U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0070

HENRY HALL	)	
	)	
Claimant-Petitioner	)	
	)	DATE ISSUED: 01/31/2020
v.	)	
	)	
CERES GULF, INCORPORATED	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer's Motion for Summary Decision and the Order Denying Motion for Reconsideration of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Dennis L. Brown (Dennis L. Brown, PC), Bellaire, Texas, for claimant.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

BOGGS, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order Granting Employer's Motion for Summary Decision and the Order Denying Motion for Reconsideration (2016-LHC-00996) of Administrative Law Judge Larry W. Price rendered on a claim filed pursuant to the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).[1] We must affirm the administrative law judge's findings of fact and conclusions of law if they 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).

[1] The Board reinstated this appeal in an Order dated July 11, 2019, following the district director's reconstruction of the record.

On June 17, 2015, claimant was working for employer delivering cargo from the Port of Houston Barbours Cut Container Terminal (BCCT) to the Gulf Winds Warehouse.[2] On his way to turn in paperwork for that day, claimant slipped and fell while walking in the Gulf Winds parking lot. He injured his left knee, both wrists, and his right shoulder, and filed a claim for benefits under the Act.

Employer filed a Motion for Summary Decision, contending claimant was not injured on a covered situs under Section 3(a) of the Act, 33 U.S.C. §903(a). Specifically, it asserted the parking lot where claimant fell is located outside the fenced-in boundaries of the BCCT, across a divided public highway, and inside the fenced-in boundaries of the Gulf Winds Warehouse facility. In response, claimant urged the administrative law judge to deny the motion and consider the Gulf Winds property covered by virtue of its proximity and functional ties to the BCCT so as to avoid workers walking in and out of coverage. Employer replied, asserting there are no factual disputes and the geographic boundary is clear. The administrative law judge found the parking lot where claimant was injured is not contiguous with navigable water and does not meet the geographical component for a covered situs. Decision and Order at 3. Citing *New Orleans Depot Services, Inc. v. Director, OWCP [Zepeda]*, 718 F.3d 384, 47 BRBS 5(CRT) (5th Cir. 2013) (en banc), *Williams v. Northrop Grumman Shipbuilding, Inc.*, 45 BRBS 57 (2011), and *Griffin v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 87 (1998), he granted employer's motion for summary decision and denied claimant's claim. Decision and Order at 3-4.

Claimant moved for reconsideration. He proffered "new evidence regarding the character of the Gulf Winds Warehouse property" which he claimed he could not obtain before the issuance of the initial decision. Cl. Motion for Recon. at 2-3. This "new evidence" is the statement of Joseph Trevino, a union official, who declared he assigned workers to the facility, was well aware of its location and function, and described it as "integral" to the loading and unloading of ships at the BCCT. *Id.* at exh. A (Trevino Affidavit). Employer objected to claimant's motion, asserting he did not establish any disputed facts or legal errors. The administrative law judge denied claimant's motion for reconsideration, finding the submitted evidence supported the undisputed facts with respect

[2] The BCCT is owned and operated by the Port of Houston, which is owned by the City of Houston and operated by the Port of Houston Authority. It adjoins Galveston Bay, which is a navigable body of water. https://porthouston.com/ (last visited Jan. 29, 2010); https://porthouston.com/container-terminals/barbours-cut-container-terminal/ (last visited Jan. 29, 2020)). Employer provides container stevedoring services at the Port. https://www.ceresglobal.com/locations/texas-ports.html (last visited Jan. 29, 2020). Gulf Winds owns the warehouse and provides transloading, warehousing, and other freight services to companies using the Port. https://www.gwii.com/ (last visited Jan. 29, 2020).

to the location of the injury. Order Denying Recon. at 1-2. Claimant appeals the decisions. Employer has not responded to the appeal.

Claimant contends the administrative law judge erred in granting employer's motion for summary decision because such action deprived him of the opportunity to produce evidence to show he was injured on a covered situs.[3] Claimant also contends the administrative law judge should have considered the BCCT and Gulf Winds properties as one contiguous maritime commercial zone that borders navigable water because there are no non-maritime businesses located between them, making the holdings in *Zepeda* and *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996), distinguishable from this case. He asserts the administrative law judge erred in relying on fences and a public roadway as boundaries to delineate covered areas so as to conclude there are no questions of fact related to the situs issue. He further asserts the administrative law judge's conclusion impermissibly results in employees walking into and out of coverage. We reject claimant's contentions and affirm the administrative law judge's decision granting employer's motion for summary decision.

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *R.V. [Villaverde] v. J. D'Annunzio & Sons*, 42 BRBS 63 (2008), *aff'd sub nom. Villaverde v. Director, OWCP*, 335 F. App'x 79 (2d Cir. 2009); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §18.72. A fact is "material" if it "might affect the outcome of the suit under the governing law." *O'Hara*, 294 F.3d at 61. An issue of fact is "genuine" where "the evidence is such that a reasonable [fact-finder] could return a verdict for the nonmoving party." *Id.* To defeat a motion for summary decision, the non-moving party must "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd., v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the administrative law judge *could* find for the non-moving party, or if it is necessary to weigh evidence or make credibility determinations on the issue presented,

[3] Claimant avers testimony would show that employees are required to travel between the two properties to perform their duties, giving them direct access to navigable water at the Port, and that maritime work is performed at the Gulf Winds Warehouse. Cl. Br. at 6; *see, e.g.*, Trevino Affidavit.

summary decision is inappropriate. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-248 (1986) ("By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." (emphasis in original)); *Walker v. Todd Pac. Shipyards*, 47 BRBS 11 (2013), *vacating in pert. part on recon.*, 46 BRBS 57 (2012).

Coverage under the Act is "material" to a claimant's claim because it affects the outcome of his case. He must establish his injury occurred on a covered situs pursuant to Section 3(a), which 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). Where there are no disputed facts, as here, the issue of situs is a legal one. *See Villaverde*, 42 BRBS at 64.

In this case, claimant does not contend his injury occurred on a site enumerated in Section 3(a). If an injury occurs on a non-enumerated site, it is covered only if it qualifies as an "other adjoining area." 33 U.S.C. §903(a). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that a site is an "other adjoining area" only if it satisfies a two-part test: it must border on, or be contiguous with, navigable water (geographic component), and it must be customarily used for "loading, unloading, repairing, dismantling, or building a vessel" (functional component). 33 U.S.C. §903(a); *Wood Group Prod. Services v. Director, OWCP [Malta]*, 930 F.3d 733, 53 BRBS 35(CRT) (5th Cir. 2019); *Zepeda*, 718 F.3d 384, 47 BRBS 5(CRT) (overruling in part *Textports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (en banc), *cert. denied*, 452 U.S. 905 (1981));[4] *see also Sidwell*, 71 F.3d 1134, 29 BRBS

[4] In *Zepeda*, the Fifth Circuit held the geographic component of the situs element is no longer satisfied if the site is "in the vicinity of" or "neighboring" navigable waters as previously held in *Winchester*. *Zepeda*, 718 F.3d at 394, 47 BRBS at 11(CRT) (adopting *Sidwell*). Claimant appears to challenge the courts' decisions in *Zepeda* and *Sidwell* as going "too far" in setting coverage boundaries. To the extent claimant makes this challenge and tries to resurrect some form of *Winchester*'s more relaxed standard, we reject his

138(CRT); *Church v. Huntington Ingalls – Pascagoula Operations*, 53 BRBS 1 (2019). To be an "adjoining area," therefore, the site must satisfy both components.

The sole issue employer raised in its motion for summary decision to the administrative law judge was whether the site where claimant's injury occurred satisfies the geographic component of the adjoining area situs test. *See, e.g., Church*, 53 BRBS 1; *Spain v. Expeditors & Prod. Serv. Co., Inc.*, 52 BRBS 73 (2018), *aff'd sub nom. Expeditors & Prod. Serv. Co., Inc. v. Director, OWCP*, ___ F. App'x ___, No. 18-60895, 2019 WL 5699966 (5th Cir. Nov. 5, 2019); *Griffin*, 32 BRBS 87.[5] Thus, the sole issue in this case before the Board is whether claimant raised a genuine issue of material fact before the administrative law judge regarding whether the Gulf Winds Warehouse meets the geographic component of the Fifth Circuit's "other adjoining area" test or is part of one contiguous maritime area with the BCCT adjoining navigable water.[6]

In addressing the geography of a site, the Fifth Circuit adopted the approach of the United States Court of Appeals for the Fourth Circuit in *Sidwell* "that adheres more faithfully to the plain language of the statute." *Zepeda*, 718 F.3d at 391, 47 BRBS at

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arguments. *Zepeda* is controlling circuit precedent which the Board is bound to follow in this case. *See Malta*, 930 F.3d at 738, 53 BRBS at 37(CRT).

[5] In *Church*, the Board held it need not address the specific function of the parking lot where the claimant was injured because, despite being separated from the production areas by a fence, the parking lot was situated entirely within the confines of the shipyard property, itself an adjoining area, and was covered. *Church*, 53 BRBS at 3; *see also Williams*, 45 BRBS 57. In *Spain*, the Board affirmed the administrative law judge's finding that the claimant's injury in living quarters at a marine terminal occurred on a covered situs as the terminal is used for the loading and unloading of vessels. The Board held the living quarters are not separate from the terminal merely because of internal security fences, noting the living quarters were designated for use only by those working at the port and were not separated from the loading operations by any structures or public roads. *Spain*, 52 BRBS 73. In *Griffin*, the Board held that the parking lot where the claimant was injured was a separate and distinct property, physically separated from the employer's shipyard by a public road and a security fence. *Griffin*, 32 BRBS at 89.

[6] BCCT, which is a port/terminal on Galveston Bay, is an enumerated site in its entirety. *See Zepeda*, 718 F.3d at 391-392, 47 BRBS at 10-11(CRT); *Sidwell*, 71 F.3d at 1140 n.11, 29 BRBS at 144 n.11(CRT); *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 6 BRBS 229 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977); *Church*, 53 BRBS at 3; *Spain*, 52 BRBS at 75-76.

9(CRT). The Fourth Circuit explained:

> although one might be tempted initially to eschew any reliance on conventional property lines in defining 'other adjoining area[s],' we believe 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.' Indeed, it is for this reason that conglomerations of multiple properties, like the entire Commonwealth of Virginia, are not single 'areas' under the terms of the statute.

Sidwell, 71 F.3d at 1140, 29 BRBS at 144(CRT). The Fourth Circuit continued: "it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which a claimant is injured." *Id.* at n.11. Indeed, in adopting the Fourth Circuit's definition of "adjoining," the Fifth Circuit quoted *Sidwell* that: "'in order for an area to constitute an 'other area' under the statute, it must be a discrete shoreside structure or facility'" that adjoins navigable water. *Zepeda*, 718 F.3d at 392, 47 BRBS at 10(CRT) (quoting *Sidwell*, 71 F.3d at 1139, 29 BRBS at 143(CRT)).

Based on the parties' submissions, the administrative law judge found: "The location where Claimant fell is separated from the Port of Houston by the fence around the port, Barbours Cut Boulevard and the fence around the warehouse." Decision and Order at 2. He discussed cases in which fences or roads provided a demarcation between covered and non-covered areas and concluded claimant's injury did not occur on a covered situs. He rejected claimant's contention that such a result would cause employees to "walk in and out of coverage," relying on the Supreme Court's statement in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985):

> [t]here will always be a boundary to coverage, and there will always be people who cross it during their employment. If that phenomenon was enough to require coverage, the Act would have to reach much further than anyone argues that it does or should.

Id., 470 U.S. at 426-427, 17 BRBS at 84(CRT); Decision and Order at 3-4.

We hold claimant has failed to establish either the existence of a genuine issue of material fact as to the situs issue or a legal error in the administrative law judge's conclusion that he was not injured on a covered situs. Contrary to the opinion of our dissenting colleague, claimant has presented nothing that would lead us to conclude the Gulf Winds Warehouse is a geographically-covered situs. He suggests only that the entire area, including the road and the Gulf Winds Warehouse, "should be considered" to be one parcel with the BCCT based on usage and he demonstrates only that he could provide

evidence proving the functional component of the site, which is not at issue. For example, on appeal, claimant describes Barber's Cut Boulevard as a "port access road," but he does not dispute it is a *public* road, not used exclusively for port traffic.[7] Claimant also does not specifically contend the road is in fact part of a larger parcel that constitutes the port or terminal adjoining navigable water.[8] Rather, he merely asserts that, despite being a public road, Barbours Cut Boulevard should not be considered a boundary so as to preclude coverage. Cl. Br. at 12-15. Claimant's assertions do not demonstrate an error in the administrative law judge's findings.

Geographically, there is no dispute claimant was injured in the Gulf Winds parking lot within the boundaries of the Gulf Winds facility, separated from the BCCT and navigable water by two property fences and a public road.[9] Motion for Summ. Dec. at Exh. F;[10] Cl. Dep. at 22-25. The evidence claimant offered to defeat employer's motion for summary decision cannot change these geographical facts or, in this case, their legal significance. He has not shown the properties to be one continuous area or parcel

[7] Barbours Cut Boulevard also provides access to other businesses and communities on the peninsula. *See* Motion for Summ. Dec. at Exh. F.

[8] *Harris v. Virginia Int'l Terminals, LLC*, __ BRBS __, BRB No. 19-0177 (Nov. 20, 2019), cited by our dissenting colleague, is distinguishable. In that case, the claimant was injured in the employer's chassis yard which abuts its terminal, though it is separated from navigable water by security fences. The chassis yard is connected to the main terminal by railroad tracks, and trains run between the employer's two properties daily. In *Harris*, the parties did not dispute that the railroad tracks are part of the terminal. Thus, that case is more akin to *Church* and *Spain* where the "fence does not sever the contiguity" between the properties. *Harris*, slip op. at 6. In this case, however, two perimeter property fences and a public road "sever the contiguity" between the BCCT property and the Gulf Winds Warehouse property, and employer contested the notion that the parcels constitute one contiguous area.

[9] While we acknowledge the proffered statement that the Gulf Winds Warehouse is 50 to 75 feet from the BCCT, Trevino Affidavit at 2; Cl. Br. at 15, we note it appears to be the distance between the gates/entrances to the two properties, not the distance between the warehouse and the water where loading and unloading occurs.

[10] The Gulf Winds Warehouse property is separated from navigable water on its other side by another public road, parks, and residential communities. Motion for Summ. Dec. at Exh. F.

contiguous with navigable water.[11] *Cf. Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 178, 6 BRBS 229, 230 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977) (though distant from the water, the site of injury was "within the contiguous shipbuilding area which adjoins the water"); *Church*, 53 BRBS at 3. Moreover, it is legally insufficient to satisfy the geographic component by showing that an injury occurred in a "general maritime area" or that the injury site is used for maritime purposes. Establishing the former violates *Zepeda* by, effectively, reinstating *Winchester*. *Zepeda*, 718 F.3d at 394, 47 BRBS at 11((CRT); *see also, e.g., McCormick v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 207 (1998) (employer's warehouse separated from its shipyard by three public roads and security fence); *Griffin*, 32 BRBS 87 (employee parking lot outside shipyard boundary fence and across public road); *Kerby v. Southeast Pub. Serv. Auth. of Va.*, 31 BRBS 6 (1997), *aff'd mem.*, 135 F.3d 770, 1998 WL 77837 (4th Cir.), *cert. denied*, 525 U.S. 816 (1998) (power plant providing electricity and steam to shipyard separated from shipyard by private railroad and security fences).[12] Establishing the latter conflates the two "other adjoining area" criteria, effectively eliminating the geographic component in favor of the function component.

Our dissenting colleague appears to do just that. However, we must be mindful when considering the "proximity and interconnectedness" of an "area" that we do not define the geography of an area by its function. When the Fifth Circuit used the phrase in *Hudson*, it was addressing the question of whether an oil platform off the coast of Louisiana was a covered situs in the *Winchester* era. *Hudson*, 555 F.3d at 435, 42 BRBS at 73(CRT).[13] Post-*Zepeda*, the language remains relevant in certain situations, such as in

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[11] A witness's opinion cannot resolve a legal issue. *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008) ("expert witness cannot give an opinion as to her *legal conclusion*, i.e., an opinion on an ultimate issue of law." (emphasis in original)).

[12] In its unpublished memorandum decision affirming the Board, the *Kerby* court acknowledged: "the parcel of land on which the power plant is located is not independently contiguous with that river or any other navigable waters." *Kerby*, 1998 WL 77837 at *1.

[13] The *Hudson* court specifically stated:

> *Winchester* countenanced defining a general area (a geographic notion) by its function. If a general area is customarily – not necessarily exclusively or predominantly – used for loading and unloading of vessels, all parts within it are a maritime situs. *To determine whether it is fair to call a particular part of a facility* 'within' the 'general area' used for loading and unloading, we

Spain, where the case involved living quarters designated for port personnel within the boundaries of the terminal property, yet removed from the loading/unloading area. The language should not be used to include separate parcels of property beyond those which border on navigable water. *Malta*, 930 F.3d at 737, 53 BRBS at 37(CRT); *Zepeda*, 718 F.3d at 393-394, 47 BRBS at 11(CRT). Recall the quote from the Fourth Circuit: "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.'" *Sidwell*, 71 F.3d at 1140, 29 BRBS at 144(CRT).

As the Gulf Winds Warehouse parcel of property lacks contiguity with navigable water, it fails the geographic element necessary for coverage under Section 3(a). *Zepeda*, 718 F.3d at 393-394, 47 BRBS at 11(CRT); *Sidwell*, 71 F.3d at 1141, 29 BRBS at 145(CRT). As claimant's injury occurred in an area that does not meet the geographic component for an "adjoining area" under Section 3(a), and both components must be satisfied to establish situs, the administrative law judge correctly found claimant failed to satisfy the situs element, and his injury is not covered under the Act. *Zepeda*, 718 F.3d 384, 47 BRBS 5(CRT); *Griffin*, 32 BRBS 87. Consequently, employer is entitled to summary decision as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Villaverde*, 42 BRBS at 65; *B.E. [Ellis] v. Electric Boat Corp.*, 42 BRBS 35 (2008); 29 C.F.R. §18.72.

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must look both to its proximity and its interconnectedness to the loading and unloading location, along with its function.

Hudson, 555 F.3d at 435, 42 BRBS at 73(CRT) (emphasis added).

Accordingly, we affirm the administrative law judge's Decision and Order Granting Employer's Motion for Summary Decision and the Order Denying Motion for Reconsideration.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

I concur:

DANIEL T. GRESH
Administrative Appeals Judge

BUZZARD, Administrative Appeals Judge, dissenting:

Claimant was employed as a truck driver at the Port of Houston, transporting shipping containers between the Port of Houston Barbour's Cut Terminal (Terminal) and the Gulf Winds Warehouse (Warehouse), a transfer station located approximately 50 to 75 feet from the entrance to the Terminal. Trevino Affidavit at 2; Emp. Opp. to Cl. Recon. at 2. On June 17, 2015, after completing delivery of a container from the Terminal to the Warehouse, claimant was injured when he slipped and fell in the Warehouse parking lot.

Claimant filed a claim for compensation and medical benefits under the Longshore Act. On employer's motion for summary decision, the administrative law judge dismissed the claim, finding the Warehouse is not a covered situs and barring recovery as a matter of law. The majority agrees. Because the Warehouse and the Terminal, by virtue of their geographic and functional relationship, constitute a single maritime situs, I would reverse the dismissal of the claim.

Benefits are payable under the Act to claimants who are injured "on a maritime situs." *Coastal Prod. Servs., Inc. v. Hudson*, 555 F.3d 426, 431, 42 BRBS 68, 70(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009). This means the injury must have occurred:

> 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). The Terminal where claimant picked up containers for delivery to the Warehouse is among the enumerated sites, adjoins navigable waters, serves a maritime purpose, and therefore is a covered situs. *See, e.g., Northeast Marine Terminal Co. v. Caputo,* 432 U.S. 249, 279, 6 BRBS 150, 170 (1977); *International-Matex Tank Terminals v. Director, OWCP [Victorian]*, 943 F.3d 278, 286-287 (5th Cir. 2019).

The sole question is whether the Warehouse where claimant delivered the shipping containers immediately prior to his injury also satisfies the situs requirement. If considered a separate and distinct location from the Terminal, the Warehouse is not covered because, geographically, it does not "adjoin navigable waters." *New Orleans Depot Services, Inc. v. Director, OWCP [Zepeda]*, 718 F.3d 384, 393-394, 47 BRBS 5, 11(CRT) (5th Cir. 2013) (en banc). If considered part of the Terminal, however, the Warehouse is, along with the Terminal, a covered enumerated situs under the Act. *Spain v. Expeditors & Prod. Serv. Co., Inc.*, 52 BRBS 73, 74-75 (2018), *aff'd sub nom. Expeditors & Prod. Serv. Co., Inc. v. Director, OWCP*, ___ F. App'x ___, No. 18-60895, 2019 WL 5699966 (5th Cir. Nov. 5, 2019); *see Victorian*, 943 F.3d at 284-285.

Because the situs inquiry requires "application of a statutory standard to case-specific facts, it is ordinarily a mixed question of law and fact." *Zepeda*, 718 F.3d at 387, 47 BRBS at 6(CRT). However, where the facts are not in dispute, as in this case, coverage is "'an issue of statutory construction and legislative intent,' and should be reviewed as a pure question of law." *Id.* (quoting *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 305, 15 BRBS 62, 67(CRT) (1983)); *Wood Group Prod. Servs. v. Director, OWCP [Malta]*, 930 F.3d 733, 736, 53 BRBS 35, 36(CRT) (5th Cir. 2019). The Board thus reviews the administrative law judge's determination of coverage in this case *de novo*. *See Z.S. v. Science Applications Int'l Corp.*, 42 BRBS 87 (2008); *Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418 (1989), *aff'd mem.*, 924 F.2d 1055 (5th Cir. 1991).

Employer identified two facts in support of its argument that the Terminal and the Warehouse cannot be considered one situs under the Act: 1) each facility has a fence; and 2) a public road, Barbours Cut Boulevard, runs between them. The majority agrees, holding that the existence of fencing and a public road severs the two facilities as a matter of law, precluding coverage under the Act. Under this approach, an injury while picking up shipping containers and transporting them within the fence lines of the Terminal is covered, but an injury while delivering those same containers to the Warehouse, 50 to 75 feet away, is not covered. This analysis, and the reliance on fence lines and a public road as determinative of situs, lacks a necessary inquiry into the proximity and

interconnectedness of the Terminal and the Warehouse, and the indispensability of the Warehouse to the loading and unloading of ships at the Port of Houston Terminal.

The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that coverage under the Act is not defined "according to fence lines and local designations." *Hudson*, 555 F.3d at 433, 42 BRBS at 71(CRT). Rather, "[t]he test is whether the situs is within a contiguous [] area which adjoins the water." *Zepeda*, 718 F.3d at 392, 47 BRBS at 10(CRT) (quoting *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 178, 6 BRBS 229, 230 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977)). As the Board stated in *Spain*:

> "If a general area is customarily—not necessarily exclusively or predominantly—used for loading and unloading of vessels, all parts within it are a maritime situs," and it is necessary to look at both a particular part of a facility's "proximity and its interconnectedness to the loading and unloading location, along with its function" to determine if it is fair to designate a particular part of a facility as part of the situs.

Spain, 52 BRBS at 75 (quoting *Hudson*, 555 F.3d at 435, 42 BRBS at 73(CRT)).

The undisputed facts set forth in claimant's deposition testimony and the affidavit of Joseph Trevino, Vice President of the International Longshoremen's Association Local 24, establish that the Terminal and the Warehouse are interconnected geographically and functionally such that they constitute one covered maritime situs.[14] *See Spain*, 52 BRBS at 75.

The Warehouse is a transfer station operated by Gulf Winds, Inc. It is located on Barbours Cut Boulevard, 50 to 75 feet directly across from the entrance to the Port of

[14] The majority advises that an expert witness cannot be relied upon for his or her "legal conclusions, i.e., an opinion on an ultimate issue of law." *Hall*, slip op. at 8 n.11 (quoting *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058 (9th Cir. 2008)). Neither witness is being cited for that purpose, however. Both are fact witnesses with direct knowledge of operations at the Port of Houston, including the geographic and functional interconnectedness of the Terminal and the Warehouse. *See Spain*, 52 BRBS at 75. Claimant's knowledge stems from his actual work transporting shipping containers between the Terminal and the Warehouse. Cl. Dep. at 10-11, 21-25. Mr. Trevino's knowledge stems from his responsibility to assign truck drivers to work "for the various stevedoring companies who work out of the Port of Houston on a daily basis." Trevino Affidavit at 1. On a weekly basis, he assigns employees like claimant to transport shipping containers for Gulf Winds, Inc., the operator of the Warehouse. *Id.* He is "familiar with

Houston Terminal. Trevino Affidavit at 1. No buildings or structures separate the Warehouse from the entrance to the Terminal. *Id*. at 3. Although Barbour's Cut Boulevard lies between the facilities and is a public street, the "majority is port traffic." Cl. Dep. at 23. It is the only cross road into the Port of Houston; truck drivers assigned to stevedoring companies must travel down this road to enter the Terminal. Trevino Affidavit at 3. According to claimant, "The public kinda' stay off of that traffic due to the numerous trucks that's coming in and out of the port. . . . So it's anybody over there is – everything is port going in and out of the ports." Cl. Dep. at 23. On days when ships are being loaded and unloaded, the street is "stacked bumper to bumper with trucks going in and out of the Port of Houston delivering and pickup up cargo in addition to the Gulf Winds, Inc. truck drivers." Trevino Affidavit at 3.

Truck drivers assigned to Gulf Winds, including claimant,[15] pick up loaded containers from the Warehouse on a daily basis and drive them "across the street to the [Terminal] to be loaded on a vessel directly" or placed in storage at the Terminal to be loaded onto vessels at a later date. Trevino Affidavit at 3. Their duties also involve picking up loaded cargo from ships at the Terminal and delivering them to the Warehouse to be stored. *Id*. The Warehouse also serves as an "overweight station" for the Port of Houston: some containers unloaded from ships at the Terminal must be delivered by truck to the Warehouse to be "repackaged" in order to meet federal weight requirements for transport on public highways. *Id*. at 3. Finally, truck drivers transport empty containers between the Warehouse and the Terminal to be "stuffed with cargo" and loaded onto vessels or stored at the Terminal for future use by other stevedoring companies. *Id*. Truck drivers assigned to Gulf Winds "drive in and out of the [Terminal] multiple times per day" and, if necessary, travel all the way down to the dock/waterline." *Id*. at 2-3.

The functions performed by the Warehouse – receiving, storing, and warehousing cargo to and from ships – place it squarely within the definition of "terminal" in the

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their facility and their operations and ha[s] been to their facilities and spoken with their management regarding work and labor issues many times over the years." *Id*. Employer did not contest the accuracy of the witness' statements but argued, incorrectly, that the information they provided – beyond statements confirming the existence of fences and a road – is irrelevant to the situs inquiry. Emp. Opp. to Recon. at 2; Emp. Supp. Br. at 1-2.

[15] Claimant testified that, on the date of his injury, he had been operating a yard mule to pick up containers from ships at the Terminal and deliver them to the Warehouse. Cl. Dep. at 21-23. After making his final delivery of the day, claimant was injured when he fell in the Warehouse parking lot on his way to hand in paperwork at the office. *Id*. at 23-25.

maritime industry. *Victorian*, 943 F.3d at 285-287 (established definitions of "terminal" pertinent to situs inquiry under the Act).[16] Moreover, these functions are essential to the loading and unloading process. *BPU Mgmt., Inc./Sherwin Alumina Co. v. Director, OWCP [Martin]*, 732 F.3d 457, 462, 47 BRBS 39, 41(CRT) (5th Cir. 2013) (The "essential elements of unloading a vessel" are "taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area."). Geographically, its location 50 to 75 feet from the Terminal entrance not only facilitates the immediate transfer of cargo from storage to ship and ship to storage, such close proximity is quite literally indispensable to Port of Houston operations. In particular, certain containers cannot leave the vicinity of the Terminal until they are delivered to and repackaged by the Warehouse to meet federal weight restrictions for transport on public highways. *See Harris v. Virginia Int'l Terminals, L.L.C.*, __ BRBS __, BRB No. 19-0177 (Nov. 20, 2019) (chassis yard part of terminal; terminal "could not function properly" without chassis yard); Trevino Affidavit at 3.

That a street lies between the Warehouse and the Terminal is not sufficient to sever the two facilities for purposes of the situs inquiry. *Hudson*, 555 F.3d at 435, 42 BRBS at 73(CRT) (a covered area need not "exclusively" or even "predominantly" be used for loading and unloading vessels); *see Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 1140 n.11, 29 BRBS 138, 144 n.11(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996) ("[I]t suffices that the overall area which includes the location is part of a terminal adjoining water."). Although the traveling public *can* access the street, its overriding purpose is maritime commerce, including "bumper to bumper trucks going in and out of the Port of Houston" when ships are being loaded and unloaded at the Terminal. *Harris*, slip op. at 6 (distinguishing chassis yard from non-covered facilities on basis that "no roads or railroad tracks *unrelated to maritime commerce* sever[] the 'contiguity'

[16] In *Victorian*, the Fifth Circuit relied upon three established definitions of "terminal" to find an oil-and-gas facility a covered enumerated situs under the Act: a definition adopted by the Occupational Safety and Health Administration at 29 C.F.R. §1917.2; a definition in Webster's II New Riverside University Dictionary 1194 (1988); and a definition cited by the Supreme Court in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 n.30, 6 BRBS 150, 162 n.30 (1977). The definitions include areas/locations used for storage, warehousing, or packing of freight; movement of cargo from vessel to shore or shore to vessel; and receiving, handling, holding, consolidating, and loading of waterborne shipments.

between the chassis yard, the terminal, and navigable waters" (emphasis added)); Trevino Affidavit at 3.

As the Board stated in *Harris*:

> The salient fact distinguishing those cases where the claimant's injury is covered from those where it is not is that the site of the injury is considered geographically and functionally part of a contiguous covered area adjoining navigable waters, notwithstanding the existence of barriers such as fencing, which may otherwise divide the two locations.

Harris, slip op. at 5. Here, the proximity of the Warehouse 50 to 75 feet from the entrance to the Terminal, and the interconnectedness of their locations and functions for loading and unloading ships, establishes that the two are part of the same maritime situs for purposes of coverage under the Act. There are no non-maritime businesses or residences separating one from the other, and the road that lies between the two is itself used for maritime purposes and in no way restricts claimant's and other truck drivers' access to the Terminal or navigable water. Instead, employees assigned to work for Gulf Winds transport shipping containers back and forth between the Warehouse and the Terminal "multiple times per day" and, if necessary, travel "all the way down to the dock/waterline." *Compare with Zepeda*, 718 F.3d at 386, 47 BRBS at 6(CRT) (repair facility not covered; surrounded by non-maritime businesses and employees did not have access to the water); *Sidwell*, 71 F.3d at 1135, 1141, 29 BRBS at 139, 145(CRT) (repair facility not covered; surrounded by non-maritime businesses and residences and employees did not ordinarily alternate between the repair facility and the terminal); *Kerby v. Southeastern Public Service Authority*, 31 BRBS 6 (1997), *aff'd mem.*, 135 F.3d 770 (4th Cir.), *cert. denied*, 525 U.S. 816 (1998) (power plant not covered; separated by fences and private railroad such that employees did not have access to the shipyard).

Claimant was injured transporting shipping containers back and forth between a covered terminal and a warehouse 50 to 75 feet away. Although coverage determinations under the Act inevitably involve setting boundaries, *Zepeda*, 718 F.3d at 393, 47 BRBS at 11(CRT), declining coverage in this case impermissibly renders him "the paradigmatic longshoreman who walked in and out of coverage during his workday." *Herb's Welding*, 470 U.S. at 441 n.13, 17 BRBS at 84 n.13(CRT) (In amending Section 3(a) of the Act,

Congress expanded coverage to address its "concern about longshoremen walking in and out of coverage.").

I, therefore, respectfully dissent.

GREG J. BUZZARD
Administrative Appeals Judge