BRB No. 11-0132

ALLEN WILLIAMS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NORTHROP GRUMMAN SHIPBUILDING, INCORPORATED	)	DATE ISSUED: 09/29/2011
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2009-LHC-1097) of Administrative Law Judge Kenneth A. Krantz 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence and 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 involved in this case are not in dispute. On February 13, 2009, after finishing his shift as a nuclear pipe worker, claimant fell and injured his shoulder in the North Yard Parking Lot as he greeted a co-worker. Employer paid claimant "sick and accident" benefits from February 14 through March 29, 2009, totaling $1,624.89. Claimant returned to work on March 30, 2009. He filed a claim for benefits under the

Act. The parties agreed, and the administrative law judge concurred, that claimant is a maritime employee within the provisions of Section 2(3) of the Act, 33 U.S.C. §902(3). The parties disputed whether claimant's injury occurred on a covered situs pursuant to Section 3(a) of the Act, 33 U.S.C. §903(a).

The North Yard Parking Lot is situated on the premises of employer's shipyard; however, it is separated from the working areas by a fence. It is owned and maintained by employer for use by its employees, Navy personnel, and contractors who have business with employer, and is used solely for parking. There is no access to navigable waters from the parking lot, and employees must swipe their badges at a security turnstile at one end of the lot to enter the production area.

The administrative law judge, relying on the holding of the United States Court of Appeals for the Fourth Circuit in *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996), found that the North Yard Parking Lot is not a covered situs under Section 3(a) as the lot is not contiguous with navigable waters, was separated from employer's production area by a fence and a storage area, and is not used in the building, dismantling, repairing, loading or unloading of ships. Thus, the administrative law judge denied the claim for benefits. On appeal, claimant contends that the administrative law judge erred in finding that the parking lot is not a covered situs. Employer responds, urging affirmance of the administrative law judge's decision.

Our analysis begins with the words of the statute. 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); *see Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit which has defined "adjoining area" as a discrete shoreside structure or facility that is similar to the enumerated areas, actually contiguous with navigable waters, and customarily used for maritime activity. *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). The Fourth Circuit also stated that, "if there are other areas between the navigable waters and the area in question, the latter area is simply not 'adjoining' the waters under any reasonable definition of that term." *Sidwell*, 71 F.3d at 1139, 29 BRBS at 143(CRT). However, "it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which the claimant is injured." *Id.*, 71 F.3d at 1140 n.11, 29 BRBS at 144 n.11(CRT).

Claimant asserts that the North Yard Parking Lot is a covered situs because it is part of the "overall shipyard" and "within the boundaries of a marine terminal that is contiguous with navigable waters."[1] Claimant's Brief at 10, 12, 14-16. We agree that claimant's injury occurred in a shipbuilding area contiguous to navigable waters, and we therefore reverse the administrative law judge's finding that claimant's injury did not occur on a covered situs. As the Fourth Circuit explained:

> The test is whether the situs is within a contiguous ship building area which adjoins the water. . . .
>
> [I]t is not unusual for marine terminals to cover many hundreds of acres. Such terminals are covered in their entirety; it is not necessary that the precise location of an injury be used for loading or unloading operations (whatever may be the proper scope of "loading or unloading") . . . ; it suffices that the overall area which includes the location is part of a terminal adjoining water.

Sidwell, 71 F.3d at 1140 n.11, 29 BRBS at 144 n.11(CRT) (citing *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 6 BRBS 229 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977)). In this case, the record reflects that at the time of the injury, employer's property extended from navigable water to the outer edge of the parking lot. *See* EX 1-1.

[1]We reject claimant's assertions that "so long as the site is close to, or in the vicinity of navigable waters, or in a neighboring area, an employee's injury can come within the [Act]," and that "a site adjacent to navigable waters or in a neighboring area customarily used in loading or unloading a vessel satisfies the situs test even though it is not used exclusively for maritime purposes." Claimant's Brief at 13, 14. The Fourth Circuit specifically rejected the situs tests used by other circuits, *see, e.g., Texports Stevedoring Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978), and stated that an "adjoining area" must actually be contiguous with navigable waters and its *raison d'etre* must be its use in connection with the navigable waters. *See Sidwell*, 71 F.3d at 1139, 29 BRBS at 143(CRT).

Like the "marine terminal" described in *Sidwell,* the shipyard adjoined navigable water, and the parking lot was contained within the shipyard, *i.e.,* the "overall area which includes the location [of the injury] is part of a [shipyard] adjoining water." *Sidwell*, 71 F.3d at 1140 n.11, 29 BRBS at 144 n.11(CRT). We find this significant because the Fourth Circuit stated that "it is inescapable that some notion of property lines will be at least relevant, if not dispositive, in determining whether the injury occurred within a single 'other adjoining area.'" *Id.*, 71 F.3d at 1140, 29 BRBS at 144(CRT). Therefore, as the presence of a fence and security gate do not alter the fact that claimant's injury occurred within the boundaries of employer's shipyard, which is contiguous with navigable waters, claimant has satisfied the situs test. *See Caputo*, 432 U.S. 249, 6 BRBS 150; *Wakeley v. Knutson Towboat Co.*, 44 BRBS 47 (2010) (holding that an enclosed, contiguous property adjoining navigable water was covered); *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991) (holding that a naval shipyard is covered); *Martin v. Kaiser Co.*, Inc., 24 BRBS 112 (1990) (holding that an entire shipyard or terminal facility is a covered situs); *Hagenzeiker v. Norton Lilly & Co.*, 22 BRBS 313 (1989) (holding that an entire port complex is covered); *compare with Parker*, 75 F.3d 929, 30 BRBS 10(CRT) (holding that a repair facility not within the boundary of shipping terminal and not contiguous with navigable water is not a covered situs).

Contrary to employer's contention, this case is distinguishable from *McCormick v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 207 (1998), *Griffin v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 87 (1998), and *Kerby*, 31 BRBS 6. In those cases, the injuries occurred on sites that were physically separated from the shipyard by more than a fenced-off area, specifically public roads and privately-owned railroad tracks. Therefore, pursuant to *Sidwell,* the Board held that the injuries in those cases did not occur within an overall shipyard area contiguous to water and were not covered.[2] At the time of the injury, the North Yard Parking Lot, at issue in this case,

[2]In *Kerby*, the Board affirmed the administrative law judge's determination that a power plant adjacent to a shipyard was not a maritime situs, notwithstanding its ownership by the shipyard. The parcel was separated from the shipyard by fences and privately owned railroad tracks; personnel practices did not permit free employee movement between the two facilities. *Kerby,* 31 BRBS at 11.

In *McCormick,* the Board affirmed the administrative law judge's finding that Building 511 of the shipyard was not a covered situs because it was "physically separated" from the employer's shipyard by public roads and a security fence and, therefore, is "deemed a separate and distinct piece of property rather than part of the overall shipyard facility." *McCormick,* 32 BRBS at 209.

even though separated from employer's production area by a fence and a security gate, was located within the perimeter of the shipyard adjacent to water. The fence, unlike a public road, privately-owned railroad tracks, or other thoroughfare or divider, does not sever the contiguity between the North Yard Parking Lot and the rest of employer's shipyard which adjoins navigable waters. Consequently, we hold that claimant's injury occurred in an "adjoining area," and we reverse the administrative law judge's finding that claimant's injury in employer's North Yard Parking Lot did not occur on a covered situs pursuant to Section 3(a) of the Act. As this claim is covered by the Act, we remand this case for the administrative law judge to address any remaining issues.

Accordingly, the administrative law judge's finding that claimant's injury did not occur on a site covered by Section 3(a) of the Act is reversed. The denial of benefits is vacated, and the case is remanded for consideration of the remaining issues.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

In *Griffin*, the Board affirmed the finding that the situs element was not met where the injury occurred in a parking lot which was physically separated from employer's shipyard by a public street, as well as a security fence. *Griffin*, 32 BRBS at 89.