

S.W.)	
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Claimant-Petitioner)	
)	
v.)	
)	
ATLANTIC CONTAINER SERVICE)	DATE ISSUED: <u>AUG 28, 2009</u>
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION)	
)	
)	
Employer/Carrier- Respondents)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Colleen A. Geraghty, Administrative Law Judge, United States Department of Labor.

David J. Berg (Latti & Anderson LLP), Boston, Massachusetts, for claimant.

Donald E. Wallace (MacDonald & Wallace), Quincy, Massachusetts, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2007-LHC-01653) of Administrative Law Judge Colleen A. Geraghty 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 began his employment as a chassis mechanic, first with Williams Maritime in July 2005, and then with Columbia Coastal Transport (CCT),¹ at a garage located at the Conley Terminal in Boston, Massachusetts. This terminal is located within, and has direct access to, the Boston Harbor, and is also adjacent to Pleasure Bay and the Reserved Channel. In September 2006, claimant began doing the same chassis mechanic work for Atlantic Container Service (ACS, employer). However, due to space limitations within the Conley Terminal, claimant's job site moved to another facility, located one mile outside the Conley Terminal, at 95 Fargo Street. On December 4, 2006, claimant tore his left rotator cuff in the course of his work for ACS. Claimant had surgery on March 9, 2007, and returned to full duty work on July 12, 2007. Claimant filed a claim seeking temporary total disability benefits for the period that he was unable to work. ACS has since gone out of business and CCT has taken over the chassis repair function. Claimant continues to work at the 95 Fargo Street location as a chassis mechanic.

In her decision, the administrative law judge found that claimant's injury did not occur on a covered situs. 33 U.S.C. §903(a). Specifically, stating that she was applying the factors set forth by the United States Court of Appeals for the First Circuit in *Cunningham v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42(CRT) (1st Cir. 2004), the administrative law judge found that the 95 Fargo Street facility is not an "adjoining area" for purposes of coverage under the Act. Consequently, she denied the claim for benefits.

On appeal, claimant challenges the administrative law judge's finding that the 95 Fargo Street facility is not a covered situs. Employer responds, urging affirmance.

Claimant contends that the record establishes that the 95 Fargo Street facility is an "adjoining area" within the meaning of Section 3(a) and thus, a covered situs under the Act. Claimant specifically contends that the facility "is a stone's throw" from the same navigable water that is adjacent to the Conley Terminal, that claimant's job site could not be any closer to the waterway, and that the properties adjoining the 95 Fargo Street facility are primarily devoted to uses in maritime commerce. Claimant avers that this case is factually distinguishable from *Cunningham*, such that the result in that case is not controlling in this case.

For a claim to be covered by the Act, a claimant must establish that the injury occurred upon the navigable waters of the United States, including any dry dock, or that it occurred on a landward area covered by Section 3(a), and that the employee is a maritime employee under Section 2(3) and is not specifically excluded by the Act. 33

¹ CCT took over the operations of Williams Maritime after that entity went out of business in 2006.

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); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Thus, in order to demonstrate that coverage exists, a claimant must satisfy the “situs” and the “status” requirements of the Act. *Cunningham*, 377 F.3d at 102, 38 BRBS at 43(CRT).

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) of the Act 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 197 (1992). In *Cunningham*, 377 F.3d 98, 38 BRBS 42(CRT), the First Circuit addressed the scope of an “adjoining area” under Section 3(a). At the time of his injury, the claimant there was working as a pipefitter at Bath Iron Works’ East Brunswick Manufacturing Facility (EBMF), which is located in a mixed-use area 1,400 feet from the New Meadows River in Brunswick, Maine, and four to five miles from the main shipyard on the Kennebec River in Bath, Maine. The administrative law judge concluded that the situs requirement of Section 3(a), 33 U.S.C. §903(a), was not satisfied and the Board affirmed that determination. *Cunningham v. Bath Iron Works Corp.*, 37 BRBS 76 (2003) (Hall, J., concurring and dissenting).

Applying *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981),² and *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978), and considering the decisions of the United States Court of Appeals for the First Circuit in *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 12 BRBS 808 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981), and *Stockman v. John T. Clark & Son*, 539 F.2d 264, 4 BRBS 304 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977), the Board held that EBMF is not an “adjoining area” within the meaning of Section 3(a). Specifically, EBMF had a geographic relationship with the New Meadows River but had no functional relationship with that river, and it had a functional relationship with the shipyard on the Kennebec

² In *Winchester*, the Fifth Circuit held that an “adjoining area” must have a functional nexus with maritime activities and a geographic nexus with navigable waters.

River, but it was “not within the perimeter of a general maritime area around the Kennebec River or the main shipyard[.]” so it had no geographic relationship with the Kennebec River. *Cunningham*, 37 BRBS at 82, 84. As a site must have a functional and a geographic nexus with the same body of navigable water, the Board held that EBMF was not a covered situs. *Id.* at 84-85.

The First Circuit affirmed the Board’s decision. *Cunningham*, 377 F.3d 98, 38 BRBS 42(CRT). Although the court specifically stated it was not applying the restrictive definition of “adjoining area” utilized by the United States Court of Appeals for the Fourth Circuit,³ and it “assumed without deciding” that the *Herron* approach is the correct one,⁴ the court agreed that EBMF is not a covered situs, as EBMF and the main shipyard are two separate facilities that do not exist in a common geographic area. Additionally, the court held that situs cannot be satisfied by establishing a functional relationship with one body of water and a geographic relationship with another. *Cunningham*, 377 F.3d 98, 38 BRBS 42(CRT).

While the administrative law judge applied the *Herron/Winchester* factors in this case, her conclusion that the 95 Fargo Street facility is not an “adjoining area” under Section 3(a) is not supported by substantial evidence.⁵ Contrary to the administrative law

³ The Fourth Circuit requires an “adjoining area” to be actually contiguous with navigable waters. *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).

⁴ In *Herron*, the United States Court of Appeals for the Ninth Circuit stated that consideration should be given to the following factors, among others, in determining if a site is an “adjoining area:”

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.

⁵ Specifically, the administrative law judge addressed the evidence in terms of the *Herron/Winchester* factors, as tacitly approved by the First Circuit in *Cunningham*: (1) the particular suitability of the site for maritime purposes; (2) whether adjoining properties are devoted primarily to uses in maritime commerce; (3) the proximity of the

judge's finding, the 95 Fargo Street facility is in close proximity to navigable waters and its proximity to navigable waters is dictated by maritime concerns.⁶ The maps in the record, EXs D, E, establish that the 95 Fargo Street facility is within the same geographic area near the waterfront as the Conley Terminal. The Reserved Channel, which is the same body of water to which the Conley Terminal is adjacent, is approximately 200 yards away, behind the facility and across a street. The 95 Fargo Street facility is also only one mile from the Conley Terminal and its docks on Boston Harbor. Moreover the record establishes that the 95 Fargo Street facility is located as close to the waterway and to the Conley Terminal as is feasible and is particularly suited for maritime purposes. *Herron*, 568 F.2d at 141, 7 BRBS at 411.

In this regard, Mr. Kay, who serves as the Operations Manager at Conley Terminal, testified that the 95 Fargo Street facility is owned by the Massachusetts Port Authority [Massport] and that "it took [Massport] about a year" to build the garage at the 95 Fargo Street site. CX 6, Dep. at 9-10. Mr. Kay stated that Massport's decision to move the chassis repair work to 95 Fargo Street was dictated by space limitations within the Conley Terminal. Specifically, Mr. Kay said that Massport had felt that "chassis storage took up a number of acres which [they] desperately needed for container storage." CX 6, Dep. at 10. Mr. Crosby, the Terminal Manager of the 95 Fargo Street facility, likewise stated that Massport owned the 95 Fargo Street location, HT at 48, and that the move of the chassis repair work from the Conley Terminal to the 95 Fargo Street property was due entirely to space limitations at the Conley Terminal. In particular, Mr. Crosby stated that "it was an effort on the Port Authority [*i.e.*, Massport] to remove the chassis from the space on the waterfront. It's an issue that's going on in ports all over the country, to get the wheels off the terminal space, because it's much more valuable for them to have that space for the imports and exports as opposed to the wheels." HT at 49. Consequently, the relocation of the chassis repair from the Conley Terminal to the 95 Fargo Street facility was dictated by maritime concerns. CX 6, Dep. 9-11. Moreover, its

site to the waterway; and (4) whether or not the site is as close to the waterway as is feasible, given all the circumstances of the case. Decision and Order at 8.

⁶ Although the administrative law judge's finding that the adjoining properties are not devoted primarily to uses in maritime commerce is supported by the record in this case, HT at 42, 60; EXs F, G, it is important to note, as the Fifth Circuit stated in *Winchester*, that an "area" is not limited to the pin-point site of the injury; rather, a determination of whether an area is a covered situs requires an examination of both the site of the injury and the surrounding area, and the character of surrounding properties is but one factor to be considered. *Winchester*, 632 F.2d at 513, 12 BRBS at 726; *see also Stratton v. Weedon Engineering Co.*, 35 BRBS 1, 4-5 (2001) (*en banc*).

relocation, in close proximity to the Conley Terminal and navigable water, was similarly dictated by maritime concerns, *i.e.*, the 95 Fargo Street facility was owned by Massport, and Massport itself had the garage facility constructed for the chassis repair work.

The facts in this case are akin to those in both *Winchester* and *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*), and thus distinguished from those in *Cunningham*. In *Winchester*, two of the gear rooms were located on the docks but the third gear room, where the claimant worked and sustained his injury, was located five blocks from the gate of the nearest dock because the docks lacked sufficient space for additional gear rooms. *Winchester*, 632 F.2d at 507, 12 BRBS at 720. The court held that an administrative law judge properly found that a gear room located five blocks from the nearest dock constituted a covered situs because it was in the vicinity of the navigable waterway, it was as close to the docks as feasible, and it had a functional nexus to maritime activity in that it was used to store gear which was used in the loading process. *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729. In this case, as evidenced by the testimony provided by Mr. Kay and Mr. Crosby, employer performed chassis repair work at both the Conley Terminal and the 95 Fargo Street facility,⁷ but that the chassis repair work was purposely relocated to other property owned by Massport outside of the Conley Terminal because of space limitations in and around the dock. CX 6, Dep. at 7, 10; HT at 47, 49. As in *Winchester*, the new site here remained in the same general geographic area near the docks.

In *Stratton*, the Board affirmed the administrative law judge's determination that claimant's injury at employer's "clean shed" occurred on a covered situs. In particular, the Board observed that the site is used to repair devices used on vessels, and thus has a functional nexus with maritime activity. Moreover, the Board found that the geographic criterion of *Winchester* was satisfied, as the site was approximately 300-400 feet from the navigable St. John's River and adjacent to a canal which leads to the river. Consequently, the Board held that the injury occurred "within the vicinity" of a navigable body of water, notwithstanding that there are non-maritime businesses and residences in the surrounding area. *Stratton*, 35 BRBS at 5.

In this case, as in *Stratton* and in contrast to *Cunningham*, the 95 Fargo Street facility has both a functional and geographic relationship with the Conley Terminal,

⁷ Mr. Kay explicitly stated that "[t]he chassis repair work is done at two locations, one at the *Fargo Terminal* and the second at Conley Terminal." CX 6, Dep. at 7 (emphasis added). Mr. Kay's use of the term "terminal" in describing the Fargo Street property supports the position that Massport essentially considered that property as an extension of its Conley Terminal.

which is sufficient to establish that it is an “adjoining area” under Section 3(a). In this regard, it is undisputed that the Conley Terminal is surrounded on three sides by navigable water, *i.e.*, the Boston Harbor, the Reserved Channel and Pleasure Bay, and that the 95 Fargo Street facility is across a street from the Reserved Channel. Additionally, the courts and the Board have held that a facility used for the repair and maintenance of equipment employed in the loading/unloading process may be an “adjoining area.” *See, e.g., Winchester*, 632 F.2d 504, 12 BRBS 719 (gear room used to store gear used in the loading process located five blocks from nearest dock is a covered situs); *Herron*, 568 F.2d 137, 7 BRBS 409 (claimant responsible for maintaining and repairing equipment used in loading and unloading vessels injured at gear locker located 2,600 feet from a river and 2,050 feet from a port); *D.S. Consolidation Coal Co.*, 42 BRBS 80 (2008) (garage used to repair heavy equipment used in the unloading/loading process has a functional nexus with the loading process on a navigable river sufficient to bring it within the scope of Section 3(a)); *Pearson v. Jered Brown Bros.*, 39 BRBS 59 (2005), *aff’d on recon en banc*, 40 BRBS 2 (2006) (employer’s facility, used to fabricate and construct marine parts, has a maritime purpose and thus meets the *Winchester* ‘function’ requirement); *Stratton*, 35 BRBS 1 (claimant, a marine mechanic, injured at employer’s “clean shed” next to its repair shop facility).

The fact that the 95 Fargo Street facility is used, as the administrative law judge found and the parties concede, exclusively to repair chassis that are used to transport shipping containers at the Conley Terminal establishes that the garage has a functional nexus with the loading process at Conley Terminal sufficient enough to bring it within the scope of Section 3(a). *Id.* The administrative law judge, in essence, conceded this point in finding that “the 95 Fargo Street facility’s functional relationship is with the Conley Terminal, a separate facility on Boston’s waterfront which is located one mile away from 95 Fargo Street.” Decision and Order at 9. Moreover, while the 95 Fargo Street and Conley Terminal facilities are separate facilities, they nonetheless exist in a common geographic area. The 95 Fargo Street facility is encompassed “within the perimeter of a general maritime area” which is dominated by the Conley Terminal. Thus, in contrast to the locations in *Cunningham*, while the 95 Fargo Street facility and the Conley Terminal are separate facilities, they exist in a common geographic area, and the 95 Fargo Street facility has both a functional and geographic nexus with the same bodies of water, *i.e.*, the Reserved Channel and the Boston Harbor, as does the Conley Terminal. *See generally Waugh v. Matt’s Enterprises, Inc.*, 33 BRBS 9 (1999).

We therefore hold that the 95 Fargo Street facility has the requisite functional and geographic nexus with navigable waters such that it is an “adjoining area” under Section 3(a). *See Winchester*, 632 F.2d 504, 12 BRBS 719; *Herron*, 568 F.2d 137, 7 BRBS 409; *Stratton*, 35 BRBS 1. In this case, the record establishes that employer’s 95 Fargo Street facility is as close to the Reserved Channel and Boston Harbor as is feasible, that

employer's relocation of its chassis repair work from the Conley Terminal to the 95 Fargo Street facility was dictated by maritime concerns, and that the 95 Fargo Street facility is in the general geographic area of the Boston Harbor. The administrative law judge's finding that claimant's injury did not occur on a covered situs is thus reversed. Consequently, we vacate the denial of claimant's claim and remand the case for a consideration of the remaining issues.

Accordingly, the administrative law judge's finding that claimant's injury did not occur on a covered situs is reversed, the denial of benefits is vacated, and the case is remanded for consideration of the remaining issues.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge