

BRB No. 02-0511

LEON CHARLES)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
UNIVERSAL OGDEN SERVICES)	DATE ISSUED: <u>APR 17,</u>
)	<u>2003</u>
and)	
)	
ALASKA NATIONAL INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Leon M. Charles, New Orleans, Louisiana, *pro se*.

R. Scott Jenkins (Jones, Walker, Waechter, Poitevent, Carrère & Denègre, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2001-LHC-1651) of Administrative Law Judge Larry W. Price 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). In an appeal by a claimant who is not represented by counsel, the Board will review the administrative law judge's findings of fact and conclusions of law to determine if they are rational, supported by substantial evidence, and are in accordance with law. If they are, they must be affirmed. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was employed as a truck driver to deliver boxes of groceries to

docks on the Gulf coast where they were loaded onto vessels for shipment to offshore oil rigs. Claimant would load his truck at employer's warehouse in Harahan, Louisiana, and drive to docks on the Gulf coast, 65 to 70 miles away, where he would unload the boxes from the truck and load them into "grocery boxes," also referred to as containers. He would then take anything left in the empty "boxes," such as spoiled food, as well as empty containers, load them onto his truck and return to the warehouse. On May 29, 1997, while unloading the returns at employer's warehouse, claimant injured his back and ribs when he fell over the gate of the truck. Claimant initially sought benefits under the Louisiana state workers' compensation program, but benefits were ultimately denied on appeal. Claimant sought benefits under the Act.

Claimant was not represented by counsel before the administrative law judge. The administrative law judge held that, as the state court found that claimant was not covered under the Longshore Act, he would restrict the hearing to the issue of coverage. After a hearing and review of the evidence, the administrative law judge found that claimant did not meet the status requirement as his sole responsibility on the waterfront was to pick up and deliver cargo unloaded from, or destined for, maritime transportation. In addition, the administrative law judge found that employer's warehouse has no functional relationship to the nearby Mississippi River and that the waterfront with which the warehouse has a functional nexus is 65 to 70 miles away. Thus, the administrative law judge found that claimant's injury did not occur on a covered situs and denied benefits under the Act.

Claimant, without legal representation, appeals the administrative law judge's decision. Employer responds, urging affirmance of the administrative law judge's decision as it is supported by substantial evidence and is in accordance with law.

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or that his injury occurred on a landward area covered by Section 3(a), and that his work is maritime in nature and is not specifically excluded by a provision of the Act. 33 U.S.C. §§902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Thus, in order to demonstrate that coverage exists, a claimant must satisfy

¹ The Louisiana Fourth Circuit Court of Appeals found that the evidence does not support the Workers' Compensation Judge's finding that claimant has a continuing disability. The court also addressed claimant's contention on appeal that the claim should have been brought under the Longshore Act rather than the state act and held that claimant did not meet the status requirement of the Longshore Act. *Charles v. Universal Services Inc.*, No. 99-CA-0689 (La. 4th Cir. Ct. App. 2000); Emp. Ex. 3.

the “situs” and “status” requirements of the Act.

After a review of the evidence, we affirm the administrative law judge’s finding that claimant’s injury did not occur on a covered situs. Section 3(a) 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).

33 U.S.C. §903(a). 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 Constr. Co.*, 26 BRBS 97 (1992). To be considered a covered situs, a landward site must be either one of the sites specifically enumerated in Section 3(a) or an “adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.” 33 U.S.C. §903(a). Employer’s warehouse is not an enumerated situs, and the administrative law judge found that it is not an “adjoining area” within the meaning of Section 3(a).

In determining whether a site is within an “adjoining area” under Section 3(a), the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that the perimeter of an area is defined by function rather than labels or fence lines; thus, a covered area encompasses sites customarily used for maritime activity by any statutory employer. Moreover, an area can be “adjoining” if it is “close to or in the vicinity of navigable waters, or in a neighboring area...” *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 514, 12 BRBS 719, 727 (1980), *cert. denied*, 452 U.S. 905 (1981); *Melerine*, 26 BRBS 97. Thus, the geographic area and the function of the site are of the utmost importance in determining whether a location is a covered situs. See *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001). In *Winchester*, the court held that claimant’s injury in a gear room located five blocks from the nearest dock occurred on a covered site as it occurred within an area customarily used by employers for loading and unloading. Not only was the gear room in a general area adjoining navigable waters where other gear rooms were located and which was thus customarily used for loading activities, but the gear room itself also had a sufficient nexus to the waterfront to be a covered site. Most recently, the Fifth Circuit held a worker injured 50-300 feet from the Harvey Canal, a navigable waterway, was not injured on a covered situs since at the time of the worker’s injury, the facility was not yet used to

load or unload cargo, or to repair, dismantle or build a vessel. *Boomtown Belle Casino v. Bazor*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002). The court stated that whether a site is an “adjoining area” is determined not only by geographic proximity to navigable waters, but also by the nature of the work performed there at the time of the injury. *Id.*, 313 F.3d at 304, 36 BRBS at 83(CRT).

Similarly, in *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 Board considered a case in which the claimant was injured at employer’s container refurbishment facility, which was 12 miles from employer’s terminal at the Port of Oakland. The site of injury was located approximately 750 feet from a waterway and approximately ½ mile from the deep water Port of Richmond. However, employer did not use the harbor facilities at that port in conjunction with its refurbishment operations. The Board affirmed the administrative law judge’s finding that employer’s facility was not a covered situs as it was not particularly suited to maritime uses, the site was not as close as feasible to employer’s terminal and it was chosen on the basis of economic factors considered by businesses generally. Moreover, the areas adjoining the facility were not primarily devoted to maritime business pursuits. Thus, the Board concluded that the proximity of employer’s facility to navigable waters was fortuitous and not dictated by maritime concerns. *Bennett*, 14 BRBS at 531.

In the present case, employer’s warehouse is located near the Mississippi River, with a levee, River Road, and three other companies between the warehouse and the river. Employer’s warehouse stored groceries and supplies which were sent by truck to a dock 65 to 70 miles away for shipment to offshore oil rigs. The administrative law judge found that the Mississippi River played no role in the functioning of employer’s business nor in that of any of the surrounding businesses, as there are no docks in the area near employer’s warehouse from which loading or unloading of vessels could occur and as employer’s nearest delivery point was 65 to 70 miles from the warehouse. Employer’s representative testified that the warehouse could have been located anywhere and that employer did not make any deliveries to sites on the Mississippi River. Tr. at 68. The administrative law judge also found that there is no evidence that the properties adjoining employer’s warehouse are primarily maritime in nature, Tr. at 68-69. Therefore, the administrative law judge rationally found that the proximity of employer’s facility to the Mississippi River was not dictated by maritime concerns and that there is no functional relationship between employer’s warehouse and the Mississippi River. While goods from employer’s warehouse are ultimately loaded onto vessels, all loading and unloading activities occur at docks on the Gulf Coast, and the

² The site adjoining the navigable waterway was to be used in the future as the docking area for a casino vessel.

warehouse is too far away from those docks to be considered part of that general area. Based on these factors, we conclude that employer's warehouse cannot be considered an "adjoining area" within the meaning of the Act. The facility functioned as a warehouse from which trucks, not vessels, were loaded. Although near navigable waters, neither employer's business nor surrounding properties had facilities on the water for loading, unloading, building or repairing vessels. Therefore, we affirm the administrative law judge's finding that claimant's injury did not occur on a covered situs as it is supported by substantial evidence and in accordance with law. See *Boomtown Belle*, 313 F.3d at 304, 36 BRBS at 83(CRT); *Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31 BRBS 199(CRT) (5th Cir. 1998); *Bennett*, 14 BRBS at 531. Moreover, as we affirm the administrative law judge's finding that claimant's injury did not occur on a covered situs, we need not address the administrative law judge's finding that claimant did not meet the status requirement under the Act. Consequently the denial of benefits is affirmed.

Accordingly, the administrative law judge's decision denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

³ In its response brief, employer contends that as the Louisiana Court of Appeals previously found claimant lacked status as a covered employee under the Longshore Act, the doctrine of issue preclusion bars consideration of this issue by the Board. We need not address this contention as we deny benefits on alternate grounds.

PETER A. GABAUER, Jr.
Administrative Appeals Judge