BRB No. 07-0550

C.C.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TECNICO CORPORATION	)	DATE ISSUED: 12/13/2007
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montgna Klein Camden L.L.P.), Norfolk, Virginia, for claimant.

R. John Barrett and Lisa L. Thatch (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2006-LHC-01601) of Administrative Law Judge Alan L. Bergstrom 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).

The facts of this case are not in dispute. Claimant worked for employer as a sheet-metal mechanic beginning in 2003. Claimant worked at the sheet-metal facility and later began installing sheet metal on ships in repair. In February 2006, he was sent to Hawaii to install sheet metal on the *USS Chaffee*. Claimant testified that employer arranged and paid for the flights on a commercial airline, and it also paid claimant eight hours of regular pay on the days he traveled.[1] Claimant testified that on the departing trip on February 9, 2006, he spent time reviewing blueprints in preparation for his work on the project. He also testified that he spent some time double-checking the blueprints on the return flight on February 27-28, 2006. Tr. at 12-16. Claimant felt some pain in his legs in Hawaii, but the pain went away. Due to pain in his legs following his return to Virginia, and his inability to walk within two weeks of his return, claimant saw Dr. Pearman, a vascular specialist, who diagnosed bilateral deep-vein thrombosis as well as superficial phlebitis. Dr. Pearman concluded that the vascular problems were due to the prolonged flights. Emp. Ex. 4. Employer paid claimant benefits for disability from March 13 through May 31, 2006, under the Virginia workers' compensation law. Jt. Ex. 1. Claimant contends his benefits should be paid under the Longshore Act.

The administrative law judge found that claimant satisfied the status requirement by virtue of the "trip payment" exception to the coming-and-going-rule because employer arranged for and paid for claimant's trips to and from Hawaii. Decision and Order at 9; *see* 33 U.S.C. §902(2) and (3). However, the administrative law judge found that claimant did not satisfy the situs requirement of Section 3(a), 33 U.S.C. §903(a), because claimant was flying in a commercial airline at the time of his injury. He found that even if the injury occurred while claimant's plane was over navigable waters, the aircraft is not an area that was customarily used by employer for maritime activities. Decision and Order at 11. The administrative law judge distinguished these facts from those in *Zapata Haynie Corp. v. Barnard*, 933 F.2d 256, 24 BRBS 160(CRT) (4th Cir. 1991), wherein a fish-spotter who flew in a plane over water to direct fishing boats to large schools of fish was held covered under the Act. The administrative law judge also stated that claimant could not convert a plane into a maritime situs by reading blueprints. Decision and Order at 11. Therefore, the administrative law judge found that claimant was not a covered employee as he failed to satisfy the situs requirement, and he denied benefits under the Act. Claimant appeals, and employer responds, urging affirmance.

Claimant contends the administrative law judge's decision is contrary to law. He argues that the United States Court of Appeals for the Fourth Circuit declined to make a

[1]Claimant's itinerary and testimony establish that he took the following flights: Norfolk to Newark (one hour 18 minutes); Newark to Honolulu (10 hours 55 minutes); Honolulu to Houston (over seven hours plus a five-hour delay); and, Houston to Norfolk (two hours 45 minutes).

distinction between "working on" and "flying over" navigable water; therefore, because nearly half of claimant's flying time was over navigable waters, he should be covered under the Act. Moreover, claimant argues that, as he flew with co-workers and supervisors, this was not an isolated trip involving only one employee; thus, he was in an area customarily used by employer for maritime activities. We reject claimant's arguments.

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 pursuant to Section 2(3) and is not specifically excluded by any provision in 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); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). 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). Coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *Stratton v. Weedon Engineering Co.*, 35 BRBS 1, 5 (2001) (*en banc*) (geography and function of the area are of utmost importance); *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998); *Melerine v. Harbor Constr. Co.*, 26 BRBS 197 (1992). The Fourth Circuit has held that a claimant who was injured in an aircraft over navigable waters while engaged in the traditional maritime activity of fish spotting was injured "on navigable waters." *Zapata Haynie*, 933 F.2d 256, 24 BRBS 160(CRT); *see also Ward v. Director, OWCP*, 684 F.2d 1114, 15 BRBS 7(CRT) (5th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983) (fish spotter killed when his plane crashed into the Gulf of Mexico covered). It is clear from the facts of the instant case that the commercial airplane in which claimant was flying is not an enumerated area, as a commercial airplane is not an "adjoining pier, wharf, dry dock, terminal, building way, [or] marine railway."[2] Therefore, claimant was injured on a covered situs only if his injury aboard

[2]A plane also is not a "vessel" under the Act. *Zapata Haynie*, 933 F.2d at 259, 24 BRBS 168(CRT); *Ward*, 684 F.2d 1114, 15 BRBS 7(CRT); *Smith v. Pan Air Corp.*, 685 F.2d 102 (5th Cir. 1982). However, if an injury occurs in an aircraft flying over navigable waters or an aircraft crashes into navigable waters, there is federal admiralty jurisdiction only if the aircraft bears some relationship to maritime commerce or the crash occurs on

the aircraft would have been covered under the pre-1972 Amendments because the injury occurred "on navigable waters" or if he was injured in an "adjoining area" under Section 3(a). *Perini*, 459 U.S. 297, 15 BRBS 62(CRT).

The case cited by claimant in support of his contention that he was injured on navigable waters, *Zapata Haynie*, does not dictate the result sought by claimant. Rather, claimant's interpretation is overly broad as that case is distinguishable on its facts. In *Zapata Haynie*, the claimant was a fish spotter who piloted his plane at low altitudes over the Chesapeake Bay to search for schools of menhaden.[3] When he spotted a large school, he relayed his information to fishing vessels on the water, and he assisted the vessels in guiding the nets and loading the fish. After having been transferred to fly out of the congested Norfolk area, the claimant developed psychological problems brought on by work-related stress, and he was grounded. The Fourth Circuit held that the claimant would have been covered under pre-1972 law, as he was performing traditional maritime employment over, and therefore on, navigable waters. *Zapata Haynie*, 933 F.2d at 259, 24 BRBS at 168(CRT); *see also Ward*, 684 F.2d 1114, 15 BRBS 7(CRT). The court rejected the employer's arguments that fish spotting is not a traditional maritime activity that occurs over water and that the claimant should not be covered because he never actually came into contact with the water.[4] The court explained that all of the claimant's employment, except taking off and landing, occurred on navigable waters.

The facts of the case at bar are not analogous, and *Zapata Haynie* does not extend coverage to claimant. Claimant's job, while maritime, is traditionally land-based. Unlike the flights in *Zapata Haynie*, claimant was not required to perform his job from an aircraft. His trip to and from Hawaii was not a regular part of claimant's work; rather, claimant was commuting to one specific job, and the commercial airplane was not engaged in any maritime activity – other than flying over the water, it had no connection to it. In comparison, the fish spotter's work was related to the water and the fishing vessels thereon, and the use of a plane was not merely a way of getting to and from a job but was necessary to the performance of the claimant's job on a daily basis. Consequently, we reject claimant's contention that *Zapata Haynie* controls this case.

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the high seas. *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Executive Jet Aviation, Inc. v. City of Cleveland, Ohio*, 409 U.S. 249 (1972).

[3]Fish spotters previously performed their duties from the crow's nests of ships.

[4]The Fourth Circuit stated: "To draw a distinction between actually making contact with the water and simply working over it would be hypertechnical and contrary to the liberal construction of the Act." *Zapata Haynie*, 933 F.2d at 260, 24 BRBS at 167(CRT).

Even assuming, *arguendo,* that claimant's injury occurred while he was traveling over the Pacific Ocean, his injury would not have been covered prior to the 1972 Amendments.[5] *See Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir. 1999) (*en banc*). Thus, claimant's injury can be covered by the Act only if it occurred in "an adjoining area."

The Act requires other "adjoining area[s]" to be "customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." In addition, the Fourth Circuit requires that "adjoining" areas actually be contiguous to or abut the navigable water. *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86(CRT) (4th Cir. 1998), *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 the instant case, the administrative law judge reasoned that both *Ward* and *Zapata Haynie* could support finding that "the airspace directly above navigable waters" could be an "adjoining area" because it was customarily used by those employers for traditional maritime activity, fish spotting. Decision and Order at 11. As he stated, however, such was not the case in *Shippy v. Crowley Maritime Corp.*, 20 BRBS 55 (1987).

In *Shippy*, the decedent was traveling to a worksite in southern Alaska, flying mostly over water, when the plane crashed into a mountain-side approximately 2.5 miles from the airport and .5 mile from the dock where decedent was to have worked. Applying the *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978), factors for determining whether an area is an "adjoining area" in the jurisdiction of the United States Court of Appeals for the Ninth Circuit,[6] the Board affirmed the administrative law judge's finding that the decedent was not killed on a

[5]Contrary to claimant's argument, "upon" does not always mean "over," and coverage does not include all persons injured over or above navigable waters. *Morrissey v. Kiewit-Atkinson-Kenny*, 36 BRBS 5 (2002) (that part of tunnel rose above surface of water is of no import – the claimant worked in a sewage treatment plant discharge tunnel that was in bedrock under the Atlantic Ocean – no situs); *Kehl v. Martin Paving Co.*, 34 BRBS 121 (2000) (worker on bridge over navigable waters – no situs). Further, not all persons "upon" navigable waters are covered. *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir. 1999) (*en banc*) (a person transiently or fortuitously on navigable water at the time of injury may not be covered).

[6]The Ninth Circuit considers factors such as the suitability of the site for maritime use, the usage of adjoining properties, the proximity to the waterway, and whether the site is as close to the water as feasible. *Herron*, 568 F.2d 137, 7 BRBS 409; *Shippy*, 20 BRBS at 56.

maritime situs because the mountain was not proximate to navigable waters and had no relationship to the maritime industry. *Shippy*, 20 BRBS at 57. The Board affirmed the administrative law judge's reasonable conclusion that the mountain's only connection to the maritime industry was that a plane which was carrying a maritime employee to the airport closest to his worksite crashed into it.[7] *Id.* Relying on *Shippy*, the administrative law judge in the case currently before the Board found that claimant failed to establish that the commercial airliner in which he traveled was an area *customarily* used by employer in "loading, unloading, repairing, dismantling, or building a vessel." Decision and Order at 11. As a commercial aircraft flying over navigable waters is not an "adjoining area" that is customarily used by the employer in "loading, unloading, repairing, dismantling, or building a vessel[,]" under Section 3(a), the administrative law judge's finding is in accordance with law.[8] Thus, the aircraft in which claimant commuted to a project in Hawaii was not an enumerated situs, an adjoining area, or an area covered prior to the 1972 Amendments. Therefore, we affirm the administrative law judge's determination that claimant was not injured on a covered situs, and we hold that he properly denied benefits under the Act.

[7]The Board rejected "zone of danger" and "coming and going" arguments, stating that those are concepts related to the "course and scope of employment" issues. Claimant here argues that the administrative law judge erred in discussing claimant's personal activity as it bears no relationship to the situs issue. While claimant is correct, it appears that part of claimant's argument had been that he was reviewing blueprints during the course of his flights. Thus, it appears the administrative law judge may have interpreted that argument as an attempt to show situs on the plane by showing that claimant was performing covered work on the plane. The Board has stated: "the breadth of duties encompassed by an employee's course of employment, however, does not enlarge the situs." *Shippy*, 20 BRBS at 57; *see also Martin v. Pride Offshore, Inc.*, 34 BRBS 192 (2001) (claimant's auto accident on land, following work on the Outer Continental Shelf which caused fatigue, not covered).

[8]Claimant also could not prevail in arguing that the plane is an adjoining area in the Ninth Circuit under the *Herron* factors. Additionally, contrary to claimant's argument, the fact that claimant was not the only employee to fly to Hawaii for this project does not make the plane an area customarily used for maritime activity.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge