BRB No. 09-0315

REX DRYDEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	DATE ISSUED: 12/31/2009
THE DAYTON POWER & LIGHT COMPANY	)	
	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Kirk E. Karamanian, Birmingham, Michigan, for claimant.

Todd M. Powers and Megan C. Ahrens (Schroeder, Maundrell, Barbiere & Powers), Mason, Ohio, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits (2007-LHC-02029) of Administrative Law Judge Larry S. Merck 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 injured his back on June 17, 2002, opening a water valve (PIV 15) when a "cheater bar" slipped off a valve handle. Employer's electricity generating facility, the J.M. Stuart Station (Stuart Station), is located on the Ohio River. Coal is delivered to the facility by river barges. The coal is unloaded onto and transported by a series of conveyor belts directly to the power plant silos, or it is diverted to a coal pile from which it is later re-loaded, as needed, onto conveyor belts and transported to the power plant. Claimant was employed by employer as a coal handling operator for 24 years. He was

qualified to perform all of the duties of a coal handling operator, including operating a barge unloader and tow boat, for which he obtained a Coast Guard license. Employer paid claimant disability benefits under Ohio's workers' compensation statute from June 2002 to December 2004, and under its Illness and Disability Plan from January 2005 to January 2008. Claimant filed a claim for compensation under the Act, which employer controverted.

In his decision, the administrative law judge found that claimant was injured on a covered situs pursuant to Section 3(a) of the Act, 33 U.S.C. §903(a). The administrative law judge also found that claimant's regular employment was integral to unloading coal from vessels and that claimant, therefore, is a maritime employee pursuant to Section 2(3) of the Act, 33 U.S.C. §902(3), and consequently, that claimant established coverage under the Act.[1] The administrative law judge found, based on the record as a whole, that claimant's June 17, 2002 work injury caused or aggravated a herniated disc and leg radiculopathy, and aggravated his pre-existing degenerative disc disease. The administrative law judge accepted the parties' stipulation that claimant's back condition reached maximum medical improvement on March 23, 2004. The administrative law judge found that claimant is unable to return to his usual employment and that employer did not establish the availability of suitable alternate employment. Claimant was therefore awarded compensation for temporary total disability from June 18, 2002 through March 22, 2004, 33 U.S.C. §908(b), and for permanent total disability commencing March 23, 2004, 33 U.S.C. §908(a). The administrative law judge also found claimant entitled to medical treatment for work-related back and leg pain. 33 U.S.C. §907. The administrative law judge accepted the parties' stipulation that employer is entitled to a Section 3(e) credit, 33 U.S.C. §903(e), for compensation payments totaling $65,521.16 it made to claimant under Ohio law. The administrative law judge denied employer a credit pursuant to Section 14(j), 33 U.S.C. §914(j), for $23,150.60 it paid claimant under its Illness and Disability Plan.

On appeal, employer challenges the administrative law judge's findings that claimant was injured on a covered situs and that it is not entitled to a Section 14(j) credit for the sum it paid claimant pursuant to its Illness and Disability Plan. Claimant responds, urging affirmance of the administrative law judge's findings. Employer filed a reply brief.

Employer first contends the administrative law judge erred in finding that claimant's injury occurred on a site covered by Section 3(a) of the Act. Employer contends that the location of claimant's injury at PIV 15 is not an adjoining area under the decision of the United States Court of Appeals for the Fourth Circuit in *Sidwell v.*

[1] The parties also stipulated that claimant is a maritime employee.

Express Container Services, Inc., 71 F.3d 1134, 29 BRBS 138(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996). Employer also argues that the location of claimant's work injury is geographically and functionally removed from the coal unloading process at its Stuart Station facility and, therefore, that claimant was not injured on an "adjoining area."

To obtain benefits under the Act, an injury must occur on a covered situs. 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). In this case, as claimant was not injured on navigable waters or on an enumerated site, his injury must have occurred in an "other adjoining area customarily used by an employer" in loading or unloading a vessel. *See generally Rizzi v. Underwater Constr. Corp.*, 84 F.3d 199, 30 BRBS 44(CRT) (6th Cir.), *cert. denied*, 519 U.S. 931 (1996). In construing "adjoining area," the courts have generally recognized that the phrase encompasses both a geographic and functional nexus with navigable water. *See Cunningham v. Director, OWCP*, 377 F.2d 98, 38 BRBS 42(CRT) (1st Cir. 2004); *Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002); *Nelson v. American Dredging Co.*, 143 F.3d 780, 32 BRBS 115(CRT) (3d Cir. 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); *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). Regarding the functional nexus, a site must have a customary maritime use, but need not be used exclusively or primarily for such maritime purposes. *See Winchester*, 632 F.2d 504, 12 BRBS 719; *Herron*, 568 F.2d 137, 7 BRBS 409. Regarding the geographic nexus, the Fifth and the Ninth Circuits have held that an area can be an "adjoining area" within the meaning of the Act if it is in the vicinity of navigable waters, or in a neighboring area, and is customarily used for maritime activity. *Winchester*, 632 F.2d at 513-516, 12 BRBS at 726-728, *Herron*, 568 F.2d at 141, 7 BRBS at 411; *see also* Cunningham, 377 F.2d 98, 38 BRBS 42(CRT) ("there must be at least some sense of a largely continuous neighborhood of maritime uses, some shape of a perimeter . . . that extends out from the water's edge"); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (*en banc*). The Fourth Circuit, in contrast, has held that an "adjoining area" must be a discrete shoreside structure or facility that is actually contiguous with navigable waters. *Sidwell*, 71 F.3d at 1139, 29 BRBS at 143(CRT); *accord Parker v. Director*,

OWCP, 75 F.3d 929, 30 BRBS 10(CRT) (4th Cir. 1996), *cert. denied,* 519 U.S. 812 (1996); *Kerby v. Southeastern Public Service Authority*, 31 BRBS 6 (1997), *aff'd mem.,* 135 F.3d 770 (4th Cir. 1998), *cert. denied,* 525 U.S. 816 (1998).

In this regard, we reject employer's argument that PIV 15 is not an "adjoining area" because it is not adjacent to navigable water as required by the Fourth Circuit in *Sidwell,* 71 F.3d 1134, 29 BRBS 138(CRT). In *Sidwell*, the Fourth Circuit held, with regard to the definition of "other adjoining areas," that non-enumerated areas must actually abut navigable waters, be similar to the enumerated areas, and be customarily used for maritime activity. Thus, the court held that the "*raison d'etre*" for the facility or structure must be for use in connection with the navigable waters in order for a site to be covered. *Sidwell*, 71 F.3d at 1138-1139, 29 BRBS at 142-144(CRT). This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, 33 U.S.C. §921(c), which has not addressed the meaning of the word "adjoining." We note that *Sidwell* has not been applied outside the jurisdiction of the Fourth Circuit. *See Cunningham,* 377 F.2d 98, 38 BRBS 42(CRT); *Nelson*, 143 F.3d 780, 32 BRBS 115(CRT); *Gavranovic v. Mobil Mining & Minerals*, 33 BRBS 1 (1999). In this case, we need not address whether a site must be adjacent to navigable waters to be an "adjoining area," as the administrative law judge found the site at issue was adjacent to navigable water. Stuart Station is located on the north side of the Ohio River. EX 8 at 25. Coal is unloaded from barges on the river and moves through the facility on conveyor belts from south to north and from east to west. PIV 15 is located outside, between the power plant and the river. Tr. at 73; EXs 8 at 1; 25; 19 at ex 5. As claimant was injured on a facility located adjacent to the Ohio River, a geographic nexus with navigable waters is established; application of *Sidwell* in this case thus does not lead to a different result.[2] *See infra; see also Pearson v. Jered Brown Brothers*, 39 BRBS 59 (2005), *aff'd on recon. en banc,* 40 BRBS 2 (2006).

The primary issue in this case, therefore, is whether claimant was injured in an area used for a maritime activity, the unloading of coal barges, or in the electricity

[2] Moreover, under *Sidwell*, an entire adjacent facility used for a maritime purpose is a covered situs. *Sidwell*, 71 F.3d at 1140 n.11, 29 BRBS at 144, n.11(CRT); *see Sowers v. Metro Machine Corp.*, 35 BRBS 154 (2001) (Hall, C.J., dissenting), *aff'd on recon. en banc*, 35 BRBS 181 (2002) (Hall, J., dissenting). Thus, that PIV 15 is located 1000 to 1500 feet from the Ohio River, upon which employer relies in this case, does not alter the result as the facility is used for unloading vessels. Moreover, while employer asserts that a road separates the facility from the water's edge, the administrative law judge described it as an access road and, thus, part of the facility; the administrative law judge found that Stuart Station has no public roads or buildings separating it from the waterfront.

generating facility. *See, e.g., Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (injury occurring in wallboard and gyprete manufacturing department is not covered even though raw gypsum in offloaded from vessels elsewhere on the site); *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86(CRT) (4th Cir. 1998), *cert. denied*, 525 U.S. 1040 (1998) (steel facility directly adjacent to river is not a covered site because there was no functional relationship with the river). As all circuit courts agree that a site must have a customary maritime function in order to be covered, we will apply this generally established law to resolve this case. In his decision, the administrative law judge found that the entirety of Stuart Station is a covered situs as it is adjacent to the Ohio River and coal is unloaded from barges at the facility for use in the generation of electricity, citing the Board's decision in *Gavranovic*, 33 BRBS 1, and the Sixth Circuit's decision in *Stowers v. Consolidated Rail Corp.*, 985 F.2d 292 (6th Cir. 1993). The administrative law judge also found that the site of claimant's injury at PIV 15 was a covered site as it is on the east side of Unit 1 (one of three coal-burning silos) and the west side of the coal-handling building offices, and within the system of conveyor belts that carries coal to the power plant from the barges.

The administrative law judge's finding that all of Stuart Station is a covered situs is overbroad.[3] As we have discussed, in order to meet the "function" requirement, an adjoining area must be used for the loading, unloading, repairing or building of vessels. Where a facility is used for both maritime and non-maritime functions, the Board has recognized that there is a point at which the loading and unloading process ceases, and the manufacturing process begins, and vice versa.[4] *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998); *Melerine v. Harbor Constr. Co.*, 26 BRBS 97 (1992). In *Gavranovic*, 33 BRBS 1, the Board held that the administrative law judge properly found that the building where claimants were injured was part of the conveyor belt system used for loading fertilizer onto vessels; the building was not part of the manufacturing facility and thus claimants were injured on a covered situs. Contrary to the administrative law

[3] The administrative law judge incorrectly stated that the *Stowers* decision interpreted the situs requirement as focusing on an entire facility. *Stowers* is not a situs case; it addressed only the status element of Section 2(3). The court expressly declined to address the situs issue. *Stowers v. Consolidated Rail Corp.*, 985 F.2d 292, 297 (6th Cir. 1993).

[4] This statement is consistent with cases holding that employees whose duties are integral to a manufacturing process rather than to a longshoring or shipbuilding process are not engaged in maritime employment pursuant to Section 2(3) of the Act. *See Coyne v. Refined Sugars, Inc.*, 28 BRBS 372 (1994); *Garmon v. Aluminum Co. of America-Mobile Works*, 28 BRBS 46 (1994), *aff'd on recon.*, 29 BRBS 15 (1995).

judge's statement in the present case, the Board did not hold in *Gavranovic* that the entire facility was a covered site, although the Board noted that the entire facility was adjacent to navigable waters. *Id.* at 5. The inquiry in "mixed-use cases," *i.e.*, those involving a site with both a manufacturing and a maritime component, concerns whether the claimant's injury occurred in the area used for unloading vessels, as that area has a functional relationship with navigable water. *See Bianco v. Georgia Pacific Corp.*, 35 BRBS 99 (2001), *aff'd*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002); *see also D.S. [Smith] v. Consolidation Coal Co.*, 42 BRBS 80 (2008); *Maraney v. Consolidation Coal Co.*, 37 BRBS 97 (2003); *Dickerson v. Mississippi Phosphates Corp.*, 37 BRBS 58 (2003); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001). In this case, as the power plant is used for generating electricity, the area of the plant itself cannot be brought into coverage simply because coal is shipped by barge and unloaded at another portion of the facility.

Although we therefore cannot affirm the rationale used by the administrative law judge in finding coverage under the Act, we affirm the result he reached, as the administrative law judge's findings establish that claimant was injured outside the plant in the area where conveyors used to unload coal vessels are located. The administrative law judge found that the precise location of claimant's injury has a functional nexus with the Ohio River and the unloading of the coal barges thereon. Employer contends that claimant was not injured in an "adjoining area," asserting that the unloading process ceases once the coal leaves conveyor belt 4 for storage or is diverted onto conveyer belt 50 where it enters the electricity generating process. Employer asserts that as PIV 15, the fire hydrant it serviced, and the nearest conveyor belt, 8C, are in the storage pile area at Stuart Station, the area where claimant was injured is not an "adjoining area" under Section 3(a). We reject employer's contentions of error and affirm the conclusion that the situs element is satisfied. *See 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) (area adjacent to river used for both loading via conveyor system and manufacturing meets the situs requirement).

The administrative law judge found that the injury site at PIV 15 is on the east side of Unit 1 (one of three coal-burning silos) and the west side of the coal-handling building offices. This location is adjacent to the river and is underneath the overhead, outdoor, system of conveyor belts that carries coal from the river barges to the power plant. Claimant and James Poole, employer's operations supervisor, testified that PIV 15 controls the water flow to a fire hydrant that is used to protect the overhead conveyor belts and other equipment from fire damage and to wash down belts in order that they may operate properly. Tr. at 77-78; EX 19B at 12. Claimant further testified that coal moves from the river barges to, in sequence, conveyor belts 1-4. Tr. at 47-51. Belt 4 moves the coal to the coal pile or onto belt 50, which unloads the coal onto the "1500 system." *Id*. at 54-55. The 1500 system consists of a series of conveyor belts and

equipment (cracker pit, crushers, desurge bin) that move and process coal for burning in the silos at the power plant. *Id*. at 54-58. PIV 15 is located near conveyor belt 8C, which transports coal from the pile to the 1500 system. Tr. at 72, 144; EX 19B at 12.

The administrative law judge's finding that PIV 15 is located outside of the electricity generating units and underneath the system of outdoor conveyor belts that carries coal from the river to the power plant is supported by substantial evidence. *See* Tr. at 42, 73, 77-78, 160-162. It is apparent from the pictures offered into evidence that the outdoor system of conveyor belts commences at the river and is used in unloading the barges on the river, and that the belts are not within the power plant itself.[5] *See* CX 34; EX 8. The area of the conveyor belt system, which includes PIV 15, thus has a functional relationship with the Ohio River. *See Winchester*, 632 F.2d 504, 12 BRBS 719. The area is adjacent to the river and is customarily used for the maritime activity of unloading coal from barges. *See Cuellar v. Garvey Grain Co.*, 11 BRBS 441 (1979), *aff'd sub nom. Garvey Grain Co. v. Director, OWCP*, 639 F.2d 366, 12 BRBS 821 (7th Cir. 1981) (grain spout attached to both vessel and grain elevator is covered situs). Although case precedent supports finding that maritime manufacturing areas are not covered situses, *see Bianco*, 304 F.3d 1053, 36 BRBS 57(CRT); *Maraney*, 37 BRBS 97; *Stroup*, 32 BRBS 151, there is no basis in law for apportioning the conveyor unloading system outside of the power plant into covered and uncovered situses.[6] *See Coastal Prod. Serv., Inc., v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009),

[5] Moreover, claimant testified that PIV 15 serviced a fire hydrant used for fire protection and to wash belts 3, 4, and 50; these belts are used in the unloading of coal from the barges. Tr. at 78, 166.

[6] A related concept applicable to the "maritime employee" requirement of Section 2(3), 33 U.S.C. §902(3), concerns the rejected "point of rest" theory. This theory "denotes the point where the stevedoring operation ends (or, in the case of loading, begins) and the terminal operation function begins (or ends, in the case of loading)." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 274-279, 6 BRBS 150, 166-167 (1977). The Supreme Court rejected this concept as too restrictive in view of the 1972 Amendments to the Act, *id*., and subsequently held specifically that those involved in the intermediate steps of loading and unloading are covered under the Act. *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979). In view of *P.C. Pfeiffer*, the Sixth Circuit held that the claimant's trucking of gravel from ship-side to the storage pile adjacent to the factory was an integral part of the process of unloading the barges: "The dumping of gravel from the barges into the hopper did not complete the unloading process." *Warren Brothers v. Nelson*, 635 F.2d 552, 555-556, 12 BRBS 714, 718 (6th Cir. 1980).

aff'g 40 BRBS 19 (2006); *Prolerized New England Co.*, 637 F.2d 30, 12 BRBS 808; *Uresti v. Port Container Industries, Inc.*, 34 BRBS 127 (2000) (Brown, J., dissenting), *aff'g on recon.* 33 BRBS 215 (2000) (Brown, J., dissenting). As claimant was injured in an area adjoining navigable waters customarily used for unloading barges, he was injured on a covered situs. Thus, we affirm the administrative law judge's finding that the site of claimant's injury is an "adjoining area" pursuant to Section 3(a) and his finding of coverage under the Act. *Smith*, 42 BRBS 80.

Employer next contends that the administrative law judge erred by disallowing it a credit for payments claimant received under its Illness and Disability Plan (the Plan). Claimant received disability pay totaling $23,150.60 for the period of January 2005 through January 2008. Employer sought reimbursement for payments it made for long-term benefits for a disability lasting longer than 40 weeks. EX 11 at 7. The amount of the disability payment is based on the employee's years of service. *Id*. at 9. The administrative law judge found that employer's Employee Manual states that the Plan does not cover disabilities covered by workers' compensation. *Id*. at 11. Employer stated in its brief to the administrative law judge that it provided claimant long-term disability benefits under the Plan because it maintained that claimant's degenerative disc disease was not work-related; however, should the administrative law judge find this condition work-related, then employer contended that its payments should be construed as advance payments of compensation subject to Section 14(j). Employer's Post-Hearing Brief at 19.

The administrative law judge found that employer did not offer any evidence that its disability payments under the Plan were intended as compensation payments, nor does the Plan contain language stating that the payments would be considered advance compensation if the condition causing the disability were later found to be work-related. The administrative law judge also found that since the benefits were based, in part, on claimant's length of employment, they were earned for years of service. Accordingly, the administrative law judge denied employer a Section 14(j) credit for long-term disability benefits claimant received under the Plan.

On appeal, employer contends that since the sole condition precedent to claimant's receipt of the long-term benefits is that he is disabled, and since this is the same condition precedent to his receiving benefits under the Act, the Plan description constitutes clear evidence that the disability payments claimant received were advance payments of compensation. Moreover, employer contends that the administrative law judge erred by finding that claimant's entitlement to disability compensation under the Plan is based on his years of service, since service time governs only the amount of a disability payment.

Pursuant to Section 14(j), employer is entitled to a credit only for its prior payments of compensation against any compensation subsequently found due.[7] *Trice v. Virginia Int'l Terminals, Inc.*, 30 BRBS 165 (1996). Employer must establish that the benefits were intended as advance payments of compensation in order to be entitled to a credit under Section 14(j). *Mijangos v. Avondale Shipyards, Inc.*, 19 BRBS 15 (1986), *rev'd on other grounds*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Specifically, employer is not entitled to a credit under a salary continuance plan unless it shows that these payments were intended to be advance payments of compensation. *Shell Offshore, Inc. v. Director, OWCP*, 122 F.3d 312, 31 BRBS 129(CRT) (5th Cir. 1997), *cert. denied*, 523 U.S. 1095 (1998); *Fleetwood v. Newport News Shipbuilding and Dry Dock Co.*, 16 BRBS 282 (1984), *aff'd*, 776 F.2d 1225, 18 BRBS 12(CRT) (4th Cir. 1985). In this case, the administrative law judge reviewed employer's Employee Manual and found no indication that employer intended the length of service-based payments made to compensate claimant for a long-term disability to be advance payments of compensation. This finding is supported by substantial evidence. EX 11. Contrary to employer's contention, the fact that the payments were for a disability does not *per se* establish that these payments were intended as advance payments of compensation under Section 14(j). A disability may be work-related or non work-related. Moreover, it was not irrational for the administrative law judge to credit the years of service-based calculation used to determine the amount of long-term disability benefits paid by the Plan as evidence that these payments are not intended by employer as advance payments of compensation. This service-based calculation is distinct from benefits under the Act, which compensate the injured worker for lost wages, and thus are calculated based on the lost wage-earning capacity of the injured employee, rather than the number of years the worker was employed by an employer. Accordingly, we affirm the administrative law judge's denial of a Section 14(j) credit.

[7] Section 14(j) provides:

> If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

33 U.S.C. §914(j).

Accordingly, the administrative law judge's Decision and Order-Awarding 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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BETTY JEAN HALL
Administrative Appeals Judge