BRB No. 02-0661

JAMES R. MARANEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: JUN 19, 2003
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Dismissing Claim for Lack of Jurisdiction of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Stephen P. Moschetta (Joseph P. Moschetta and Associates), Washington, Pennsylvania, for claimant.

Jean E. Novak (Strassburger McKenna Gutnick & Potter), Pittsburgh, Pennsylvania, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Dismissing Claim for Lack of Jurisdiction (2001-LHC-1150) of Administrative Law Judge Robert J. Lesnick 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).

Claimant allegedly sustained a torn rotator cuff of his left shoulder while working for employer on November 10, 1999, at its Robena Preparation Plant located in Greensboro, Pennsylvania. Employer is involved in the preparation and processing of coal. Its facility, which is adjacent to the Monongahela River, a navigable body of water, receives coal from barges. The coal is moved by conveyor belts through the processing plant to the tipple where the finished coal is then loaded onto riverside barges. At the time of his injury, claimant was

working in his classified job as a mobile equipment operator assigned to Amake the footprint@ for phase two of an upstream construction project taking place at Pond No. 4. In 1997, employer undertook a two-phase construction project to prepare this site to serve as a coal impoundment, or depository for coal slurry.[1] Hearing Transcript (HT) at 170. Claimant=s work predominantly involved the operation of a bulldozer to push coarse refuse, or slate, over old slurry at Pond No. 4 in order to increase the capacity of that pond for slurry disposal. HT at 300-301.

As a result of his work accident on November 10, 1999, claimant alleged that he was forced to stop working on December 27, 1999, and has since been unable to return to any employment. He thereafter filed a claim seeking permanent total disability benefits under the Act. Employer responded that: (1) this claim does not fall within the coverage of the Act; and (2) that claimant is not permanently and totally disabled. By Order dated May 7, 2001, the administrative law judge granted employer=s motion to bifurcate the proceedings in this case such that the issue of coverage would be resolved separately from and prior to any consideration of the merits.

In his decision, the administrative law judge concluded that claimant did not establish situs under Section 3(a), 33 U.S.C. ' 903(a), or status under Section 2(3), 33 U.S.C. ' 902(3). Specifically, the administrative law judge determined that claimant did not establish that he engaged in any job duties that entitled him to status as a maritime employee and that claimant was not injured on a maritime situs. Accordingly, benefits were denied.

On appeal, claimant challenges the finding that he is not a covered employee and was not injured on a covered situs. Employer responds, urging affirmance.

[1]Coal impoundments hold wastewater and impurities that result from coal washing and processing. A bulkhead or embankment is made of coarse coal refuse and acts as a dam. Behind it lays a pond of coal slurry. Sediment settles out of this turbid mixture, filling the pond, while wastewater is recycled back into the coal washing process. The sizes of the ponds and bulkheads vary, but pond basins are often hundreds of feet deep and hold millions of gallons of slurry. HT at 170, 293-296, 300-301.

The Protective Order

Claimant first asserts that the administrative law judge erred in not permitting him to inspect employer=s facility pursuant to his request under 29 C.F.R. '18.19(a)(2). Claimant maintains that he has been prejudiced in prosecuting his claim before the administrative law judge, and that the administrative law judge=s order denying claimant access to employer=s facility constitutes reversible error because it precluded him from conducting necessary discovery, thereby violating his due process rights.

The record reflects that by motion dated February 1, 2001, claimant requested, pursuant to the Federal Rules of Civil Procedure and 29 C.F.R. '18.19(a)(2), that employer permit claimant Ato enter upon Employer=s premises (Robena Preparation Plant) to inspect and photograph the loading and unloading apparatus as well as the area where claimant sustained the relevant injuries.@ Claimant=s Request For Entry to Inspect dated February 1, 2001. In response, employer requested, pursuant to 29 C.F.R. '18.15(a)(1), a Protective Order barring claimant and/or his representatives from entering its property. Employer=s Motion for Protective Order dated March 27, 2001. By Order dated May 7, 2001, the administrative law judge granted employer=s request for a protective order staying any discovery requests until such time as the coverage issues are decided, as employer=s motion was Areasonable and in the interest of judicial economy.@ Claimant thereafter filed a Motion to Compel Discovery Responses on June 29, 2001. In this motion, claimant explicitly sought, among other things, Aphotographs, which were to be produced by employer in discovery, [which] would obviate the need for the inspection [of employer=s facility].@ Claimant=s Motion to Compel Discovery Responses Directed to Employer dated June 29, 2001 (Cl=s M/C) at 3.

In response to claimant=s motion, the administrative law judge, on July 10, 2001, ordered, Aas per the conversation held between the parties and the [administrative law judge] by conference call on July 6, 2001,@ that employer provide claimant, Aphotographs of the site and surrounding area of all locations where claimant worked for the period of January 1, 1999, to the date of the accident,@ and Aeither an aerial photograph or a map which will show the overall plant operation, including the operation of coal belts, and allow for the identification of each of the photographs provided.@ Order dated July 10, 2001. As instructed, employer submitted into the record aerial photographs of the Robena Preparation Plant, maps of this facility, and color photographs of employer=s operations around Pond No. 4, including the refuse and stock pile areas, as well as photographs of the barge unloader and a bulldozer. In addition, employer submitted a videotape, entitled ACoal Preparation,@ which generally outlines the process used by employer at its Robena Preparation Plant. EX CC.

An administrative law judge has broad discretionary power to direct and authorize discovery in support of the adjudication process. 33 U.S.C. '927(a); 5 U.S.C. '556(c); *see generally* 20 C.F.R. ''702.338 B702.341; 29 C.F.R. '18.14 *et seq*. The administrative law judge=s discretion includes the authority to limit the admission of documents and testimony

based on relevance. *Harrison v. Barrett Smith, Inc.*, 24 BRBS 257 (1991), *aff=d mem. sub. nom. Harrison v. Rogers*, No. 92-1250 (D.C. Cir. March 19, 1993); *Olsen v. Triple A Machine Shops, Inc.*, 25 BRBS 240 (1991), *aff=d mem. sub nom. Olsen v. Director, OWCP*, 996 F.2d 1226 (9th Cir. 1993). A discovery ruling will constitute reversible error only if it is so prejudicial as to result in a denial of due process. *Martiniano v. Golten Marine Co.*, 23 BRBS 363 (1990).

We reject claimant=s contentions. First, the administrative law judge did not abuse his discretion by limiting discovery to evidence relevant to the pertinent issue before him in this case, *i.e.*, coverage. *Harrison*, 24 BRBS 257; *Olsen*, 24 BRBS 240. Second, as admitted by claimant, employer=s eventual production of a number of photographs into the record Aobviate[d] the need for the inspection.@ Cl=s M/C at 3. Thus, it cannot be said that claimant sustained any prejudice in the prosecution of his claim as a result of the administrative law judge=s denial of access to employer=s facility. Moreover, an examination of the entire record reveals no violation of due process, as it is clear that claimant was provided notice and an opportunity to be heard on this issue, prior to the administrative law judge=s issuance of the protective order. In short, the administrative law judge considered claimant=s request in a fair and reasonable manner, and required employer to provide photographs of the relevant areas, thus protecting employer=s interests while at the same time addressing claimant=s request for discovery. Consequently, the administrative law judge=s decision to issue a protective order preventing claimant from inspecting employer=s premises is affirmed.

Situs

Claimant contends that the administrative law judge erred in finding that he did not meet the situs test under Section 3(a), as employer=s facility is an Aadjoining area@ as defined by the United States Court of Appeals for the Fifth Circuit in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981).

To obtain benefits, an injury must occur on a covered situs. *Nelson v. American Dredging Co.*, 143 F.3d 789, 32 BRBS 115(CRT) (3d Cir. 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).

33 U.S.C. ' 903(a). 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); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Winchester*, 632 F.2d 504, 12 BRBS 719.

In *Nelson*, 143 F.3d 789, 32 BRBS 115(CRT), the United States Court of Appeals for the Third Circuit, within whose jurisdiction the instant case arises, considered the issue of coverage as an Aadjoining area@ under Section 3(a). In that case, at the time of claimant=s injury, employer was engaged in a beach renourishment project on Fenwick Island, Delaware. Claimant, a bulldozer operator and assistant foreman, injured his back when he fell while dismounting from his bulldozer; at the time of this incident, claimant's bulldozer was on the beach approximately 50 feet from the water's edge. The administrative law judge concluded, in part, that the Asitus@ requirement of Section 3(a), 33 U.S.C. '903(a), was not satisfied and the Board affirmed that determination. *Nelson v. American Dredging Co*, 30 BRBS 205 (1996).

In reversing the Board=s decision, the Third Circuit held that the dispositive question regarding situs was whether at least one employer customarily used the beach for loading and/or unloading, and it concluded employer did so on the facts presented.[2] *Nelson*, 143 F.3d at 797, 32 BRBS at 122(CRT). Considering the meaning of the term Aarea,@ the court rejected a construction requiring a discrete structure or facility,[3] in favor of the plain meaning of the term, including an open piece of land and a distinct piece of ground set aside for a specific use. Thus, an unimproved beach could be an Aadjoining area.@ Based on the facts of the case, the Third Circuit thus held that the beach at Fenwick Island constituted an adjoining area where employer customarily unloaded sand from its vessels and, as such, it constituted a covered maritime situs under the Act. *Nelson*, 143 F.3d at 797, 32 BRBS at 123(CRT).

In the instant case, the administrative law judge determined that employer=s Pond No. 4, the site of claimant=s injury, is not Aan adjoining area customarily used by [employer] in loading, unloading, repairing, dismantling, or building a vessel.@ 33 U.S.C. '903(a).

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[2]The Third Circuit held that the Board too narrowly defined the word Acustomarily@ in Section 3(a), by construing it to mean that the customary use of the beach had to be for some maritime purpose. *Nelson*, 143 F.3d at 796, 32 BRBS at 121(CRT). Rather, the court held that the word Acustomarily@ in Section 3(a) modifies the phrase Aadjoining area . . . used by an employer,@ not simply the phrase Aadjoining area.@ *Id.*

[3]The Board relied on the Fourth Circuit=s decision in *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996), wherein the court concluded that the Aother adjoining area@ must be like those specifically enumerated in Section 3(a), each of which is a Adiscrete structure or facility.@ The Third Circuit declined to accept this construction of the statute.

Specifically, the administrative law judge found that employer=s Pond No. 4 is used exclusively for the disposal of processing waste, and not the loading or unloading of coal from vessels. In making this determination, the administrative law judge relied on the testimony provided by Mr. Smith that the coal processing wastes, both slate and slurry, are disposed of at Pond No. 4. HT at 293-296.

We reject claimant=s contention that the entire facility must be a covered situs under *Winchester*, 632 F.2d 504, 12 BRBS 719. It is true that entire shipyards and ports are covered areas, as the entire facility is devoted to a maritime purpose. *See, e.g.*, *Caputo*, 432 U.S. 249, 6 BRBS 150; *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991) (*en banc*), *aff=d sub nom. Ins. Co. of N. Am. v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). However, where a site contains distinct areas used for loading and unloading, and for non-maritime manufacturing purposes, the separate manufacturing area has been held outside the Act=s coverage. *See Bianco v. Georgia Pac. Corp.*, 35 BRBS 99 (2001), *aff=d*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002); *Jones v. Aluminum Co. of Am.*, 35 BRBS 37 (2001); *see also Dickerson v. Mississippi Phosphates Corp.*, BRBS , BRB No. 02-0547 (Apr. 29, 2003).

In *Jones*, 35 BRBS 37, the Board considered situs in the context of an employer whose operations contained both manufacturing facilities and areas used in maritime work. The Board recognized that the portion of employer's facility where loading and unloading occurred constituted a maritime situs. *Id.* at 43. In contrast, the Board held that employer's manufacturing plant, which manufactured aluminum oxide, was not a covered situs, as it lacked the requisite Afunctional@ use in maritime activity. *Id.* Specifically, the Board found that the plant itself was a distinct area which was not used for the loading, unloading, repairing or building of vessels. *Id.* Consequently, the Board held in *Jones* that 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 at another portion of the facility. *Id.* The Board thus remanded the case for factual findings regarding whether the employee was exposed to asbestos while working on the conveyor system used in the loading process.

In *Bianco*, 35 BRBS 99, 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 United States Court of Appeals for the Eleventh Circuit upheld the Board=s decision, applying the holding in *Winchester* that the boundaries of a covered area are defined by function, and holding that the production plant lacked a maritime function. The court stated that to accept claimant=s argument that the entire facility was covered because a part of it is engaged in maritime activity would be tantamount to Awriting out of the statute the

requirement that the adjoining area >be customarily used by an employer in loading, unloading, dismantling, or building a vessel.=@ *Bianco*, 304 F.3d at 1060, 36 BRBS at 62(CRT). Furthermore, in *Dickerson*, the Board held that employer=s phosphoric acid plant is not a covered situs because, although it has a loading and unloading area on navigable waters, the plant has no connection to the docks by way of a conveyor belt or other means, it is geographically and functionally separate from the docks, and it Adoes not house products destined for vessels; it houses only unfinished fertilizer products.@ *Dickerson*, slip op. at 7-8. In each of these cases, the situs inquiry hinged, consistent with *Nelson*, on whether the area where claimant was injured is customarily used by employer for loading, unloading, repairing, dismantling, or building a vessel. *Nelson*, 143 F.3d at 797, 32 BRBS at 122(CRT).

In the instant case, Pond No. 4 is functionally and geographically separate from employer=s unloading/loading operations. With regard to function, employer=s Pond No. 4 is not used for any maritime purpose. It functions solely as the final resting point for employer=s coal refuse and does not store products destined for vessels; it is merely a repository for slate and slurry, which are by-products of the cleaning process. Pond No. 4, in essence, represents the tail end of employer=s coal preparation process and thus has no functional relationship with the navigable water where employer=s unloading/loading operations occur. Similarly, Pond No. 4 is, from a geographic standpoint, distinct from employer=s unloading/loading area. CXs 5, 7. Claimant=s photographs, CX 5, 7, indicate that Pond No. 4 is separated from the processing plant by about .8 miles, CX 17, that the two areas are buffered by some woods, and that the two areas are connected only by a roadway. *See Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998) (warehouse shipping bays, located 3 to 2 mile from employer=s docks on the Mississippi River considered geographically separate); *Melerine v. Harbor Constr. Co.*, 26 BRBS 97 (1992)) (steel mill located 3 mile from dock area considered geographically separate).

In light of the facts in this case, we hold that as Pond No. 4 is separate and apart from employer=s unloading/loading area and it is not used for a maritime purpose, the pond is not Aan adjoining area,@ under Section 3(a). *See Bianco*, 304 F.3d 1053, 36 BRBS 57(CRT); *Jones*, 35 BRBS at 43; *Dickerson*, slip op. at 7-8. Consequently, we affirm the administrative law judge=s finding that claimant=s injury did not occur on a covered situs. *Id.* Moreover, in light of our affirmance of the administrative law judge=s finding that the situs requirement is not met, we need not address claimant=s contentions regarding status. *But see Maher Terminals, Inc. v. Director, OWCP*, F.3d , 2003WL 21234911 (3d Cir. 2003), *aff=g Riggio v. Maher Terminals, Inc.*, 35 BRBS 104 (2001). Consequently, the administrative law judge=s denial of benefits is affirmed.

Accordingly, the administrative law judge=s Decision and Order Dismissing Claim for Lack of Jurisdiction is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge