BRB No. 92-1164

DONALD ECKHOFF, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DOG RIVER MARINA AND BOAT WORKS, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
ST. PAUL FIRE AND MARINE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Ben H. Walley, Administrative Law Judge, United States Department of Labor.

Tony B. Jobe, New Orleans, Louisiana, for claimant.

Winston Grow, William H. Sisson, and Charles H. Hillman (Brown, Hudgens, P.C.), Mobile, Alabama, for employer/carrier.

Joshua T. Gillelan II and Marianne Demetral Smith (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (90-LHC-2188) of Administrative Law Judge Ben H. Walley 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 if they 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). Oral argument was heard in this case on January 13, 1994, in New Orleans, Louisiana.

Claimant, a marine carpenter employed by employer, performed various employment duties including the installation of bulkheads, boat cabins, and windows, the laying down of engine beds, and the construction, replacement, and expansion of employer's existing dock facilities. *See* Transcript at 44. In August 1988, claimant was assigned to work at employer's president's home and pier located on Alabama's Dauphin Island. While on Dauphin Island, claimant, working by himself, lifted and placed 14 foot beams during the construction of a boat dock, shored up a 300 pound iron sink at the pier, and performed duties at the president's home. *Id.* at 69-71. On the third of the five days claimant was engaged in this work, he began experiencing arm and chest pains while working on the dock and pier.[1] These pains continued on exertion throughout the next two days; however, claimant believed the pains were related to the heavy work and therefore did not immediately seek medical attention. *Id.* On Friday, August 19, 1988, claimant received his regular salary from employer; that night, claimant was admitted into the hospital and diagnosed as having a heart attack. Claimant, who had not returned to gainful employment through the date of the hearing, subsequently filed a claim for compensation under the Act, alleging that his chest pains and August 19, 1988, heart attack were caused, hastened, contributed to and/or aggravated by his work for employer during the preceding week.

In his Decision and Order, the administrative law judge determined that since claimant's employment duties as a marine carpenter constituted maritime employment, he was an employee covered under Section 2(3) of the Act, 33 U.S.C. §902(3). The administrative law judge then concluded that the situs requirement of Section 3(a), 33 U.S.C. §903(a), was not satisfied. Specifically, the administrative law judge determined that claimant was injured at his employer's home and pier which together do not constitute an adjoining area necessary for establishing a covered situs under the Act. Accordingly, the administrative law judge denied the claim.

[1]It would appear that the parties used the terms "dock" and "pier" interchangeably when discussing employer's Dauphin Island facility.

On appeal, claimant contends that the administrative law judge erred in finding that he was not injured on a covered situs. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief in support of claimant's contention that the administrative law judge erred in determining that claimant did not establish that his injury occurred on a covered situs.

To be covered under the Act, claimant must satisfy both the "status" requirement of Section 2(3) and the "situs" requirement of Section 3(a). *See P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 74, 11 BRBS 320, 322 (1979); *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 264, 6 BRBS 150, 159 (1977). The status inquiry under Section 2(3) involves an analysis of the employee's overall employment duties. *Id.* Section 3(a) provides coverage for such employees injured in specified locations. The administrative law judge found claimant satisfied the status requirement, but denied the claim because he found claimant was not injured on an area within Section 3(a). On appeal, claimant challenges this finding.

Section 3(a) provides coverage for disability resulting from an injury occurring 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). The Board has held that the breadth of the requirements of claimant's employment does not enlarge situs under the Act; thus, an employee injured while working off a covered situs is not covered by Section 3(a) even if within the course of maritime employment. *See Cabaleiro v. Bay Refractory Co., Inc.*, 27 BRBS 72 (1993). Accordingly, coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *See Melerine v. Harbor Construction Co.*, 26 BRBS 97 (1992); *Alford v. MP Industries of Florida*, 16 BRBS 261 (1984).

Initially, claimant, arguing that the administrative law judge erred in finding that he was not injured on navigable waters, urges the Board to take judicial notice of the fact that British Bay, *i.e.*, the waters surrounding Dauphin Island, is a navigable waterway of the United States as defined by Section 3(a). In addressing the issue of situs, the administrative law judge stated that, as claimant's injury occurred while he was working on employer's president's pier and home, his injury did not occur on navigable waters. Contrary to claimant's interpretation of this finding, our review of the decision indicates that the administrative law judge was not finding that the waters surrounding Dauphin Island were not navigable, but rather that claimant was not injured while physically on navigable waters, which would confer both status and situs under the Supreme Court's decision in *Director, OWCP v. Perini North River Assoc.*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983). *See* Decision and Order at 9-10. This interpretation is supported by the administrative law judge's subsequent analysis of whether the home and pier constituted an area adjoining navigable waters, *id.*, and claimant's uncontroverted testimony that the pier was used for the docking of yachts. It is clear that the water surrounding Dauphin Island is navigable and that claimant was not injured while actually in the water or afloat on it. Accordingly, we affirm the administrative law judge's determination that claimant was not injured on actual navigable waters. The issue therefore is

whether the administrative law judge properly found claimant was not injured on an area within the statutory area of coverage, which includes adjoining land areas including a pier.

Claimant next contends that the administrative law judge erred in requiring that both employer's pier and home together meet the requirements of an "adjoining area" in order to satisfy the situs requirement of the Act. We agree. In addressing situs, the administrative law judge stated that

> [t]he general area of claimant's accident is a "maritime area" inasmuch that it included a pier, an enumerated situs, and was along the waterfront. [cite omitted]. However, there is no evidence that [the] home was customarily used by employer in loading, unloading, repairing, dismantling, or building a vessel... Thus, [the] home/pier is not an adjoining area, establishing the necessary situs.

See Decision and Order at 10. As the specific enumerated sites set forth in Section 3(a) of the Act are separated by the disjunctive "or," there is no justification under the Act for the administrative law judge's decision to deny coverage by combining employer's pier and home into one area. Rather, as it is uncontroverted that claimant suffered chest pains while he worked on both the pier and home, and the Board has long recognized that chest pains constitute an injury within the meaning of the Act, *see Care v. Washington Metropolitan Area Transit Authority*, 21 BRBS 248 (1988), either of these two areas may constitute a situs covered under the Act. *See Alford*, 16 BRBS at 261. We therefore hold that the administrative law judge erred in combining the two areas where claimant experienced chest pains when analyzing the issue of situs.

Accordingly, we will now consider whether the pier upon which claimant worked and experienced chest pains was, in fact, an enumerated situs as determined by the administrative law judge.[2] The unequivocal language of the Act supports the interpretation that when an injury occurs on a pier, it is within the situs requirement if the pier adjoins navigable waters. *See* 33 U.S.C. §903(a). The Board has held that a pier is a covered situs regardless of whether it is customarily used by an employer in loading, unloading, repairing, or building a vessel. *See Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Rhodes v. Healy Tibbits Construction Co.*, 9 BRBS 605 (1979)(Miller, J., dissenting on other grounds). In *Dupre*, the Board, noting that a pier need only adjoin navigable waters and may be under construction, affirmed a finding of situs when a claimant fell from a tree, striking either the side of the pier or a sailboat which was on the pier. *See Dupre*, 23 BRBS at 92. In *Rhodes*, the Board held that a pier used for recreational fishing and to carry a sewer pipe to the ocean is a maritime situs pursuant to Section 3(a), even though that structure would not be used for the loading, unloading, building or repairing of vessels. *See Rhodes*, 9 BRBS at 605.

The United States Court of Appeals for the Ninth Circuit has also recently addressed this issue. *Hurston v. Director, OWCP*, 989 F.2d 1547, 26 BRBS 180 (CRT)(9th Cir. 1993)(Ararcon J., dissenting), *reversing sub nom. Hurston v. McGray Construction Co.*, 24 BRBS 94 (1990). In

[2]Claimant does not contend on appeal that employer's home on Dauphin Island constituted an adjoining area pursuant to Section 3(a).

Hurston, the court held that, under the plain meaning of Section 3(a), a pier adjoining navigable waters is a covered situs without regard to whether it is used for a maritime purpose. The court held that it is the type of structure, rather than its function, which defines "any adjoining pier" under the Act.

In the instant case, the administrative law judge specifically stated that the pier on which claimant experienced chest pains was an enumerated situs. It is uncontroverted that employer's pier was built and maintained for the mooring of boats. It could be reached both from land, *i.e.*, Dauphin Island, and from the waters of British Bay, and it contained facilities for tying up boats. Consequently, we affirm the administrative law judge's finding that the pier upon which claimant contends he was injured is an enumerated situs. As such, it is sufficient to confer coverage under Section 3(a). *See Hurston*, 989 F.2d at 1547, 26 BRBS at 180 (CRT); *Dupre*, 23 BRBS at 86; *Rhodes*, 9 BRBS at 605. Accordingly, as claimant was allegedly injured on an area specifically enumerated in Section 3(a), we reverse the administrative law judge's finding that claimant failed to satisfy the situs requirement.

Employer raises additional arguments in its response brief regarding coverage which, if accepted, would support the ultimate result reached by the administrative law judge below, the denial of the claim. These arguments will therefore be addressed. *See King v. Tennessee Consolidated Coal Co.*, 6 BLR 1-87 (1983). Employer first contends that the administrative law judge erred in determining that claimant satisfied the status requirement of the Act. We disagree. Section 2(3) provides coverage for an employee "engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . ." 33 U.S.C. §902(3). In the instant case, the administrative law judge determined that claimant's employment duties involving working on vessels over seventy feet in length, redesigning and rebuilding employer's fuel dock and gas house, and expanding employer's marine facilities, satisfied the status requirement of the Act. *See* Decision and Order at 8. The record establishes, and employer does not dispute, that claimant was engaged in the building or repair of employer's marine facilities, and the Board has held that such work is covered under the Act. *See Dupre*, 23 BRBS at 86. We, therefore, reject employer's contention of error, and we affirm the administrative law judge's determination that claimant has established status based on his uncontroverted job duties involving working on vessels as well as repairing and expanding employer's existing marine facilities, as that finding is supported by substantial evidence and is in accordance with law.

Employer additionally challenges the administrative law judge's finding that an employer-employee relationship existed between it and claimant, contending that claimant was not its "employee" because it did not deduct income and social security taxes from his pay, he worked only eight hours a day, and was given no insurance benefits.[3] The fact that deductions were not taken

[3]Further, we note that employer raises arguments addressing causation and the nature and extent of claimant's alleged disability. The administrative law judge did not reach these issues because he found that jurisdiction had not been established. The Board has nothing to review on these issues and declines to address them. *See generally Williams v. Newport News Shipbuilding and Dry Dock Co.*, 17 BRBS 61 (1985); *Jones v. Midwest Machinery Movers*, 15 BRBS 70 (1982). These issues must be addressed on remand.

from claimant's check is not dispositive of the issue. *See* 1c Arthur Larson, *Workmen's Compensation Law* §44.33(b)(1986). Under the factors set forth in The Restatement (Second) of Agency §220, subsection 2, it is apparent that claimant was an employee because: (1) claimant's work was directed by his supervisor; (2) his duties were dictated by his boss; (3) claimant did not independently determine his work schedule; and (4) claimant used employer's tools. *See* Transcript at 14-15. Moreover, employer is in the business of building and servicing vessels and the repair, building and maintenance of its facilities, which claimant did, are a regular part of employer's business. Finally, employer's contention that claimant was paid with a company check by mistake and that he should have been paid by a personal check of the company's president is unsubstantiated by the evidence of record. We thus affirm the administrative law judge's finding of an employer-employee relationship.

Claimant has thus established that he is a maritime employee who sustained his alleged injury on a covered situs. As claimant met the requirements for coverage under the Act, the case is remanded for consideration of the remaining issues in dispute.

Accordingly, the administrative law judge's determination that claimant was not covered under Section 3(a) of the Act is reversed, and the case is remanded for further consideration of the remaining issues in dispute. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge