

BRB No. 02-0577

DAMON E. CUNNINGHAM, JR.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
BATH IRON WORKS)	DATE ISSUED: <u>May 16, 2003</u>
CORPORATION)	
)	
Self-Insured)	
Employer-Respondent)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS,)	
UNITED STATES DEPARTMENT)	
OF LABOR)	
)	DECISION and ORDER
Party-in-Interest)	

Appeal of the Decision and Order – Denial of Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Marcia J. Cleveland (Cleveland & Chowdry), Topsham, Maine, for claimant.

Stephen Hessert, Doris V. R. Champagne, and John H. King, Jr. (Norman, Hanson & DeTroy), Portland, Maine, for self-insured employer.

Whitney R. Given (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Joshua T. Gillelan II, Senior Attorney), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: McGRANERY, HALL and GABAUER, Administrative Appeals Judges.

McGRANERY, Administrative Appeals Judge:

Claimant appeals the Decision and Order – Denial of Benefits (2000-LHC-3261) of Administrative Law Judge Daniel J. Roketenetz 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board held oral argument in this case on February 25, 2003, in Boston, Massachusetts.

The facts of this case are not in dispute. Claimant worked as a pipefitter for employer at its East Brunswick Manufacturing Facility (EBMF). On October 1, 1999, he injured his back during the course of his employment; as a result he missed approximately three months of work. Employer voluntarily paid all medical bills, and it paid disability compensation pursuant to the state workers' compensation law. Employer also stipulated that it is a maritime employer and that claimant is a maritime employee, 33 U.S.C. §902(3), (4), leaving only the issue of whether claimant's injury occurred on a maritime situs in accordance with Section 3(a) of the Act, 33 U.S.C. §903(a). Tr. at 16, 31-33.

The administrative law judge denied the claim for benefits under the Act, finding that claimant's injury did not occur on a covered situs. He found that Thompson Brook, north of Adams Road, including the portion of the Brook that crosses into employer's property, is not presently navigable, could not be made navigable by improvements, is a separate body of water from the New Meadows River, and is not tidally influenced where it crosses employer's property. Decision and Order at 18-21. Thus, he found that Thompson Brook is not a navigable waterway of the United States and that EBMF, therefore, is not an "adjoining area" in relation to Thompson Brook. *Id.* at 21. Next, the administrative law judge considered whether EBMF is an "adjoining area" pursuant to Section 3(a) of the Act in relation to the New Meadows River. The administrative law judge used the test set forth 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). Applying the factors set forth in *Herron*, the administrative law judge concluded that EBMF has no functional relationship with the New Meadows River; thus, EBMF is not an "adjoining area," and claimant was not injured on a covered situs. Decision and Order at 22-25. Claimant appeals the denial of benefits, and employer responds, urging affirmance. The Director, Office of Workers' Compensation

Programs (the Director), responds in support of coverage, asserting that the site is an adjoining area due to its functional relationship with the main shipyard and the Kennebec River on which the shipyard is located.

Employer Bath Iron Works operates a shipyard on the Kennebec River in Bath, Maine. EBMF, one of employer's five additional facilities located in Brunswick, Maine, opened in early 1990 on a plot of land located just south of Bath Road, directly across the street from employer's Harding facility. Cl. Exs. 18 (EBMF1), 26; Emp. Ex. 50. The lot, which also contains employer's Consolidated Warehouse facility, lies approximately 1,400 feet west of the New Meadows River and approximately 3,400 feet north of Thomas Bay. Cl. Ex. 18 (EBMF8). Thompson Brook, a tributary of Thomas Bay, extends from the northern end of Thomas Bay and crosses employer's property at its western-most tip. Cl. Ex. 18. Employees at EBMF prefabricate sections of pipe units for installation on ships built at employer's main shipyard on the Kennebec River approximately four to five miles away. Prefabricated sections are taken by truck to the main shipyard. Tr. at 36-37, 42-43. Pipe prefabrication was originally performed at the main shipyard, but because space limitations prohibited expansion of that facility, employer moved the workers who prefabricated pipe sections from the main shipyard to EBMF. Emp. Exs. 27, 28 at 17-19, 22-23. Later, employer filled EBMF positions by moving employees who volunteered to transfer, based on seniority or injury. Tr. at 31, 38-40. Due to a prior injury, claimant transferred from the main shipyard to EBMF.

Claimant asserts that EBMF is a covered situs based on its proximity to any one of three bodies of water: Thompson Brook, the New Meadows River, and the Kennebec River. The Director also argues that EBMF is a covered situs. He contends the administrative law judge erred in three respects: 1) in his application of *Herron* to the facts presented; 2) in failing to apply the less-structured test espoused in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 514, 12 BRBS 719, 727 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981); and 3) in not considering the relationship between EBMF and the main shipyard on the Kennebec River. Claimant also contends that failure to include EBMF within the scope of the Act's coverage defeats the purpose of the Act and results in disparate treatment of similar employees. Employer disagrees on all points and urges the Board to affirm the administrative law judge's decision. For the following reasons, we reject the contentions of claimant and the Director, and we hold that the administrative law judge correctly concluded EBMF is not an "adjoining area" within the meaning of

¹The Consolidated Warehouse facility and the Harding facility are nearby, and the Surface Ship Support Center (James facility) and the DD2BIW facility are located on Bath Road a short distance west of EBMF. Cl. Ex. 18 (EBMF1); Tr. at 51-54.

Section 3(a) of the Act.

Is EBMF an Adjoining Area?

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).

33 U.S.C. §903(a). Where, as here, the injury did not occur on a navigable waterway or on an enumerated site, the issue is whether the site of the injury constitutes an “adjoining area.” Initially, it is not disputed that the site in question is used by the shipyard to prefabricate parts to be installed on ships. It thus meets the requirement that an “adjoining” area be “customarily used by an employer in . . . building a vessel.” At issue is whether this shipbuilding facility is an area “adjoining” navigable waters.

The instant case arises within the jurisdiction of the United States Court of Appeals for the First Circuit. That court has twice had occasion to construe Section 3(a) of the Act and has declared: “The site of the injury must adjoin navigable waters. . . .” *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 38, 12 BRBS 808, 818 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); *accord Stockman v. John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 272, 4 BRBS 304, 315 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977)(“ ‘Adjoining’ can only refer to navigable waters . . .”). In *Prolerized New England Co.*, a worker was injured at a scrap metal business alongside the Mystic River; at this facility scrap metal was processed and almost all of the end product was loaded onto ships. The Board had affirmed the administrative law judge’s finding of coverage because the injury occurred “near the dock and loading facilities adjacent to the Mystic River.” *Prolerized New England Co.*, 637 F.2d at 38, 12 BRBS at 818. The First Circuit flatly rejected the Board’s rationale:

This analysis leaves much to be desired. Plainly, the site of the injury must adjoin navigable waters, not a loading area as the Board would seem to have it. *Stockman, supra*, 539 F.2d at 272. The situs requirement is not satisfied merely because the injury occurred “near” a covered area. Even if “near” were enough, it is questionable that the Board could be sustained on its analysis since McNeil was injured several hundred yards away from the dock, and the 8-Y conveyor from which he fell, viewed functionally, was far removed from the loading of

ships.

Id., 637 F.2d at 38, 12 BRBS at 818. The court held, however, that the claimant was injured on a covered situs, in light of the Supreme Court's decision in *Northeast Marine Terminal v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). The *Caputo* Court held that an injury occurring in a terminal was covered, where the entire terminal adjoined the water and one of its piers was used for loading and unloading vessels. The First Circuit similarly held that the entire scrap metal facility was an adjoining area even though it was used for both loading and manufacturing.

Also, in *Stockman*, the First Circuit found claimant was injured on a covered situs where the injury occurred at Boston Army Base, a terminal customarily used for loading and unloading ships, adjoining navigable waters and Boston Harbor. The claimant had been injured when stripping a container which had been unloaded at a berth across Boston Harbor, because the Army Base did not have the special facilities necessary to unload that kind of container. The court observed:

[T]he area is several hundred yards directly across open water from the berth of Sea-Land's container vessels and is generally part of the same Boston waterfront area. We are not faced with the stripping of a container at an inland freight depot having only some incidental connection with navigable waters. We therefore conclude, from all these factors, that the situs requirement of §903(a) has been met.

Stockman, 539 F.2d at 272, 4 BRBS at 315. The court thereby made clear that the same navigable waters which adjoin the Army Base adjoin the terminal where the container was unloaded and that the work of the Base was significantly related to these navigable waters. Based on these considerations, the court held the injury occurred on a covered situs.

Thus far, the First Circuit has not considered the situs issue where the place of injury was on a facility which was not immediately adjacent to navigable waters. In its insistence, however, that an adjoining area is one which adjoins "navigable waters, not a loading area . . .," *Prolerized New England Co.*, 637 F.2d at 38, 12 BRBS at 818, the First Circuit's approach to the situs issue appears to be consistent with that of the Fourth Circuit in *Sidwell v. Director, OWCP*, 71 F.3d 1134, 1138-39, 29 BRBS 138, 143(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996), which held: "that an area is 'adjoining' navigable waters only if it 'adjoins' navigable waters. . . ."

Although the First and Fourth Circuits agree that a covered situs necessarily entails adjoining navigable waters, one cannot reasonably project from the First Circuit's statements that it would adopt the Fourth Circuit's test for situs set forth in

Sidwell. Integral

parts of the *Sidwell* test are the court's specific definitions of "adjoining" and "area;" both have been strongly criticized and neither has been specifically addressed by the First Circuit. In any event, it is readily apparent that claimant cannot establish situs under *Sidwell*, the most stringent of the circuit court tests. Discussion will be necessary, however, to consider the administrative law judge's findings in light of decisions of the Fifth and Ninth Circuits which have interpreted Section 3(a) more broadly, setting forth situs tests which are not based on physical contiguity with navigable waters. See *Winchester*, 632 F.2d 504, 12 BRBS 719; *Herron*, 568 F.2d 137, 7 BRBS 409.

In *Brown v. Bath Iron Works Corp.*, 22 BRBS 384 (1989), a case arising within the First Circuit involving employer's Harding facility, the Board applied the standard set forth by the Ninth Circuit in *Herron*, and it has consistently done so in other cases where a circuit court has not established its own criteria. See, e.g., *Waugh v. Matt's Enterprises, Inc.*, 33 BRBS 9 (1999); *Gonzalez v. Ocean Voyage Ship Repair*, 26 BRBS 12 (1992); *Anastasio v. A.G. Ship Maintenance*, 24 BRBS 6 (1990). In *Brown*, the Board affirmed the administrative law judge's determination that employer's Harding facility, located across the street from EBMF, is not a covered situs, as it did not meet the criteria set forth

²The *Sidwell* majority's definition of "adjoining" was criticized as too narrow by Judge Beaty in his concurring opinion. 71 F.3d at 1142-43, 29 BRBS at 146(CRT). His concerns were shared by Judge Murnaghan in his concurring opinion in *Parker v. Director, OWCP*, 75 F.3d 929, 935, 30 BRBS 10, 14(CRT) (4th Cir. 1996), *cert. denied*, 519 U.S. 812 (1996).

³The Third Circuit rejected the *Sidwell* court's definition of "area" in *Nelson v. American Dredging Co.*, 193 F.3d 789, 796, 32 BRBS 115, 122(CRT) (3^d Cir. 1998).

⁴The Fourth Circuit requires an "adjoining area" to be used for a maritime function and actually contiguous with navigable waters. *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86(CRT) (4th Cir.), *cert. denied*, 525 U.S. 1040 (1998); *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996). In contrast, while the Fifth Circuit recognized that "adjoin" can be defined as "contiguous to," it also is defined as "to be close to" or "to be near;" the court thus rejected a requirement of absolute contiguity in favor of coverage so long as a site is in the vicinity of navigable waters. *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 514, 12 BRBS 719, 727 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981). *Accord Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978).

in *Herron*. Accordingly, it was reasonable for the administrative law judge to apply *Herron* to the facts of the instant case.

In *Herron*, the Ninth Circuit addressed whether a gear locker located 2,600 feet from the Columbia River and 2,050 feet outside the entrance to the Port of Longview was a covered situs. In holding that the site was covered, the Ninth Circuit held that “adjoining area” must be read to describe a functional relationship with navigable waters that does not require physical contiguity with those waters in all cases. In determining whether such a relationship exists, the court stated that consideration should be given to the following factors, among others:

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 of the circumstances in the case.

Herron, 568 F.2d at 141, 7 BRBS at 411; see also *Brown*, 22 BRBS at 387. The United States Court of Appeals for the Fifth Circuit adopted a similar test in considering whether a gear locker located five blocks from navigable waters was an “adjoining area.” The court stated that the boundaries of a covered “area” are defined by function, that is, the area must be 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. . . .” *Winchester*, 632 F.2d at 514, 12 BRBS at 727. Thus, geography and the function of the area are of the utmost importance in determining whether a location is a covered situs. *Stratton v. Weedon Eng’g Co.*, 35 BRBS 1, 5 (2001). For the reasons below, we hold that EBMF does not constitute an “adjoining area” under the *Herron* or *Winchester* tests.

Is Thompson Brook Navigable?

Because Thompson Brook crosses the property in question and EBMF is, therefore, physically contiguous to it, claimant first relies on this waterway to establish that the site is on an area adjoining navigable water. The first question to address in this regard is whether Thompson Brook is navigable. In arguing that Thompson Brook should be considered navigable waters of the United States, claimant makes three basic assertions: 1) Thompson Brook is tidal; 2) the definition of “navigability” should be based, in part, on the commerce clause definition; and 3) Thompson Brook could be made navigable with improvements. We reject these

⁵Claimant argues that *Brown* is distinguishable from the instant case and that it did not establish a clear standard for determining situs in the First Circuit. However, the Board used the *Herron* test in *Brown* and did not establish a new standard therein. Although the record in *Brown* was not as well-developed as the record here, *Brown* is not significantly distinguishable.

contentions, and we hold that the administrative law judge properly determined that Thompson Brook is not a navigable body of water.

It is well-established that the question of whether a body of water is navigable is one of fact to which the applicable legal standard must be applied. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940); *United States v. Utah*, 283 U.S. 64 (1931). The Board has held that the applicable definition of “navigability” under the Act is the “navigable in fact” test, as that definition establishes the limits of admiralty jurisdiction. *George v. Lucas Marine Constr.*, 28 BRBS 230, 234 (1994), *aff’d mem. sub nom. George v. Director, OWCP*, No. 94-70660 (9th Cir. May 30, 1996); *see also Haire v. Destiny Drilling (USA), Inc.*, 36 BRBS 93 (2002); *Rizzi v. Underwater Constr. Corp.*, 27 BRBS 273, *aff’d on recon.*, 28 BRBS 360 (1994), *aff’d*, 84 F.3d 199, 30 BRBS 44(CRT) (6th Cir. 1996), *cert. denied*, 519 U.S. 931 (1996); *Lepore v. Petro Concrete Structures*, 23 BRBS 403 (1990). Accordingly, we reject the argument that the definition of “navigability” under the Act should encompass the commerce clause definition of navigability. *George*, 28 BRBS at 235-236. This issue was thoroughly addressed in *George*, and we need not revisit it here. The threshold requirement of navigability in admiralty law and under the Act is the presence of an “interstate nexus” which allows the body of water to function as a continuous highway for commerce between ports. *Lepore*, 23 BRBS at 406; *see also Rizzi*, 27 BRBS at 277. A natural or an artificial waterway incapable of being used as an interstate artery of commerce because of natural or man-made conditions is not considered navigable for purposes of jurisdiction under the Act. *Lepore*, 23 BRBS at 407.

In this case, the evidence of record establishes that EBMF is north of Adams Road and that Thompson Brook, which flows beneath Adams Road via a six-foot wide culvert, is not presently navigable north of Adams Road. The administrative law judge concluded that the Brook is “a narrow, shallow channel of water with many sharp meandering turns.” Decision and Order at 18. Photographs, maps and the testimony of Mr. Kamila, a civil engineer and land use consultant whom the administrative law judge credited, support this conclusion. Cl. Ex. 18; Emp. Exs. 50, 54, 66-70; Tr. at 226-227, 247-248. Further, there is no evidence of present commercial use of the Brook. Tr. at 233-234. As there is no current usage, and as Thompson Brook is located in a “Resource Protection Zone,” the administrative law judge reasonably rejected claimant’s assertion that evidence of a defunct, historical canal, located in another area of Maine, establishes that construction of a canal could make Thompson Brook navigable in the future. As the evidence credited by the administrative law judge supports his findings that Thompson Brook is not used

⁶The Act derives its legitimacy from Article III of the United States Constitution, concerning federal court jurisdiction over admiralty and maritime cases. U.S. Const. art. III, §2, cl. 1; *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128 (1930); *George v. Lucas Marine Constr.*, 28 BRBS 230 (1994), *aff’d mem. sub nom. George v. Director, OWCP*, No. 94-70660 (9th Cir. May 30, 1996).

for commercial purposes, nor is it adaptable for future commercial use, we affirm the administrative law judge's conclusion that Thompson Brook is not navigable. *George*, 28 BRBS at 239. Thus, EBMF cannot be considered an adjoining area with respect to Thompson Brook.

Is the Work of EBMF Related to the New Meadows River?

Next, claimant contends the administrative law judge erred in finding that EBMF is not an "adjoining area" with regard to the New Meadows River. Applying the *Herron* factors to the facts of this case, the administrative law judge concluded there is no functional relationship between EBMF and the New Meadows River. This conclusion is supported by substantial evidence.

The administrative law judge determined that the pipe prefabrication work done at EBMF is not and need not be done on the water or on a maritime site and that the area surrounding EBMF involves mixed usage. He also found there is no evidence that employer sought to locate EBMF as close as possible to a navigable waterway. Rather, to make better use of the main shipyard area, employer moved its fabrication department to a large flat inland area several miles away. Decision

⁷Claimant's contention that the ebb-and-flow test should be used to define navigability under the Act lacks merit, as use of this test has been rejected. *Perry v. Haines*, 191 U.S. 17, 26 (1903); *George*, 28 BRBS at 239. Accordingly, the tidal fluctuations of Thompson Brook are irrelevant. We also affirm the administrative law judge's determination that the navigability of the New Meadows River cannot be attributed to Thompson Brook because it is not an extension of that river, as the administrative law judge reasonably found the two bodies of water both flow from north to south and do not converge until well south of employer's property. Decision and Order at 19; Emp. Exs. 23, 57; Tr. at 236.

⁸The Director argues that the administrative law judge erred in failing to apply the Section 20(a), 33 U.S.C. §920(a), presumption to the situs issue and in allocating the burden of proof to claimant. We reject this contention. The facts of this case are not disputed, and the sole issue involves whether these facts entitle claimant to coverage under the appropriate legal standard. The issue is thus one of legal interpretation of Section 3(a), and the courts and the Board have rejected the argument that Section 20(a) applies to the legal interpretation of the Act's coverage provisions. *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 4 BRBS 156 (2^d Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Stockman*, 539 F.2d 264, 4 BRBS 304; *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002); *Arjona v. Interport Maintenance Co., Inc.*, 34 BRBS 15 (2000); *George*, 28 BRBS 230; *Davis v. Doran Co. of California*, 20 BRBS 121 (1987), *aff'd mem.*, 865 F.2d 1257 (4th Cir. 1989). Accordingly, Section 20(a) is inapplicable, and the administrative law judge committed no error in this regard.

and Order at 25; see Cl. Exs. 26, 28 at 17-19, 22-23, 32-33 (historical perspective of the Harding facility). In this regard, the administrative law judge's most important finding is that EBMF's proximity to the New Meadows River is irrelevant. Although the eastern-most corner of the property on which EBMF sits is only 1,400 feet from the navigable New Meadows River, the evidence establishes that employer does not own the intervening property or use the River for any reason; all prefabricated parts are trucked overland where they are used at employer's main shipyard on the Kennebec River. Consequently, any proximity between EBMF and the New Meadows River is, as the administrative law judge reasonably determined, fortuitous.

As the First Circuit indicated in *Stockman*, situs cannot be based on "only some incidental connection with navigable waters." *Stockman*, 539 F.2d at 272, 4 BRBS at 315. The administrative law judge considered all of the relevant evidence in light of the *Herron* factors, and rationally concluded that no functional relationship exists between EBMF and the New Meadows River. We affirm his finding that such a relationship is absent. Application of the *Winchester* test similarly results in a holding that the site is not covered under Section 3(a): employer, indisputably, does not use the New Meadows River, and thus, that waterway cannot define an area with a functional use related to it. See, e.g., *Charles v. Universal Ogden Services*, ___ BRBS ___, BRB No. 02-0511 (April 17, 2003).

Does EBMF's Relationship with the Main Shipyard, which Adjoins the Kennebec River, Establish Situs?

Both claimant and the Director rely heavily on EBMF's relationship with the main shipyard in Bath to demonstrate that EBMF should be considered a covered situs. Specifically, they argue that the pipes fabricated at EBMF are used in constructing ships at employer's facility on the Kennebec River; thus, they assert the two facilities are closely bound by this arrangement, giving EBMF a functional relationship with the Kennebec River and requiring the conclusion that EBMF is an "adjoining area." Employer does not dispute this particular relationship. Indeed, it agrees that the purpose of EBMF is to supply fabricated parts to the main shipyard. Although the Kennebec River is thus related by function to employer's shipbuilding operations at EBMF, we nevertheless cannot agree with claimant and the Director that EBMF is a covered situs, as the required geographic nexus is absent. The administrative law judge did not explicitly address the nexus between EBMF and the

⁹We reject the assertion that the administrative law judge erroneously required satisfaction of all the *Herron* factors in order to establish situs. Rather, he properly considered each factor, found that none was satisfied or that, at best, the area might be considered maritime because of the presence of employer's facilities, and he concluded, on the record as a whole, that EBMF is not an "adjoining area." Contrary to the Director's interpretation, we understand the administrative law judge's statement, Decision and Order at 24, to mean that satisfaction of just one factor is insufficient to confer coverage, not that every factor must be met.

Kennebec River. However, as the facts are undisputed and a number of the administrative law judge's findings are relevant, we disagree with our dissenting colleague on the need to remand this case, and we hold, as a matter of law, that EBMF is not an "adjoining area" with respect to the Kennebec River.

No case law defines an "adjoining area" solely by its function; rather, as discussed above, the test involves both a functional use and geographic proximity to navigable water. In *Brown*, 22 BRBS 387, the Board concluded that the Harding facility located across the street from EBMF was not a covered situs, holding that the site's maritime use is not sufficient alone to bring it within Section 3(a). As *Brown* remains good law, and there is no basis for distinguishing it, we conclude that EBMF is similarly outside the scope of the Act's coverage.

The record reveals that EBMF is approximately four to five miles inland from the Kennebec River where the main shipyard is located and where the pipes fabricated at EBMF are installed on ships. In cases involving large ports, terminals or shipyards, sites within the general perimeter of such areas may be within the definition of an adjoining area despite a location several miles from navigable waters. See, e.g., *Triguero v. Consolidated Rail Corp.*, 932 F.2d 95 (2^d Cir. 1991); *Hagenzeiker v. Norton Lilly & Co.*, 22 BRBS 313 (1989). EBMF, however, is not in the same geographic area as the Kennebec River and the main shipyard. The Kennebec River runs through the heart of Bath, while EBMF is located four to five miles outside of Bath in East Brunswick. The topographical evidence of record, Cl. Ex. 28 at 22-24, 29, which confirms employer's statement at oral argument that the facility is situated "reasonably close to the main shipyard[,]" OA Tr. at 24-25, establishes that EBMF may have been built as close as feasible to the main shipyard. However, this factor, alone, is insufficient to mandate the conclusion that EBMF qualifies as an adjoining area, as it does not bring EBMF within the functional area of the Kennebec River. Although an "area" is not bound by fence lines, *Winchester*, 632 F.2d at 514, 12 BRBS at 726, facilities must lie within a general perimeter which includes sites with a common function. In this case, a reasonable perimeter for shipbuilding around the Kennebec River cannot extend four to five miles inland to EBMF.

In addressing whether the location of EBMF is particularly suitable for maritime purposes, the administrative law judge aptly determined that, although the prefabrication of pipe systems to be installed on ships is a maritime function, there is

¹⁰Employer stated that, in looking for suitable land on which to build the Harding facility, "[t]hey were, in fact, and we acknowledge this, looking for something reasonably close to the main shipyard." Employer also acknowledged that the land "has some proximity to the main shipyard, which is simply logical. I don't think if you're going to put a fabrication shop or any other aspect of the shipbuilding process to work, you're going to put it 50 miles away from Bath, Maine. It doesn't make any sense." OA Tr. at 24-25.

nothing in the record indicating that this function must be performed on or near the water or at a maritime site. This conclusion is best supported by the fact that, although this function was performed at the shipyard at one time, it is no longer performed there. Tr. at 36-38, 42-43. Thus, his conclusion that claimant failed to satisfy the first element of the functional relationship test of *Herron*, *i.e.*, whether a site is suited to maritime uses, is reasonable and applies equally to the relationship between EBMF and the Kennebec River as to the New Meadows River.

The administrative law judge also reasonably found that the properties surrounding EBMF are not predominantly maritime. This finding is equally relevant to an analysis of EBMF's relationship with the Kennebec River as to the New Meadows River. While EBMF and other of employer's facilities occupy a large portion of the eastern part of Brunswick, the maps, photographs and testimony clearly describe a locale containing a number of different businesses as well as residences, and the administrative law judge rationally concluded that the area is one of mixed use. Decision and Order at 24. Review of the record establishes undisputed evidence that the city and suburbs of Bath are situated between employer's Brunswick facilities and the main shipyard on the Kennebec River. There are restaurants, motels, convenience stores, gas stations, auto repair shops, residences, and any number of other non-maritime uses of land. There are major roadways, and there are changes in zoning areas from industrial to farm and forest. In downtown Bath, there are residences, which hem in employer's Bath shipyard, restaurants, a courthouse, and more. Cl. Exs. 18 (EBMF9), 19; Tr. at 56, 75-76, 84-85, 89-97; *see also* Cl. Exs. 19, 32; Emp. Exs. 52-53. Although the New Meadows River also lies between EBMF and the main shipyard, and there are some maritime activities in and around that river, these activities do not dominate the area in such a way that the entire region should be considered one large maritime area. In fact, employer has no shipbuilding or loading facilities on the New Meadows River, and that river is not part of a river system or coastal area common to the Kennebec River. *See* Emp. Ex. 25.

Although the presence of non-maritime facilities between the injury site and the Kennebec River is not dispositive of the character of the area, *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726, the administrative law judge's conclusion that the area around EBMF is not *primarily* used for maritime activity is reasonable. This finding is also relevant to assessing the relationship between EBMF and the Kennebec River, and is even more persuasive when looking at the larger area. Employer's presence in the Brunswick area, while extensive, does not alter the landscape of non-maritime commercial and residential uses in the area between

¹¹As the Fifth Circuit noted in *Winchester*, "[a]erial photographs, surveys, charts, demographic studies and exhibits . . . are extremely helpful in determining whether or not a particular site is within an 'adjoining area.' One picture may be clearer than a thousand words." *Winchester*, 632 F.2d at 516 n.20, 12 BRBS at 728 n.20.

Bath and Brunswick. *Davis v. Doran Co. of California*, 20 BRBS 121 (1987), *aff'd mem.*, 865 F.2d 1257 (4th Cir. 1989). Thus, even if EBMF is as close as feasible to the Kennebec River, the nature of the properties between the two facilities supports the conclusion that EBMF cannot be an “adjoining area” of the Kennebec River.

While some courts have been willing to interpret Section 3(a) broadly, the case-law does not support an interpretation of the Act that would cover the miles encompassed in the area from Bath to Brunswick, Maine. We hold that EBMF fails the geographical proximity test under either *Herron* or *Winchester*, as EBMF is not within the perimeter of a general maritime area around the Kennebec River or the main shipyard. *Gonzalez*, 26 BRBS 12; *Anastasio*, 24 BRBS 6; *Davis*, 20 BRBS 121; *Lasofsky v. Arthur J. Tickle Eng'g Works, Inc.*, 20 BRBS 58 (1987), *aff'd mem.*, 853 F.2d 919 (3^d Cir. 1988). As EBMF cannot be considered within the proximity, “within the vicinity,” or “in the neighboring area” of the Kennebec River, we affirm the administrative law judge’s conclusion that EBMF is not a covered situs. *Brown*, 22 BRBS 384.

Claimant raises one other argument with regard to the definition of adjoining area that must be addressed. Specifically, claimant asserts that situs can be established by demonstrating that a facility has a geographic proximity to one body of water and a functional relationship with another. He relies on the decision in *Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31 BRBS 199(CRT) (5th Cir. 1998), wherein the Fifth Circuit considered situs with respect to two bodies of water and acknowledged a geographic proximity with one. Because there was a functional relationship with neither, the facility in question was not a covered situs. *Id.* Contrary to claimant’s assertion, *Sisson* does not support claimant’s position. Rather, *Sisson* demonstrates that the Fifth Circuit gave consideration to more than one body of water when ascertaining whether a facility is an adjoining area and that situs need not be based on the nearest body of water. *Sisson* does not abrogate the requirement that a site have both a functional and geographic relationship with the same body of navigable water. To hold that a site may be covered through a geographic proximity to one body of water and a functional nexus with another would

¹²The Director contends that his statutory interpretation is entitled to deference. As he acknowledges, the degree of deference owed any particular interpretation by the Director “will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade if lacking power to control.” *Pool Co. v. Cooper*, 274 F.3d 173, 177, 35 BRBS 109, 112(CRT) (5th Cir. 2001), *citing U.S. v. Mead Corp.*, 533 U.S. 218 (2001) (*quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). Because the Director’s interpretation of the Act, as it applies to the undisputed facts of this case, would expand coverage beyond the established bounds, we decline to defer to his position. Further, his reliance on a 1977 position memorandum is misplaced. While the memorandum reflects the current state of the law holding that entire shipyard areas are covered, it says nothing about sites located miles outside of a shipyard’s area.

result in the coverage of all maritime facilities which are fortuitously placed near a navigable waterway, but lack any usage of that waterway. We decline to construe the situs requirement in this manner. See *Bennett v. Matson Terminals*, 14 BRBS 526 (1981), *aff'd sub nom. Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982). It is clear from reading both *Herron* and *Winchester* that the site in question must have both a geographic and functional nexus with the same body of navigable water. *Herron*, 568 F.2d at 141, 7 BRBS at 411; *Winchester*, 632 F.2d at 515, 12 BRBS at 728; *Charles*, slip op. at 4-5; *Arjona v. Interport Maint. Co., Inc.*, 34 BRBS 15 (2000); *Bennett*, 14 BRBS 526. Furthermore, the First Circuit requires no less. See *Stockman*, 539 F.2d 264, 4 BRBS 304.

Policy Considerations

Claimant contends that excluding EBMF from coverage defeats the congressional purpose of extending the *Jensen* line landward and results in disparate treatment of similar employees. In *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969), the Supreme Court held that longshoremen who are injured on a pier are not covered under the Act, as a pier is considered an extension of land. *Nacirema*, 396 U.S. at 214-215, 223-224. The Court concluded that, in drafting the Act, Congress specifically chose to adhere to the rule that injuries occurring on the landward side of the *Jensen* line are covered under state workers' compensation acts. In direct response to *Nacirema*, Congress amended the Act. Following the 1972 Amendments, 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 the Act. 33 U.S.C. §§902(3), 3(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); *Caputo*, 432 U.S. 249, 6 BRBS 150. Thus, the strict *Jensen* line was abolished. See *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 12 BRBS 890 (1980) (federal and state law may co-exist on land).

The Supreme Court cautioned in *Caputo* that situs is not to be interpreted so broadly that it is read out of the Act. 432 U.S. at 279 n. 40, 6 BRBS at 168 n. 40. The administrative law judge determined, and we have affirmed, that EBMF is not a

¹³In *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), the Supreme Court established what is called the “*Jensen* line” which is the line where water meets land. It marks the limit of admiralty jurisdiction. See *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 216 (1969); *Kennedy v. American Bridge Co.*, 30 BRBS 1, 4 (1996); *George*, 28 BRBS 230.

¹⁴Citing the Third Circuit's decision in *Sea Land Service, Inc. v. Director, OWCP*, 540 F.2d 629, 4 BRBS 289 (3^d Cir. 1976), the Supreme Court stated: “The Circuit appears to have essentially discarded the situs test. . . .” *Id.*

covered site. EBMF is four to five miles inland from the shipyard on the Kennebec River and the various uses of the intervening properties establish that the region is not a general maritime area. For claimant to assert that we have resurrected the *Jensen* line by not extending coverage to a facility four to five miles inland from the relevant shoreline is without merit. We, therefore, reject claimant's allegation that the decision herein resurrects outdated law.

Further, we reject claimant's assertion that he and other EBMF workers will be treated unfairly as a result of this decision. The fact that EBMF produces maritime products for installation into ships and the fact that this activity previously occurred at the shipyard, alone, are not sufficient to confer coverage. While such activity establishes claimant's status, that is but one factor necessary to impart coverage, and the situs requirement cannot be ignored. *Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT)(11th Cir. 2002), *aff'g* 35 BRBS 99 (2001). Although employer has pipefitters at the shipyard who are covered by the Act and pipefitters at EBMF who are not, this fact does not demonstrate disparate treatment of like employees. Rather, the employees of the shipyard are properly distinguished by the different locales where they work, as the site of injury is an indispensable factor when determining the scope of coverage of the Act. Therefore, we reject claimant's allegation that EBMF must be a covered situs to assure equal treatment among similar employees.

We have thoroughly reviewed the record in this case and found that the administrative law judge's factual findings are supported by substantial evidence. Considering these findings in light of the relevant decisions of the First, Fifth and Ninth Circuits, we hold that the administrative law judge correctly determined that claimant failed to establish situs under Section 3(a) of the Longshore Act.

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur:

PETER A. GABAUER, Jr.

¹⁵In *Winchester*, the court very clearly stated that, while “[g]rowing ports are not hemmed in by fence lines[,]” the “outer limits of the maritime area will not be extended to extremes.” *Winchester*, 632 F.2d at 514, 12 BRBS at 726.

Administrative Appeals Judge

HALL, concurring and dissenting:

While I concur with the majority's decision to affirm the findings that Thompson Brook is not navigable and that EBMF is not an adjoining area of the New Meadows River, and I concur with the holding that situs must be established with respect to one body of water, I respectfully dissent from their conclusion that EBMF is not an adjoining area of the Kennebec River. A review of the record in this case reveals several pieces of evidence the administrative law judge did not discuss. Accordingly, I would remand the case for further consideration of the issue of whether EBMF is an adjoining area with regard to the Kennebec River.

Specifically, there is testimony from two historians in evidence in this case, but the administrative law judge discussed testimony from only one of them, Mr. Hawes, in his decision. Decision and Order at 5-6, 24. Also submitted into evidence, however, were a book, *Bath Iron Works, the First Hundred Years*, Emp. Ex. 84, an excerpt from the book, Cl. Ex. 27, and the testimony of Ralph Linnwood Snow, historian and author of that book, Cl. Ex. 28. All of these pieces of evidence pertain to the history of the selection of the Harding facility site, but given the proximity of the Harding facility to EBMF, I believe the information is relevant. As the administrative law judge did not discuss this evidence in reaching his decision, I believe he should have the opportunity to do so.

To summarize, the Harding facility was built in 1940 on a large tract of flat land located on the outskirts of Brunswick. Employer's goal at the time was to expand its production, but room for expansion at the shipyard was limited. As a result, employer devised a way to remove from the waterfront a shipyard function that did not need to be on the water to free up space for more launching ways. Cl. Exs. 25, 28 at 13-19, 32-33; Emp. Ex. 84 at 219. The Harding facility opened by 1941, and it has been producing steel fabrications ever since. Cl. Ex. 27 at 328. To keep stride with employer's manufacturing process, zoning in this East Brunswick area changed from mixed use to industrial, and it continues to evolve with employer's businesses. Tr. at 56, 70-71.

In explaining employer's choice of property in 1940, Mr. Snow also discussed the topography of the area. He stated that Bath contains a series of ridges running north/south parallel to the Kennebec River beginning at Washington Street. From the shoreline, where it is flattest, going westward, the ridges get progressively higher; the land becomes flatter on the western shore of the New Meadows River.

¹⁶Mr. Snow's deposition was taken in 1990 for another claim under the Act. Cl. Ex. 28.

Cl. Ex. 28 at 22-24, 29. Mr. Snow stated that, at the time of the Harding property purchase in 1940, there was no other parcel of land closer to the shipyard that would be large enough for the construction of this plant. Cl. Ex. 28 at 36-37.

Conceivably, the same may have been true at the time of the EBMF property purchase. Though the evidence in the record discussing the purchase of the EBMF property and the opening of that facility is sparse, the administrative law judge could have made an analogy between these two expansion efforts. This evidence, in conjunction with the topographical evidence, may support the determination that EBMF was built as close to the shipyard and the Kennebec River as feasible. See *also* Cl. Exs. 21-22, 33; Emp. Exs. 57-58. If EBMF is as close as possible to the shipyard, the administrative law judge could conclude that the site is covered. Because the administrative law judge did not discuss the history behind the site selections or the topographical information, and because it is his duty to evaluate the facts of the case, I would remand the case for further consideration. Additionally, the administrative law judge restricted his consideration of the situs issue to EBMF's relationship with the New Meadows River. He did not address the *Herron* and *Winchester* factors with regard to the shipyard and the Kennebec River. Because I believe the relationship between EBMF and the Kennebec River is the relevant relationship, I would remand this case for him to properly apply the tests. Claimant here worked many years at the main shipyard performing fabrication work for installation on ships located on navigable water. The administrative law judge should consider whether employer's transferring claimant a short distance to another facility performing the same work altered his coverage under the Act.

BETTY JEAN HALL
Administrative Appeals Judge