BRB No. 02-0547

RICHARD DICKERSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MISSISSIPPI PHOSPHATES CORPORATION	)	DATE ISSUED: APR 29, 2003
	)	
and	)	
	)	
U.S. FIDELITY & GUARANTY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin & Dulin, Ltd.), Gulfport, Mississippi, for claimant.

A. Kelly Sessoms (Brown$Buchanan$Sessoms, PA), Pascagoula, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2001-LHC-2685) of Administrative Law Judge Clement J. Kennington 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 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, a temporary AB@ mechanic who began his employment on January 29, 1998, injured his leg, back, neck, and shoulders, at work on March 8, 1998. He fell off a ladder while welding in employer=s phosphoric acid plant located about 100 feet from the water=s edge. Claimant returned to work and, on March 31, 1998, was reinjured while working near employer=s temporary shop. Claimant allegedly quit his job that day and has not returned to work.

Employer is a chemical plant which manufactures fertilizer. Tr. at 107-109. The plant is located in the Port of Pascagoula, Mississippi, off Bayou Casotte, a navigable waterway leading to the Gulf of Mexico. The plant takes in phosphoric rock by vessel, converts it into sulfuric acid and then phosphoric acid, and the phosphoric acid is made into a fertilizer called diammonium phosphate. The fertilizer leaves employer=s plant by rail, truck, or barge. Tr. at 116. Claimant described his job with employer as requiring him to weld pipe and operate forklifts, cherry pickers, and front end loaders. Tr. at 31. Mr. Law, claimant=s former supervisor, stated that claimant=s work required him to perform a lot of steel fabrication work, some expansion work in the phosphoric acid plant, some pipefitting, and foundation work for machinery. Tr. at 135-136; Cl. Ex. 11 at 4-5. At the hearing, claimant conceded that he never loaded or unloaded a vessel, never worked in the materials handling department which loads and unloads vessels, and did not maintain or repair any equipment used in the loading or unloading of a vessel. Tr. at 92. Employer paid claimant Mississippi state workers= compensation and medical benefits totaling over $100,000. Claimant seeks temporary total disability benefits under the Act asserting that his compensation rate is $200 more per week under the Act than under the state workers= compensation scheme.

The administrative law judge found that claimant did not meet the status test of Section 2(3) of the Act, 33 U.S.C. ' 902(3), or the situs test of Section 3(a) of the Act, 33 U.S.C. ' 903(a). Consequently, the administrative law judge denied claimant benefits since he was not covered under the Act. Assuming, *arguendo*, that claimant met both the status and situs tests, the administrative law judge found that claimant=s injuries were work-related and that claimant would be entitled to disability and medical benefits.

On appeal, claimant challenges the administrative law judge=s status and situs findings. Claimant also generally challenges the administrative law judge=s findings on the merits. Employer responds in support of the administrative law judge=s decision denying benefits, contending he properly found that claimant did not meet the status and situs tests.

Status

Claimant argues that the administrative law judge erred in finding that the status test was not met under Section 2(3) of the Act because claimant=s job assignment of removing pilings from the water=s edge, which lasted for approximately two weeks, is maritime work. To be covered under the Act, a claimant must satisfy both the Astatus@ requirement of Section 2(3) of the Act, 33 U.S.C. '902(3), and the Asitus@ requirement of Section 3(a), 33 U.S.C. '903(a). *See P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 160 (1977). Section 2(3) states:

> The term Aemployee@ means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, ...@

33 U.S.C. '902(3). Generally, an employee satisfies the Astatus@ requirement if he is engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See* 33 U.S.C. '902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT)(1989). To satisfy this requirement, a claimant must Aspend at least some of [his] time in indisputably longshoring operations.@ *Caputo*, 432 U.S. at 273, 6 BRBS at 165.

We affirm the administrative law judge=s finding that claimant=s work removing wood pilings from the water=s edge is not covered employment. The administrative law judge found, and it is uncontested by the parties, that this work was part of claimant=s regularly assigned duties based on the short period of his overall employment. *See Boudloche v. Howard Trucking Co.*, *Inc.,* 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). However, the administrative law judge also found that the job was not maritime work because it was not established that it had a connection to the docking of ships, or to the loading, unloading, building, or repairing of vessels.

In this regard, the administrative law judge discussed the testimony of claimant, his former supervisor, Mr. Law, and his former co-worker, Mr. Thomas. Claimant testified to removing a large stack of wood pilings from land adjacent to the bayou and some from the water with a cherry picker, placing the unbroken pilings on

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[1]Thus, we reject claimant=s contention that the administrative law judge failed to consider his testimony. Any error in the administrative law judge=s failure to specifically consider Employer=s Exhibit 2 is harmless as this exhibit details claimant=s work duties for certain dates in February and March 1998 and merely supports the administrative law judge=s finding that claimant spent some time removing the wood pilings.

the ground and the broken pilings in the dumpster. Tr. at 37-40. Claimant understood that the wood pilings were previously used as a place barges and ships were tied up. Tr. at 39-40. Mr. Law testified that claimant placed wood pilings which were on land into a dumpster, presuming that the pilings originally came from the water because they had barnacles on them. Tr. at 143, 154-155; Cl. Ex. 11 at 29. Mr. Thomas testified that he and claimant removed wood pilings from the ground and placed them in a dumpster and that neither he nor claimant removed them from the water. Cl. Ex. 9 at 6, 7, 19.

In conjunction with this testimony, the administrative law judge discussed the holdings in *Herb=s Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT)(1985), *McGray Constr. Co. v. Director, OWCP [Hurston]*, 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999), and *Pulkoski v. Hendrickson Bros., Inc.*, 28 BRBS 298 (1994), and concluded that claimant=s job was not maritime work. In *Gray*, 470 U.S. 414, 17 BRBS 78(CRT), the Supreme Court held that a land-based welder injured while working on a fixed offshore oil drilling platform did not meet the status test as the work was not maritime in nature. The Court relied on the absence of a relationship between the claimant=s work and the loading and unloading of ships. In *McGray*, 181 F.3d 1008, 33 BRBS 81(CRT), the Ninth Circuit held that the claimant did not meet the status test because he was a pile driver constructing a pier which did not service or accommodate ships. In *Pulkoski*, 28 BRBS 298, the claimant=s construction of concrete pile caps on top of pilings which had been installed prior to the beginning of the claimant=s employment did not satisfy the status requirement. It was not maritime work because it did not aid in navigation and there was no evidence that it was related to loading, unloading, building, or repairing a vessel.

As in these cases, no evidence in the instant case establishes that claimant=s removal of wood pilings from the water=s edge was related to the loading, unloading, building, or repairing of a vessel, or to building or repairing a harbor facility used for such activity. No evidence established what would be done to the area after the pilings were removed. The only evidence as to what the pilings were used for before they were removed was claimant=s testimony that he understood that they were previously used to tie up barges and ships. Moreover, this case is distinguishable from other cases involving Acovered@ employees working in loading operations at fertilizer plants, as claimant=s work herein was not integral to loading and unloading. In *Gavranovic v. Mobil Mining & Minerals*, 33 BRBS 1 (1999), the Board held that both claimants met the status requirement because they loaded outbound fertilizer onto barges and vessels, and unloaded phosphate rock from incoming barges. The employer also conceded that one claimant had loaded and unloaded barges and the other claimant had unloaded barges. In *Ferguson v. Southern States Coop.*, 27 BRBS 16 (1993), the Board held that a mechanic at a fertilizer plant met the status requirement where he assisted incoming ships in docking and maintained machinery essential to the unloading process. Thus, as the

administrative law judge rationally found that there is no evidence relating claimant=s work removing pilings from the water=s edge to the docking, loading, unloading, building or repairing vessels, or to work on a structure to facilitate this type of maritime work, we affirm the finding that claimant=s work does not satisfy the status test.

Situs

Claimant next argues that the administrative law judge erred in finding that the situs requirement of Section 3(a) of the Act was not met, and contends that employer=s fertilizer manufacturing facility is an Aadjoining area@ sufficient to establish a covered situs much like the employer=s facility in *Gavranovic*, 33 BRBS 1. Claimant also contends that the administrative law judge failed to consider and accord weight to claimant=s testimony and Employer=s Exhibits 4 and 5, and Claimant=s Exhibit 8, in finding that the situs requirement was not met.

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 Aadjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel.@ 33 U.S.C. '903(a); *Stratton v. Weedon Eng=g Co.*, 35 BRBS 1 (2001) (*en banc*). An Aadjoining area@ therefore must have a maritime use, 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 Cir. 1980)(*en banc*), *cert. denied*, 452

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[2]Thus, claimant=s contention that the administrative law judge should have concluded that the situs requirement was met because he arguably found that claimant=s work removing wood pilings from the water=s edge occurred on a covered situs lacks merit because claimant was not injured during this activity. *See Melerine v. Harbor Constr. Co.*, 26 BRBS 97, 99-100 (1992).

U.S. 905 (1981); *Stratton*, 35 BRBS at 4. In *Winchester*, the Fifth Circuit took a broad view of Aadjoining area,@ refusing to restrict it by fence lines or other boundaries. *See Winchester,* 632 F.2d at 514-515, 12 BRBS at 726-727; *see also Sisson v. Davis & Sons, Inc.*, 131 F.3d 55, 31 BRBS 199(CRT) (5th Cir. 1998). Specifically, the court stated that an area can be Aadjoining@ if it is Aclose to or in the vicinity of navigable waters, or in a neighboring area. . . .@ *Winchester*, 632 F.2d at 514, 12 BRBS at 727. The perimeter of an Aarea@ is to be defined by function; thus, it must be Acustomarily used by an employer in loading, unloading, repairing or building a vessel.@ *Winchester*, 632 F.2d at 515, 12 BRBS at 727; *see* 33 U.S.C. '903(a). This inquiry requires an examination of both the site of the injury and the surrounding area, and the character of the surrounding properties is but one factor to be considered. *Winchester*, 632 F.2d at 513, 12 BRBS at 726; *see Stratton*, 35 BRBS at 4-5; *Uresti v. Port Container Indus., Inc.*, 34 BRBS 127 (2000)(Brown, J., dissenting), *aff=g on recon.* 33 BRBS 215 (1999) (Brown, J., dissenting).

The administrative law judge found that the phosphoric acid plant where claimant was injured is not an adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel although it was geographically close to the water=s edge. Rather, the administrative law judge concluded that the phosphoric acid plant was solely used in the fertilizer manufacturing process, and had no relation to any customary maritime activity. The administrative law judge relied on the testimony of employer=s safety manager, Mr. Pounds to reach his conclusion. Mr. Pounds testified that once the phosphoric rock arrives at employer=s north dock by ship, it is transferred to a storage area via a conveyor belt. Tr. at 107, 115, 122, 124. Later, the rock is made into liquid sulfuric acid and is stored in containers. Subsequently, the sulfuric acid is transferred via a separate conveyor belt to the phosphoric acid plant where phosphoric acid is made and placed in a storage tank. Tr. at 122-123. Finally, the phosphoric acid is transferred via a pipeline to the diammonium phosphate plant where this product is made, stored, and awaits shipment via rail, truck, barge, or ship. Tr. at 123. The fertilizer reaches the ships or barges via a separate conveyor system that runs to the north or south dock. Tr. at 123-124. Employer=s materials handling department loads and unloads the products from the ships. Tr. at 109-110. Claimant conceded that he never worked in this department. Tr. at 92. Mr. Pounds testified that the phosphoric acid plant has nothing to do with maritime activity and its sole purpose is to convert the liquid sulfuric acid into phosphoric acid and to store it. Tr. at 110, 121. It has no connection to the docks by way of a conveyor belt or other means. Tr. at 111. It is geographically and functionally separate from the docks. Tr. at 111. The phosphoric acid plant has separate roads for ingress and egress and a separate drainage system. Tr. at 111-112.

We reject claimant=s contention that his injury occurred on a covered situs

merely because employer=s entire facility abuts navigable waters and has a dock area on the property. The Board has previously addressed the situs requirement in cases in which the employer=s facility is comprised of both maritime and non-maritime enterprises. In *Melerine*, 26 BRBS 97, and *Stroup*, 32 BRBS 151, the claimants worked, respectively, in the mill shop and warehouse shipping bay of a steel production plant. No part of the process of loading or unloading a vessel occurred in the areas where claimants were injured, nor was the site used for intermediate steps in the loading process. The Board affirmed the findings that the sites of the claimants= injuries were not covered under *Winchester*, as the plant was geographically distinct from the docks where materials were delivered and finished products were loaded. Thus, the plant was not an Aadjoining area@ used for loading, unloading, building or repairing vessels, but was a non-maritime manufacturing concern. In *Jones,* 35 BRBS at 43, the Board specifically rejected the contention that an entire manufacturing facility adjoining navigable waters must be a covered situs. The Board stated that the entire area used for loading or unloading vessels, including the areas with conveyor belts leading to and from the dock area, would be a covered situs, but that the portion of the facility used to manufacture aluminum oxide is not a covered situs. *Id.* In *Bianco v. Georgia Pacific Corp.*, 35 BRBS 99 (2001), *aff=d*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002), the Board affirmed the administrative law judge=s finding that the claimant did not sustain her injuries on a covered situs as they occurred in employer=s wallboard and gypcrete production departments which were used for manufacturing and not maritime activity. The Board rejected the claimant=s argument that employer=s entire facility must be maritime because some portions of it were maritime. The Eleventh Circuit upheld the Board=s decision stating that to accept claimant=s argument would be tantamount to Awriting out of the statute the requirement that the adjoining area >be customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.=@ *Bianco*, 304 F.3d at 1060, 36 BRBS at 62(CRT).

The cases of *Gavranovic*, 33 BRBS 1, and *Uresti*, 34 BRBS 127, are distinguishable from the instant case. In *Gavranovic*, the Board held that two claimants met the situs test as they were injured in a building where finished fertilizer products were stored to await further transhipment by vessel. The building was near navigable water and conveyor belts linked the building to areas from which vessels were loaded. In contrast to *Gavranovic*, the instant case involves a claimant who was injured in a building where unfinished fertilizer products were made and later stored to await further processing. *See also Bianco*, 35 BRBS at 103. Like the building in *Gavranovic*, the phosphoric acid plant is near navigable water. Unlike the building in *Gavranovic*, conveyor belts do not link the building to areas from which vessels are loaded, as Mr. Pounds testified. *See also Bianco*, 35 BRBS at 103. In *Uresti*, the Board held that a storage warehouse located in a port met the situs test

because maritime cargo was stored there after it was unloaded and before it entered the stream of land transportation, citing *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979) (status case addressing warehousing of goods after they are unloaded from vessels and before they enter land transportation). Here, the phosphoric acid plant is located in a port but does not house products destined for vessels; it houses only unfinished fertilizer products. The administrative law judge properly applied this case law, and thus his finding that claimant=s injury did not occur on a covered situs is affirmed.

Contrary to claimant=s contentions, the administrative law judge did consider claimant=s testimony in addressing the situs issue. *See* Decision and Order at 9; Tr. at 85-86, 91. Any error in the administrative law judge=s failure to specifically address the map and photographs of employer=s facility found at Employer=s Exhibits 4 and 5, and Claimant=s Exhibit 8, is harmless. *See* Decision and Order at 2. These photographs and map merely depict employer=s physical plant but do not establish the functional nexus to maritime activity required of the place of claimant=s injury, employer=s phosphoric acid plant, which is dispositive of the situs issue. As we affirm the administrative law judge=s finding that claimant did not establish the requirements of status and situs under Sections 2(3) and 3(a) of the Act, respectively, we affirm the administrative law judge=s denial of benefits.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

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[3]Employer=s Exhibit 4 is a map of employer=s plant. Employer=s Exhibit 5 is a very large photograph of employer=s facility. Employer=s Exhibit 5 was admitted but not included into the record as evidence; the administrative law judge accepted in its stead Employer=s Exhibit 4. *See* Tr. at 8-9, 108, 124-128, 190. Claimant=s Exhibit 8, photographs of certain portions of employer=s plant where claimant removed the wood pilings from the water=s edge and where he repaired pipe, were described by claimant, and Messrs. Law and Pounds at the hearing. Tr. at 36-44, 113-115, 152-153.

[4]Thus, the Board need not address claimant=s general challenges to the administrative law judge=s alternative findings on the merits.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge