**U.S. Department of Labor**

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0312

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| LUIGI A. MALTA | ) | |
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| Claimant-Petitioner | ) | |
| | ) | |
| v. | ) | |
| | ) | |
| WOOD GROUP PRODUCTION SERVICES | ) | |
| | ) | DATE ISSUED: May 29, 2015 |
| Self-Insured | ) | |
| Employer-Respondent | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' | ) | |
| COMPENSATION PROGRAMS, UNITED | ) | |
| STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order and the Decision and Order on Claimant's Petition for Reconsideration of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Frank M. Buck, Jr. (The Buck Law Firm) and Al J. Robert, Jr. (Law Office of Al J. Robert, Jr., LLC), New Orleans, Louisiana, for claimant.

Edward F. Stauss, III and Tori S. Bowling (Keogh, Cox & Wilson, Ltd.), Baton Rouge, Louisiana, for self-insured employer.

Matthew W. Boyle (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, McGRANERY and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and the Decision and Order on Claimant's Petition for Reconsideration (2013-LHC-01511) of Administrative Law Judge Larry W. Price 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, rational, 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. Claimant worked for employer as an offshore warehouseman on the Black Bay Central Facility, a fixed platform located in Louisiana state territorial waters. Tr. at 10, 28-30. Employer, a contractor for Helis Oil and Gas Company, provided support on the Central Facility for various satellite oil and gas production platforms located in the Helis Black Bay field.[1] *Id.* The Central Facility includes living quarters for the workers who operate the satellite production platforms. *Id*. at 11-12, 20. While other workers left the Central Facility each morning to work on the satellite platforms, claimant remained on the Central Facility platform throughout his work shift. *Id*. The Central Facility platform also contains a warehouse and three cranes used for loading and unloading vessels. *Id*. at 14-15, 24-25; CX 3. Most of the equipment and supplies needed for operations in the Helis Black Bay field were shipped by vessel from Venice, Louisiana to the warehouse on the Central Facility. *Id.* at 18, 22-23, 30-31, 33-36. These materials included pipes, valves, compressors, nitrogen cylinders, flanges, tool bags, repair parts, and potable water. *Id*. at 12, 19, 30-31. These supplies and equipment were unloaded from the vessels and stored in the warehouse on the Central Facility. *Id*. at 10-12, 22, 34. When supplies were needed by workers on the satellite platforms, they were loaded onto vessels at the Central Facility and shipped to the satellite platforms. *Id*. at 20-21. The uncontroverted hearing testimony of both claimant and Ray Pitre, employer's project manager, establishes that loading and unloading vessels at the Central Facility was a large part of claimant's job and that he performed these activities on a daily basis.[2] *Id.* at 13-14, 16-18, 20-21, 23, 29-31, 34, 36.

[1] The oil and gas produced by these satellite platforms were shipped by pipeline, and not by vessel, and were not stored in the Central Facility. Tr. at 17, 23-24, 31.

[2] Specifically, claimant assisted in unloading vessels that transported supplies from shore; claimant worked mostly with the quarters crane, located in front of the living quarters, but also worked with the warehouse crane and the compressive platform crane. Tr. at 15-16. Claimant also assisted in unloading potable water from barges by operating valves on the Central Facility platform. *Id*. at 19-20. He also loaded field boats with materials to be transported to the satellite platforms; in doing so, he placed some items into cargo baskets and he hooked up other equipment to a crane. *Id*. at 20-21. In addition to his loading and unloading activities, claimant's warehouse duties included maintaining warehouse stock, ordering parts, and performing inventories of supplies on the platform. *Id*. at 10-11, 22, 30; EX 1.

On April 14, 2012, claimant, who was on the Central Facility platform in front of the warehouse, was injured in the course of unloading a vessel. A cargo basket containing a $CO_2$ cylinder mislabeled as "empty" had been lifted off the vessel by a crane. As claimant removed the cylinder from the cargo basket, it forcefully discharged. In diving out of the way of the cylinder, claimant sustained injuries to his back, left arm and shoulder, and left foot. CXs 1, 2; ALJX 1; Tr. at 17-18, 25, 32. Employer contested coverage under the Act, but paid claimant temporary total disability benefits under the Louisiana Workers' Compensation Act. Decision and Order at 1; Tr. at 5-6.

In his Decision and Order, the administrative law judge found that claimant's injury did not occur on a covered situs. 33 U.S.C. §903(a). Specifically, the administrative law judge found that the Black Bay Central Facility is not an "other adjoining area" for purposes of coverage under the Act. Consequently, he denied the claim for benefits. The administrative law judge denied claimant's motion for reconsideration.[3]

On appeal, claimant challenges the administrative law judge's finding that the Black Bay Central Facility is not a covered situs. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), also responds, advocating that the Board reverse the administrative law judge's finding that the Central Facility is not a covered situs. Claimant has filed a reply brief addressing the arguments made in employer's response brief.

To obtain benefits under the Act, a claimant must establish that his injury occurred 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, claimant's injury occurred on a fixed platform, which, for purposes of the Act, is considered to be an artificial island. *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985); *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969); *Coastal Prod. Serv. Inc. v. Hudson*, 555 F.3d 426, 432 n.17, 42 BRBS 68, 71 n.17(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009). Thus, as claimant was not injured on navigable waters or on one of the sites specifically enumerated in

[3] The administrative law judge's Decision and Order and his Decision and Order on Claimant's Petition for Reconsideration are identical in content.

Section 3(a), the situs requirement is satisfied only if his injury occurred in an "other adjoining area customarily used by an employer" in loading or unloading a vessel.[4] *BPU Mgmt., Inc./Sherwin Alumina Co. v. Director, OWCP [Martin]*, 732 F.3d 457, 460-461, 47 BRBS 39, 40(CRT) (5th Cir. 2013); *Hudson*, 555 F.3d at 431-432, 42 BRBS at 71(CRT); *Dryden v. The Dayton Power Light Co.*, 43 BRBS 167, 168 (2009). In construing the "other adjoining area" provision, the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that "an 'other adjoining area' must satisfy two distinct situs components: (1) a geographic component (the area must adjoin navigable waters) and (2) a functional component (the area must be 'customarily used by an employer in loading [or] unloading…a vessel')." *Martin*, 732 F.3d at 461, 47 BRBS at 40(CRT) (quoting *New Orleans Depot Services, Inc. v. Director, OWCP* [*Zepeda*], 718 F.3d 384, 389, 47 BRBS 5, 8(CRT) (5th Cir. 2013) (*en banc*)); *see also Cunningham v. Director, OWCP*, 377 F.3d 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 789, 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).

In this case, it is undisputed that the platform on which claimant was injured satisfies the geographic component of the situs test,[5] s*ee* Emp. Resp. Br. at 6; Decision and Order at 5, and thus the sole issue before the administrative law judge was whether the functional component was met. As recognized by the administrative law judge, to satisfy the functional component of the situs inquiry, the site of the claimant's injury must be customarily used for loading or unloading a vessel, but need not be used exclusively or primarily for those maritime purposes. *See* Decision and Order at 5; *Martin*, 732 F.3d at 461, 47 BRBS at 41(CRT); *Hudson*, 555 F.3d at 432, 42 BRBS at 71(CRT); *Dryden*, 43 BRBS at 168. The administrative law judge, however, rejected claimant's contention that the Central Facility on which claimant was injured was customarily used for loading and unloading vessels and therefore satisfied the functional

[4] There is no suggestion that the Central Facility platform on which claimant was injured was used for "repairing, dismantling, or building a vessel." *See* 33 U.S.C. §903(a).

[5] In its decision in *Zepeda*, 718 F.3d 384, 47 BRBS 5(CRT), the Fifth Circuit overruled its governing precedent regarding the interpretation of the geographic component of the situs inquiry. Specifically, the court overruled the broad interpretation of "adjoining" it had previously adopted 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), and instead adopted the Fourth Circuit's *Sidwell* definition of "adjoining" as meaning "border on" or "be contiguous with." *Zepeda*, 718 F.3d at 393-394, 47 BRBS at 11(CRT). In the case before us, as the platform on which claimant was injured is surrounded by navigable waters, it falls within the definition of "adjoining" adopted by the Fifth Circuit in *Zepeda*.

component of the situs test. *See* Decision and Order at 6. Specifically, the administrative law judge disagreed with claimant that the unloading of supplies and equipment shipped by vessel from the shore to the Central Facility and the subsequent loading of supplies and equipment from the Central Facility onto vessels to be shipped to the satellite platforms qualifies as maritime commerce. *Id*. Rather, the administrative law judge found that the purpose of the Central Facility is "to further drilling for oil and gas, which is not a maritime purpose." *Id*. at 7 (quoting *Thibodeaux v. Grasso Prod. Management Inc.*, 370 F.3d 486, 494, 38 BRBS 13, 18(CRT) (5th Cir. 2004)).[6] The administrative law judge further distinguished the facts in this case, in which the oil itself was neither stored on nor shipped from the Central Facility, from *Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), which involved a fixed platform that facilitated the loading of oil which was

[6] In *Thibodeaux*, 370 F.3d 486, 38 BRBS 13(CRT), the claimant was a pumper/gauger on a fixed oil and gas platform injured when he attempted to repair a leaking line under the deck of the platform. The Fifth Circuit held that the oil production platform was neither a "pier" nor "an adjoining area" under Section 3(a) as it was not the site of "significant maritime activity." 370 F.3d at 493-494, 38 BRBS at 18-19(CRT). In support of its holding, the court cited two cases involving the issue of whether the Section 2(3), 33 U.S.C. §902(3), status requirement was satisfied: *Herb's Welding*, 470 U.S. 414, 17 BRBS 78(CRT), and *Munguia v. Chevron U.S.A. Inc*., 999 F.2d 808, 27 BRBS 103 (CRT) (5th Cir. 1993), *cert. denied*, 511 U.S. 1086 (1994). In those two cases, which considered the employees' maritime employment status, the Supreme Court and the Fifth Circuit, respectively, held that the work commonly performed on oil production platforms is not maritime in nature. The *Thibodeaux* court, in a case involving the separate question of maritime situs, stated that the oil production platform in that case had no connection with maritime commerce that would distinguish it from the platforms in the *Herb's Welding* and *Munguia* cases. In this regard, the *Thibodeaux* court found it significant that oil was not shipped from the production platform. 370 F.3d at 494, 38 BRBS at 18(CRT). The court added that "[a]lthough personal gear and *occasionally* supplies are unloaded at docking areas on the platform, the purpose of the platform is to further drilling for oil and gas, which is not a maritime purpose." 370 F.3d at 494, 38 BRBS at 18(CRT) (emphasis added).

shipped ashore by barge.[7] Decision and Order at 7. He determined that "[t]he platform in this case is not a shipping platform but is a central facility that houses workers and supplies for shipment to satellite platforms that drill and produce oil and gas[,]"[8] and accordingly concluded that the situs requirement was not met. *Id*. For the reasons that follow, we reverse the administrative law judge's finding that the platform on which claimant was injured does not satisfy the functional component of the Section 3(a) situs requirement.

First and foremost, we agree with claimant and the Director that the administrative law judge's analysis is inconsistent with the plain language of Section 3(a), which requires only that the other adjoining area be "customarily used by an employer in loading [or] unloading…a vessel." 33 U.S.C. §903(a).[9] As recognized by claimant and the Director, the Central Facility on which claimant was injured was customarily used for loading and unloading vessels, and three cranes were located on the platform for that purpose. *See* Tr. at 15-16, 24-25; CX 3. We agree with claimant and the Director that

[7] In *Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), the claimant was injured on a fixed platform that processed and temporarily stored oil piped to it from satellite wells. The oil was then transferred to tanks on an adjacent, interconnected oil storage barge until it could be shipped ashore by barge. The *Hudson* court held that the platform on which the claimant was injured was part of the same general area customarily used for loading cargo (the processed oil) onto vessels and, thus, the platform qualified as a maritime situs. 555 F.3d at 437-439, 42 BRBS at 75-76(CRT). The *Hudson* court distinguished the platform in that case from the drilling platform in *Thibodeaux* which was "in no way involved in loading or unloading a vessel." 555 F.3d at 438-439, 42 BRBS at 75-76(CRT); *see supra* at n.6.

[8] The administrative law judge's finding that the Central Facility is not a "shipping platform" appears premised on his view that only oil itself, and not those supplies and equipment used in the production of oil and gas, could qualify as "cargo" shipped by vessel from a platform for purposes of satisfying the situs requirement. *See* Decision and Order at 7.

[9] As argued by claimant, the Fifth Circuit's decision in *Zepeda* exemplifies the court's adherence to the well-established rule of statutory construction that the plain language of a statute may not be ignored. The *Zepeda* court adopted the Fourth Circuit's *Sidwell* definition of "adjoining" navigable water because that definition was "more faithful to the plain language of the statute." 718 F.3d at 394, 47 BRBS at 11(CRT); *see supra* at n.5. Claimant cites *Zepeda* solely for the purpose of illustrating this general principle and, contrary to employer's interpretation of claimant's argument, claimant does not contend that the *Zepeda* decision eliminates the requirement that the functional component of the situs test be satisfied. *See* Cl. Memorandum of Law in Support of Appeal at 6-7, 9; Cl. Reply Br. at 2-3; Emp. Resp. Br. at 12.

the uncontroverted evidence in this case reflects that the Central Facility, in essence, functioned as an offshore dock and a collection and distribution facility used to unload and store supplies and equipment delivered from the mainland by vessels and to load materials onto other vessels for delivery to the satellite oil and gas production platforms. *See* Tr. at 10-16, 18-25, 30-31, 33-36. Thus, based on the plain language of Section 3(a), the Central Facility, which was customarily used by an employer in loading and unloading vessels, qualifies as a covered situs. *See Dryden*, 43 BRBS at 169 ("[i]n order to meet the 'function' requirement, an adjoining area must be used for the loading, unloading, repairing or building of vessels").

While the administrative law judge found the Fifth Circuit's decision in *Thibodeaux*, 370 F.3d 486, 38 BRBS 13(CRT), to be controlling, *see* Decision and Order at 6-7; *see also supra* at n.6, we do not agree that *Thibodeaux* compels a finding in this case that the Central Facility is not a covered situs. Rather, we agree with claimant and the Director that the Central Facility, which was regularly used to load and unload vessels, is significantly different in function from the docking areas of the oil production platform in the *Thibodeaux* case, which were used only for the unloading of the oil production workers' personal gear and for the *occasional* unloading of equipment used for oil and gas production.[10] *See Thibodeaux*, 370 F.3d at 488, 494, 38 BRBS at 14, 18(CRT); *see also supra* at n.6. Significantly, the *Thibodeaux* court held that the production platform in that case did not qualify as an "other adjoining area" as the record did not establish that it was "*customarily* used for significant maritime activity." 370 F.3d at 494, 38 BRBS at 18(CRT) (internal quotations and citation omitted)(emphasis added). Thus, based on the plain language of Section 3(a), the platform involved in *Thibodeaux*, which was not *customarily* used for loading and unloading vessels, did not satisfy the functional component of the situs inquiry. As distinguished from the production platform in *Thibodeaux*, the Central Facility in this case was customarily used for loading and unloading vessels, as is required by the plain language of the statute.

Contrary to the administrative law judge's analysis, *see* Decision and Order at 6-7, the fact that the cargo loaded and unloaded at the Central Facility platform consisted of supplies and equipment used for oil and gas drilling does not divest the platform of a maritime purpose. The Fifth Circuit has stated in this regard that the "maritime nature" of loading and unloading is established when "they are undertaken with respect to a ship or vessel." *Martin*, 732 F.3d at 462, 47 BRBS at 41(CRT) (internal quotations and citation omitted); *see also Hudson*, 555 F.3d at 430 n.6, 40 BRBS at 69 n.6(CRT) (characterizing the loading of vessels as "a traditional maritime activity"). In this case, where the site of claimant's injury was customarily used for loading and unloading

[10] Moreover, in *Thibodeaux*, the Fifth Circuit took note of the fact that the claimant's injury did not occur on the portion of the production platform used for docking vessels. 370 F.3d at 488, 38 BRBS at 14(CRT). In contrast, claimant here was injured in the area of the Central Facility used for unloading vessels. *See* Tr. at 17-18, 25, 31-32.

vessels, the nature of the cargo that was loaded and unloaded is not determinative of the situs inquiry.[11] The administrative law judge's apparent supposition that, in order to be a covered situs, the Central Facility had to have a "maritime purpose" or an "independent connection to maritime commerce," in addition to being customarily used for loading and unloading vessels, *see* Decision and Order at 7, is supported neither by the plain language of Section 3(a) nor by Fifth Circuit precedent. As argued by the Director, loading and unloading vessels are traditional maritime activities, *see Martin*, 732 F.3d at 462, 47 BRBS at 41(CRT); *Hudson*, 555 F.3d at 430 n.6, 40 BRBS 69 n.6(CRT), and therefore those activities are necessarily related to maritime commerce. In a case like this one in which claimant is injured in an area that is *customarily* used for loading and unloading vessels, it follows that the requisite relationship with maritime commerce is established for purposes of the functional component of the situs test, and any further inquiry into whether there is an "independent connection to maritime commerce" is superfluous.[12]

[11] In support of his contention that the nature of the cargo does not affect coverage, the Director cites the Fifth Circuit's decision in *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 13 BRBS 1048 (5th Cir. 1981), *cert. denied*, 459 U.S 1169 (1983), a case which addressed the issue of whether the Section 2(3), 33 U.S.C. §902(3), status requirement for coverage under the Act was met. In *Gilliam*, the claimant, a bridge construction site foreman, was injured while assisting in unloading from a supply barge pilings that were to be used in the construction of a bridge at that location. The Fifth Circuit held that the status requirement was met as claimant was unloading cargo from a vessel and therefore was engaged in maritime activity at the time of his injury. 659 F.2d at 57-58, 13 BRBS at 1051-52. In this regard, the *Gilliam* court rejected the Board's reasoning that the claimant's participation in the unloading of the barge was merely incidental to the bridge building project rather than related to maritime commerce. The Fifth Circuit expressly found that the pilings were "cargo," and stated that "[t]he fact that the pilings he was unloading were to be used to build a bridge does not add a different gloss to the situation." 659 F.2d at 58, 13 BRBS at 1052.

[12] The administrative law judge cited the Fifth Circuit's decision in *Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), in support of his finding that the Central Facility lacked the requisite "independent connection to maritime commerce." *See* Decision and Order at 7. Our reading of *Hudson* leads to a contrary conclusion. Notably, the *Hudson* court stated that the sunken oil storage barge, which was the part of the facility where loading vessels actually occurred, "clearly qualifies as a covered situs." 555 F.3d at 437, 42 BRBS at 74(CRT). Claimant Hudson, however, was not injured on the storage barge but, rather, on the adjoining platform which was used for oil processing and not for loading and unloading. 555 F.3d at 428-429, 42 BRBS at 68-69(CRT). Therefore, the court was required to determine whether the platform was part of the same overall area that was customarily used for loading oil. 555 F.3d at 433, 42 BRBS at 71(CRT). As part of that inquiry, the court determined that the platform on which the claimant was injured had an "independent connection to maritime commerce," *i.e.*, the loading of oil from the barge.

*Id.*; *see also Nelson*, 143 F.3d 789, 32 BRBS 115(CRT) (employer customarily unloaded sand from vessel for beach renourishment); *Loyd v. Ram Industries, Inc.*, 35 BRBS 143 (2001) (adjoining area customarily used to load and unload dredged material from vessel).

As the uncontroverted evidence in this case establishes that the site of claimant's injury was customarily used by employer for loading and unloading vessels, we reverse the administrative law judge's finding that the functional component of the situs test was not met. As previously discussed, it is undisputed that claimant's injury occurred in an "adjoining area," thus satisfying the geographic component of the situs test. We therefore hold, as a matter of law, that claimant's injury occurred on a covered situs. We remand the case for the administrative law judge to address any remaining issues.

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555 F.3d at 438-439, 42 BRBS at 76(CRT). The *Hudson* court concluded that the platform on which the claimant was injured was part of the overall area used for loading and that the situs requirement was therefore satisfied. *Id*. In this regard, the court stated:

> So, although it need not be the case, here the platform does appear to have a predominantly maritime use -- facilitation of the loading of cargo (oil, the main product of the platform).
>
> This conclusion is not foreclosed by *Thibodeaux* or *Herb's Welding*. In *Herb's Welding*, a majority of the Supreme Court expressly declined to decide whether a fixed drilling platform qualifies as a maritime situs. The dissent thought that the situs requirement was satisfied. Yet, although the majority refused to reach the issue, there are hints that even it thought a drilling platform might qualify as a covered situs.

*Hudson*, 555 F.3d at 437-38, 42 BRBS at 75(CRT).

The only cargo in *Hudson* that was customarily loaded was the oil itself and, thus, the Fifth Circuit necessarily focused its inquiry on whether the site of the claimant's injury was part of the overall area used for loading oil. Contrary to the reasoning of the administrative law judge in this case, the fact that the cargo loaded onto and unloaded from vessels in this case consisted of supplies and equipment for oil production rather than, as in *Hudson*, oil itself, is immaterial. As claimant Hudson was not injured where the actual loading occurred, the court was required to determine whether the site of his injury had an "independent connection to maritime commerce," which in that case happened to constitute the loading of oil from a barge. In this case, as distinguished from *Hudson*, claimant was injured in the area actually used for loading and unloading vessels, and that area was customarily used for such maritime activities.

Accordingly, the administrative law judge's finding that claimant's injury did not occur on a site covered by Section 3(a) 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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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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GREG J. BUZZARD
Administrative Appeals Judge