a), presumption, but found that employer presented sufficient evidence to rebut the Section 20(a) presumption in the form of Dr. Bass's report, which stated that asbestos alone was an unlikely cause of decedent's cancer and that the asbestosis diagnosis was unsubstantiated. Decision and Order on Remand at 11. Accordingly, because he found Dr. Lorino's opinion bordered on "speculation and conjecture," the administrative law judge found that claimant did not establish that an asbestos-related disease caused or contributed to decedent's cancer and death, based on the record as a whole. Therefore, the administrative law judge denied benefits. Decision and Order on Remand at 12.

Claimant appeals this decision. She contends the administrative law judge erred in finding that employer rebutted the Section 20(a) presumption. Employer responds, urging affirmance.[3] BRB No. 00-696. Employer also filed a protective cross-appeal contending the administrative law judge erred in finding the claim timely filed and in determining that

[2]The United States Court of Appeals for the Eleventh Circuit dismissed employer's appeal, *Aluminum Co. of America v. U.S. Dep't of Labor*, No. 97-6959 (11th Cir. Apr. 30, 1998), *reh'g denied*, November 12, 1998, and the Supreme Court denied *certiorari* on May 17, 1999, *Aluminum Co. of America v. Jones*, 526 U.S. 1111 (1999).

[3]In the alternative, employer contends it is entitled to Section 8(f), 33 U.S.C. §908(f), relief; this issue was raised before the administrative law judge, but was not addressed.

decedent sustained an injury on a maritime situs. Employer also asserts that the Board's prior decision on the status issue should be reconciled with the Supreme Court's decision in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), as that case requires a Jones Act seaman to have a "substantial" connection to a vessel and not just spend "at least some of his time" in the service of the vessel. Thus, it argues that decedent was not a maritime employee. Claimant responds to these arguments, urging the Board to reject them. BRB No. 00-696A.

Section 20(a)

Claimant contends the administrative law judge erred in finding the Section 20(a) presumption rebutted. She asserts that Dr. Bass's report is insufficient to sever the connection between decedent's work-related exposure to asbestos and his death. In determining whether a death is work-related, a claimant is aided by the Section 20(a) presumption, which may be invoked only after the claimant establishes a *prima facie* case, *i.e.*, the claimant demonstrates that the decedent suffered a harm and that the accident occurred, or conditions existed, at work which could have caused that harm. *See U.S. Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 14 BRBS 631 (1982); *Gooden v. Director, OWCP*, 135 F.3d 1066, 32 BRBS 59(CRT) (5th Cir. 1998); *Kelaita v. Triple A Machine Shop*, 13 BRBS 326 (1981). Once the claimant establishes a *prima facie* case, Section 20(a) applies to relate the death to the employment, and the employer can rebut this presumption by producing substantial evidence that the decedent's death was not related to the employment. *Brown v. Jacksonville Shipyards, Inc.*, 893 F.2d 294, 23 BRBS 22(CRT) (11th Cir. 1990); *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39 (2000); *see also American Grain Trimmers v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 120 S.Ct. 1239 (2000); *Gooden*, 135 F.3d 1066, 32 BRBS 59(CRT). If the employer rebuts the presumption, it no longer controls and the issue of causation must be resolved on the evidence of record as a whole, with the claimant bearing the burden of persuasion. *Universal Maritime Corp. v. Moore*, 126 F.3d 256, 31 BRBS 119(CRT) (4th Cir. 1997); *see also Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994). Under the aggravation rule, if a work-related injury contributes to, combines with or aggravates a pre-existing condition, the entire resultant condition is compensable. *Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (*en banc*). Thus, application of Section 20(a) presumes that the work injury aggravated or contributed to the pre-existing condition, and the employer must present evidence addressing aggravation or contribution in order to rebut it. *See Hensley v. Washington Metropolitan Area Transit Authority*, 655 F.2d 264, 13 BRBS 182 (D.C. Cir. 1981), *cert. denied*, 456 U.S. 904 (1982).

It is undisputed, and the administrative law judge found, that decedent died of lung cancer with metastasis to the brain, thereby establishing a harm. *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994). The administrative law judge also found, "by inference," that decedent was exposed to asbestos while working for employer. Three former co-workers testified that

they saw decedent either remove bits of insulation when necessary to do the job or they saw him in the area where insulators were removing insulation causing dust. The testimony reveals that the insulation contained asbestos. Jt. Ex. 1 at 12-13, 17, 20, 31; Jt. Ex. 2 at 18, 20-21, 33, 49-51; Tr. at 89, 91-93, 95, 100-101. Dr. Lorino, Board-certified in internal medicine and pulmonary medicine, reported in February 1994 that decedent's previous exposure to asbestos could have contributed to his lung cancer and death. Cl. Exs. 15, 23. He testified that every exposure to asbestos is significant and cannot be excluded. Cl. Ex. 24 at 13, 16. The administrative law judge thus found that the Section 20(a) presumption was invoked.

In order to rebut the Section 20(a) presumption, an employer must present substantial evidence which severs the causal nexus. *American Grain Trimmers*, 181 F.3d 810, 33 BRBS 71(CRT); *Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976). The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, has stated that, in order to rebut the Section 20(a) presumption, employer must present evidence "ruling out" the employment as a possible cause of the injury. *Brown*, 893 F.2d at 297, 23 BRBS at 24(CRT); *cf. Conoco, Inc. v. Director, OWCP [Prewitt]*, 194 F.3d 684, 33 BRBS 187(CRT) (5th Cir. 1999) (employer need not "rule out" the employment as a cause; employer must produce substantial evidence that employment is not the cause). Under this standard, it is sufficient if a physician unequivocally states, to a reasonable degree of medical certainty, that the harm is not related to the employment. *O'Kelley*, 34 BRBS at 41-42. An employer need not establish another agency of causation to rebut the Section 20(a) presumption. *Id.* at 41; *Stevens v. Todd Pacific Shipyards*, 14 BRBS 626 (1982) (Kalaris, J., concurring and dissenting), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983), *cert. denied*, 467 U.S. 1243 (1984).

In this case, employer submitted decedent's medical records together with the report and testimony of Dr. Bass, who is also Board-certified in internal medicine and pulmonary medicine. Emp. Ex. 6. Employer also relies on decedent's normal x-rays between 1972 and 1977, the lack of "diagnostic criteria" demonstrating any asbestos-related disease in decedent's lungs, as well as portions of Dr. Lorino's testimony, as support for Dr. Bass's conclusion that nothing in the reviewed medical records and history indicates that decedent had asbestosis, thereby severing any connection between decedent's employment and his cancer.[4] *See* Cl. Exs. 14, 16, 24; Emp. Exs. 5-8. Dr. Bass stated that cigarette smoking

[4]Both physicians admitted there were no objective diagnostic tests which revealed an asbestos-related condition. Dr. Lorino stated that their existence would be helpful but would not change his opinion that decedent's cancer was related to his asbestos exposure because fibrosis is often microscopic. Cl. Ex. 24 at 11, 17-18. Dr. Bass stated there existed the possibility that a definitive diagnosis of asbestosis could not be made even with the results of those tests. Emp. Ex. 7 at 12. Employer also argued before the administrative law judge that

"could easily account for [decedent's] cancer as the sole cause." Emp. Ex. 7 at 12. He further stated: "I think it is remotely possible but unlikely that asbestos exposure could have done so." *Id.* Nevertheless, he agreed there were two potential factors which could have contributed to decedent's cancer. Emp. Ex. 7 at 14-16, 19. He reported:

> My opinion is that Mr. Jones' lung cancer resulted from a combination of two risk factors. The greatest risk factor was his history of cigarette smoking. The lessor risk factor was his history of asbestos exposure. My opinion is that these two risk factors were probably additive as risk factors for the development of his lung cancer.

Emp. Ex. 6. Because he found there was some question as to whether a diagnosis of asbestosis could be substantiated, the administrative law judge found that the Section 20(a) presumption was rebutted. Decision and Order on Remand at 11. However, Dr. Bass stated that decedent's exposure to asbestos could have contributed, at least in part, to his lung cancer and death, and he identified asbestos exposure as an additive risk factor in the development of decedent's lung cancer. As he never affirmatively stated that decedent's cancer was not caused in part by asbestos exposure, his opinion is insufficient to rebut the Section 20(a) presumption under either the "ruling out" standard or the "substantial evidence" standard. *See Brown*, 893 F.2d at 297, 23 BRBS 24(CRT); *American Grain Trimmers,* 181 F.3d 810, 33 BRBS 71(CRT); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84 (1995). Moreover, the absence of diagnostic evidence of asbestosis does not constitute substantial evidence sufficient to rebut the Section 20(a) presumption, given that the physicians' opinions allow for asbestos to have contributed to decedent's cancer. *Adams v. General Dynamics Corp.*, 17 BRBS 258, 261 (1985). Thus, employer has

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Dr. Lorino's testimony should be excluded as inadmissible as expert opinion in light of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). As the administrative law judge is not bound by formal rules of evidence, 33 U.S.C. §923, we reject this argument. *See Casey v. Georgetown Univ. Medical Center,* 31 BRBS 147 (1997). As a Board-certified specialist, Dr. Lorino certainly qualifies as an expert witness, who could be credited by an administrative law judge. In any event, the administrative law judge ultimately did not credit his opinion.

not presented substantial evidence which severs the connection between decedent's death and his employment. Therefore, we reverse the administrative law judge's determination that the Section 20(a) presumption was rebutted, and we hold that decedent's death is work-related as a matter of law. *Swinton*, 554 F.2d 1075, 4 BRBS 466; *Bridier*, 29 BRBS 84. We must, therefore, address the issues employer raises in its cross-appeal.

Status

Employer first argues that decedent did not meet the status requirement. Rather than asserting error in the Board's previous decision, which is the law of the case, employer asserts that the Board's reliance on the standard enunciated by the Supreme Court in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977), that an employee need only spend "at least some time" in maritime activities in order to be covered under the Act must be reconciled with the Supreme Court's more recent holding in *Latsis*, 515 U.S. 347, that a Jones Act seaman must have a "substantial" connection to a vessel. This argument lacks merit. The two standards employer would have us reconcile involve two different types of employees and coverage under two different Acts; they were not designed in conjunction to serve the same purpose. For this reason, they need not be reconciled or interpreted in the same way. *Erlenbaugh v. United States*, 409 U.S. 239 (1972); *Powers v. Sea Ray Boats, Inc.*, 31 BRBS 206, 211-212 (1998); *see also McDermott Int'l Inc. v. Wilander*, 498 U.S. 337, 26 BRBS 75(CRT) (1991) (Jones Act and Longshore Act are mutually exclusive). Moreover, the United States Court of Appeals for the Fifth Circuit rejected the Board's "substantial portion" standard as being contrary to the letter and spirit of the Supreme Court's holding in *Caputo*, 432 U.S. 249, 6 BRBS 150, as "some" time is not "substantial" time. *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). The Eleventh Circuit has not overruled that decision.[5] *See also Schwabenland v. Sanger Boats*, 683 F.2d 309, 16 BRBS 78(CRT) (9th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981). Therefore, we reject employer's contention regarding the status requirement.

Section 13

Employer next contends the claim for death benefits was not timely filed pursuant to Section 13. It argues that, through reasonable diligence via its 1977 abatement program and

[5]Decisions of the Fifth Circuit issued prior to close of business on September 30, 1981, are binding precedent in the Eleventh Circuit, wherein this case arises, unless specifically overruled by the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*); *see Stratton v. Weedon Engineering Co.*, __ BRBS __, BRB No. 00-583 (Feb. 13, 2001).

subsequent postings, claimant should have been aware of decedent's exposure to asbestos and its hazards in the 1970s. Thus, employer avers that shortly after decedent's death in 1980, claimant should have been aware of the relationship between asbestos exposure at employer's facility and decedent's death and that the claim filed in 1994 is untimely.

Section 13(b)(2) provides:

> a claim for compensation for death or disability due to an occupational disease which does not immediately result in such death or disability shall be timely if *filed within two years after the employee or claimant becomes aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death* or disability, or within one year of the date of the last payment of compensation, whichever is later.

33 U.S.C. §913(b)(2) (emphasis added). Claimant asserted that she first became aware of a possible relationship between decedent's employment and his death after reading Dr. Lorino's report in 1994. The administrative law judge rationally held that any abatement program or postings warning of hazards, which could serve as "presumed knowledge" to decedent, does not extend to claimant. Decision and Order on Remand at 7-8. The awareness required by Section 13(b)(2) is claimant's awareness of a relationship between the employment, the disease and the death. *See generally Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989). As this finding is supported by substantial evidence, we affirm the administrative law judge's conclusion that the claim herein was timely filed in 1994, after claimant became aware of the relationship between asbestos exposure at employer's facility and decedent's death. *See generally Love v. Owens-Corning Fiberglas Co.*, 27 BRBS 148 (1993); *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in result).

Situs

Employer contends that decedent was not injured on a covered situs. First, it challenges both the administrative law judge's and the Board's statements that the parties stipulated that decedent was injured on a covered situs. Second, it asserts that while decedent may have been exposed to asbestos at its facility, that exposure did not occur while decedent was working on a covered situs; it contends the exposure, if any, occurred while decedent worked in the manufacturing areas of the facility. Claimant, in response, asserts only that decedent's exposure to asbestos should not be limited to the times he worked on the conveyor system.

With regard to whether situs was at issue in the initial proceedings, the administrative law judge stated: "Situs has not been contested in this case as the 'alleged injury' occurred

while the [decedent] was working at a site bordering on a navigable waterway." Decision and Order at 4. In its decision, the Board relied on the administrative law judge's statement in noting that situs was not at issue. *Jones*, 31 BRBS at 131 n.4. On remand, the administrative law judge stated he was bound by the Board's decision on the matter. Upon further review of the record, it is clear that employer disputed whether decedent was exposed to asbestos on a covered situs from the outset of the proceeding and that the issue has not been addressed fully. *See* Tr. at 7.

To obtain benefits, an injury must occur on a covered situs. *Brooker v. Durocher Dock & Dredge*, 133 F.3d 1390, 1392, 31 BRBS 212, 213-214(CRT) (11th Cir.), *cert. granted*, 524 U.S. 982, *cert. dismissed*, 525 U.S. 957 (1998). Section 3(a) of the Act 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).

Coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998); *Melerine v. Harbor Construction Co.*, 26 BRBS 197 (1992). 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 Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981); *Stratton*, slip op. at 6-7. 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 504, 12 BRBS 719; *see also Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978).

In this case, the parties stipulated that employer's facility is adjacent to the navigable waters of the Mobile River. Moreover, it is undisputed that employer customarily used a portion of its facility for loading and unloading materials to and from barges, *Jones*, 31 BRBS at131 n.2, and that the bauxite needed for producing alumina arrives on barges at the state docks and is transported to employer's facility by a conveyor system, which constitutes loading and unloading. Accordingly, that portion of employer's facility where loading and unloading occur constitutes a maritime situs. *Winchester*, 632 F.2d 504, 12 BRBS 719.

It is also clear, however, that employer's manufactuing plant is not a covered situs. The Fifth Circuit's decision in *Winchester*, 632 F.2d at 515, 12 BRBS at 728, recognizes that

the "function" of an adjoining area must be one that is used for the loading, unloading, repairing or building of vessels. A plant that manufactures aluminum oxide is not engaged in these functions. *See Stroup,* 32 BRBS 151; *Melerine,* 26 BRBS 97; *see also Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86(CRT) (4th Cir. 1998), *cert. denied*, 525 U.S. 1040 (1998). In *Stroup,* the Board recognized that there is a point at which the maritime process ceases, and the manufacturing process begins, and vice versa. *Stroup,* 32 BRBS 151. This statement is consistent with cases holding that employees, whose duties are integral to a manufacturing process rather than to a longshoring process, are not engaged in maritime employment pursuant to Section 2(3) of the Act. *See Coyne v. Refined Sugars, Inc.,* 28 BRBS 372 (1994); *Garmon v. Aluminum Co. of America-Mobile Works,* 28 BRBS 46 (1994), *aff'd on recon.*, 29 BRBS 15 (1995). As employer's operation contains manufacturing facilities as well as areas used in maritime work, the entire site is not covered under Section 3(a); the plant itself lacks the functional nexus to be considered a covered area, and it cannot be brought into coverage simply because goods are shipped by water from another portion of the facility. *See Brickhouse,* 142 F.3d 217, 32 BRBS 86(CRT).

The entire area used for loading, however, including the areas containing the conveyors bringing raw materials into the plant, is encompassed by Section 3(a), as is illustrated by the Board's decisions in *Gavranovic v. Mobil Mining & Minerals*, 33 BRBS 1 (1999), and *Uresti v. Port Container Industries,* 33 BRBS 215 (Brown, J., dissenting), *aff'd on recon.*, 34 BRBS 127(2000) (Brown, J., dissenting). In *Gavranovic*, two claimants were injured in buildings where finished fertilizer products were stored to await further transhipment. The Board affirmed the administrative law judge's finding that the claimants were injured on a covered situs. The buildings in question were adjacent to navigable waters and conveyor belts linked the buildings to areas from which vessels were loaded. *Gavranovic,* 33 BRBS at 4-5. There was no contention that the claimants were injured in areas of employer's facility where only manufacturing took place. As they were injured in an area used as part of the shipment process, they were covered by the Act, regardless of the precise use of the pinpoint location of injury. In *Uresti,* the employer's facility was a storage warehouse in the Port of Houston. The Board first held that the warehouse itself had a maritime function as maritime cargo was stored there after it was unloaded and before it entered the stream of land transportation. *Uresti*, 33 BRBS at 217-218. The Board further rejected employer's assertion that the use of this warehouse should be viewed in isolation. Inasmuch as the warehouse is in the Port of Houston, and the function of the port necessarily involves the movement of maritime cargo, the Board held the claimant was injured on a covered situs. *Uresti,* 34 BRBS at 130; *see also Peterson v. General Dynamics Corp.,* 25 BRBS 71 (1995), *aff'd sub nom. Ins. Co. of North America v. U.S. Dep't of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993) (entire shipyard covered). As the instant case involves both areas used for loading and unloading and areas used solely for the manufacturing process, we turn to employer's contention that decedent's exposure to asbestos, if any, occurred during non-maritime employment in the manufacturing

areas of the facility and not in the covered areas of the facility. Thus, employer argues that whatever exposure decedent may have had is not covered by the Act.

We agree with employer that decedent must have been exposed to asbestos on a covered situs in order for the claim to be compensable.[6] Section 3(a) of the Act itself states that "compensation is payable . . . only if the . . . death results from *an injury occurring"* on a covered situs. 33 U.S.C. §903(a) (emphasis added). In an occupational disease case such as this one, this means that the employee must have been exposed to injurious stimuli on a covered situs. Case law inferentially supports this proposition. In *Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 12 BRBS 975 (5th Cir. 1981), *aff'g* 10 BRBS 340 (1979), *cert. denied*, 454 U.S. 1080 (1981), the claimant was exposed to injurious stimuli on a covered situs on only two occasions in 1967 and on non-covered areas of the employer's facility for a greater portion of his employment. The Fifth Circuit affirmed the Board's rejection of a *de minimis* rule for coverage. *Fulks*, 637 F.2d at 1011-1012, 12 BRBS at 978; *see also Meardry v. International Paper Co.*, 30 BRBS 160 (1996) (majority of exposure on non-maritime portions of employer's property - claimant covered); *Corwin v. Arthur Tickle Engineering Works*, 8 BRBS 170, 171-172 (1978) ("even a short period of exposure to injurious stimuli at a situs that is clearly covered under the Act is sufficient to satisfy the jurisdictional requirements of Section 3(a) in a case involving an occupational disease.") In this case, however, employer argues that *none* of the exposure occurred in covered areas.[7] The administrative law judge's finding on the matter of where the exposure occurred is not specific. He stated only:

> The record indicates that asbestos was present in the plant and that welder-millwrights and general mechanics such as Jones removed asbestos containing insulation on occasion, with or without permission. This inference is strongly

[6]In contrast, one who is otherwise a "maritime employee" need not sustain his injury while engaged in maritime employment. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977).

[7]Claimant has proven that decedent was a covered employee who sustained a work-related injury as a matter of law. The burden thus falls to employer as the proponent of this argument to demonstrate that decedent was not exposed to asbestos on the covered site.

supported by Messrs. House, Simon, and Howard.

Decision and Order on Remand at 9. Thus, the administrative law judge did not determine whether decedent was exposed to asbestos during maritime employment on this covered situs.

The record contains conflicting testimony as to whether the conveyor areas contained insulated steam pipes and, consequently, asbestos materials. Henry Simon, Eddie Howard, and Reginald House, former co-workers of decedent's, all testified as to exposure to asbestos insulation in the manufacturing areas of the facility. Jt. Exs. 1-2; Tr. at 81-104. Mr. House stated that asbestos insulation could be found on steam lines in all buildings throughout the facility. Mr. Howard testified that insulated steam pipes could be found throughout the plant, including in the conveyor buildings and tunnels but not on the conveyors from the docks. Jt. Ex. 2. Ray Hartwell, a former plant manager, testified that, while steam lines requiring insulating were prevalent throughout the facility, there were none in the conveyor galleries or tunnels. Heat in those areas was provided by electric lamps and heaters. Tr. at 74-75, 99-100. Mr. Simons had no knowledge of claimant's work on the outdoor conveyors and was unsure whether asbestos was in the indoor conveyor system because of the red bauxite dust which covered everything. Given the conflicting testimony which was not addressed by the administrative law judge, and the necessity for at least *some* exposure to have occurred while decedent was on a covered situs, we remand the case to the administrative law judge for consideration of whether decedent was exposed to asbestos on a covered situs.

Accordingly, the administrative law judge's finding that decedent's death was not related to his employment is reversed. The case is remanded for findings on whether decedent was exposed to asbestos on a covered situs, and for findings on any remaining issues. In all other respects, the Decision and Order on Remand is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge