BRB No. 91-1912

JUAN CABALEIRO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BAY REFRACTORY COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
STATE INSURANCE FUND	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

James R. Campbell, New York, New York, for claimant.

Richard A. Cooper (Fischer Brothers), New York, New York, for employer/carrier.

Before: BROWN, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order of Remand (90-LHC-978) of Administrative Law Judge Ralph A. Romano awarding benefits 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was employed as a ship maintenance worker. On January 28, 1989, claimant met his co-workers at employer's warehouse in Brooklyn, New York, where they loaded vehicles owned by employer with tools and supplies used for ship maintenance work. Claimant and his foreman proceeded in one of the vehicles to the ship to be worked on that day on a New Jersey waterway. While in New Jersey, this vehicle, for unknown reasons, came to rest in the yard of Penn Muffler and Brake Shop where it was struck by a truck, injuring claimant's back and neck. An investigator for employer, whose testimony is uncontradicted, stated that the shop was five miles from the ship

and three miles from water. After the accident, claimant and his foreman proceeded to the ship and worked for several hours at the ship, after which time claimant went home. Tr. at 10-18. Claimant has not returned to work as a result of his injuries, and the parties agreed to a stipulation that claimant was temporarily totally disabled from January 29, 1989 and continuing. Claimant has received benefits pursuant to the workers' compensation law of New York.

The sole issue before the administrative law judge was whether claimant was injured on a covered situs. *See* 33 U.S.C. §903(a). The administrative law judge found that "the Penn Muffler and Brake Shop yard neither `adjoins' the navigable waters of the United States, nor is it customarily used by employer in repairing vessels." Decision and Order at 4. However, the administrative law judge found that only an employment nexus with maritime activity is necessary, and that as it is undisputed claimant sustained injuries arising out of and in the course of his maritime employment, claimant was injured upon a situs covered under Section 3(a) of the Act. Decision and Order at 4-5. The administrative law judge summarily denied employer's Motion for Reconsideration. In a Supplemental Decision and Order Awarding Attorney Fees, the administrative law judge ordered employer to pay claimant's counsel $7,562.50 in an attorney's fee.[1]

On appeal, employer contends that the administrative law judge erred in finding that claimant was injured upon a covered situs as the injury itself did not occur on navigable waters or in an adjoining area. Claimant responds, urging affirmance of the administrative law judge's Decision and Order as it is supported by substantial evidence and is in accordance with law.

Section 3(a) provides that the injury must occur on 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)(1988). An injury occurring in travel on a public road to or from a job site is covered under the Act only if the location of the injury constitutes an "adjoining area" under Section 3(a). *See Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978); *Humphries v. Cargill, Inc.*, 19 BRBS 187 (1986), *aff'd*, 834 F.2d 372, 20 BRBS 17 (CRT)(4th Cir. 1987), *cert. denied*, 108 S.Ct. 1585 (1988). Factors to be considered in determining whether a site is an "adjoining area" under this test include: the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all the circumstances in the case. *See Herron*, 568 F.2d at 139, 7 BRBS at 411; *Anastasio v. A.G. Ship Maintenance*, 24 BRBS 6 (1990).

In the instant case, citing *Dravo Corp. v. Maxin*, 545 F.2d 374 (3d Cir. 1976), and *Sea-Land Service, Inc. v. Director, OWCP*, 540 F.2d 629, 4 BRBS 289 (3d Cir. 1976), the administrative law judge found that only an employment nexus with maritime activity is necessary and that the specific

[1]Following a finding of jurisdiction, the administrative law judge remanded the case to the district director to enter a compensation order based on the parties' stipulations. The Compensation Order was issued on July 22, 1991.

location of the injury is irrelevant. The administrative law judge found that as these cases had not been specifically overruled, they are still precedential in the Third Circuit wherein appellate jurisdiction in the instant case lies.

In effect, the administrative law judge found coverage under the Act based solely on the maritime nature of claimant's duties when injured. We reject the administrative law judge's reliance on *Dravo Corp.* and *Sea-Land* for this proposition as it nullifies the situs requirement of Section 3(a) in favor of a test based solely on the employee's status under Section 2(3). Subsequent to these Third Circuit decisions, the Supreme Court considered the scope of the 1972 amendments to the Act in several decisions. The Court's decisions clearly state that a claimant must satisfy both the situs test of Section 3(a) and the status test in Section 2(3) in order to be covered by the Act. *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *see also P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979)(Section 3(a) limits geographic coverage of the Act). The failure of the Supreme Court to specifically overrule *Dravo Corp.*, 545 F.2d at 374, and *Sea-Land*, 540 F.2d at 629, does not establish the precedential value of these cases in light of more recent Supreme Court decisions to the contrary.[2] *See generally Humphries v. Director, OWCP*, 834 F.2d 372, 20 BRBS 17 (CRT)(4th Cir. 1987), *cert. denied*, 108 S.Ct. 1585 (1988) ("[t]he *Sea-Land* approach is unacceptable" in light of the Supreme Court's decisions). More recently, in a case decided after the administrative law judge's Decision and Order was issued in this case, the Third Circuit stated in *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112 (CRT)(3d Cir. 1992), that the 1972 amendments instituted a two-part test looking both to the "situs" of the injury and the "status" of the injured employee. The court also noted the definition of covered situs under Section 3(a) of the Act. *Rock*, 953 F.2d at 59, 25 BRBS at 115 (CRT).

The United States Court of Appeals for the Fourth Circuit, in a case similar to the instant case, affirmed the Board's decision that the injury in the case did not occur on a covered situs where claimant, while in the course of his employment, was struck by a car and was seriously injured coming from a restaurant "well over a mile from the terminal, along a public highway which did not connect any portions of employer's operations or traverse continuous or contiguous terminal areas." *Humphries*, 834 F.2d at 376, 20 BRBS at 24 (CRT). The restaurant was separated from the river and the nearest maritime terminal by a residential neighborhood. The court held that while a broad interpretation of the maritime situs requirement is warranted on statutory and policy grounds, the facts in this case "militate against any description of the accident scene as a maritime situs." *Humphries*, 834 F.2d at 376, 20 BRBS at 24 (CRT); *see also McConnell v. Bethlehem Steel Corp.*, 25 BRBS 1 (1991).

The Board has also held that the breadth of the requirements of claimant's employment does not enlarge situs under the Act; an employee injured while working off a covered situs is not covered

[2]In fact, the Court in *Caputo* questioned the validity of *Sea-Land*, noting that the Third Circuit "appears to have essentially discarded the situs test...." *Caputo*, 432 U.S. at 277 n.40, 6 BRBS at 168 n.40.

by Section 3(a) even if within the course of his employment. *See Beachler v. National Lines Bureau, Inc.*, 23 BRBS 438, 440 (1990); *Shippy v. Crowley Maritime Corp.*, 20 BRBS 55, 57 (1987); *Alford v. MP Industries of Florida*, 16 BRBS 261 (1984). The specific employment requirements concerning the use of public roads between employer's office and the maritime area do not automatically bring the location of claimant's injury on a public road within the coverage of Section 3(a); rather, the situs inquiry looks to the relationship of the place of injury to navigable waters. *See Beachler*, 23 BRBS at 441. Further, the Board has previously rejected the notion stated by the administrative law judge that claimant should be extended coverage under the Act on the basis that Congress, when amending the Act in 1972, intended to provide uniform coverage to alleviate the problem of employees walking in and out of coverage as Congress did not eliminate the Section 3(a) requirement that the injury occur on a maritime situs. *See Beachler*, 23 BRBS at 441; *Shippy*, 20 BRBS at 57; *Alford*, 16 BRBS at 264.

There is no evidence in the instant case which could support a determination that the general area surrounding the Penn Muffler and Brake Shop in which claimant's automobile accident occurred is a "maritime area." *See generally McConnell*, 25 BRBS at 3-4; *Hagenzeiker v. Norton Lilly Co.*, 22 BRBS 313 (1989); *Sawyer v. Tideland Welding Service*, 16 BRBS 344 (1984). Further, the administrative law judge agreed with employer that the evidence is such that the Penn Muffler and Brake Shop neither "adjoins" the navigable waters of the United States, nor is customarily used by employer in building or repairing vessels, and this finding is supported by substantial evidence. *See Humphries*, 834 F.2d at 376, 20 BRBS at 24 (CRT); *McConnell*, 25 BRBS at 4. In light of the subsequent case law, we hold that the administrative law judge's determination that the Third Circuit's decisions in *Dravo Corp.* and *Sea-Land* compel a finding that claimant was injured upon a situs covered under Section 3(a) of the Act is erroneous. Furthermore, as the accident did not occur on an enumerated situs or in an "adjoining area," we hold that the administrative law judge erred in finding that claimant was injured on a covered situs, and we reverse this finding.

Accordingly, the Decision and Order of the administrative law judge awarding benefits is reversed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge