SANDRA K. KERBY	)	BRB No. 96-0705
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHEASTERN PUBLIC SERVICE AUTHORITY	)	DATE ISSUED:
	)	
and	)	
	)	
HARTFORD ACCIDENT AND INDEMNITY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
WILLIAM C. RODRIQUEZ	)	BRB No. 96-0716
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SOUTHEASTERN PUBLIC SERVICE AUTHORITY	)	
	)	
and	)	
	)	
HARTFORD ACCIDENT AND INDEMNITY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order - Awarding Benefits, the Decision and Order - Granting Benefits, and the Order of Daniel A. Sarno, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Rutter & Montagna), Norfolk, Virginia, for claimants.

Palmer S. Rutherford, Jr. (Willcox & Savage), Norfolk, Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative

Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (94-LHC-2989, 2990), the Decision and Order - Granting Benefits (95-LHC-508), and the Order (96-LHC-248) of Administrative Law Judge Daniel A. Sarno, Jr., rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).[1] 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).

The facts involved in these consolidated cases are not in dispute. In 1989, employer, a public service authority created under the laws of the Commonwealth of Virginia, entered into a contract with the United States Navy to operate and maintain a power plant that had been built adjacent to the Norfolk Naval Shipyard (NNS). NNS is located on land contiguous with the Southern Branch of the Elizabeth River. The United States Navy owns the real estate on which both its shipyard and the power plant are located, as well as the physical power plant building. The parcel of land on which the power plant is located is separated from NNS by a privately owned railroad spur. The power plant and NNS are each surrounded by a chain link fence which separates each property from the railroad spur and each other. Employer's employees do not have access to NNS by virtue of being such an employee; rather, access must be obtained by permission from NNS.

The power plant is designed to generate steam and electricity by burning refuse which is obtained from a local trash collection facility which is owned and operated by employer. The steam generated by the power plant goes directly to NNS where it is used for heating and hot water for shore facilities and ships. All of the electricity generated by the power plant goes to a switch yard operated by NNS.[2] The electricity is then sent from

[1]In an Order dated December 10, 1996, the Board consolidated for purposes of decision employer's appeals of the administrative law judge's Decision and Order - Awarding Benefits in claimant Rodriquez's case, BRB No. 96-0716, and the administrative law judge's Decision and Order - Granting Benefits, and Order, in claimant Kerby's case, BRB No. 96-0705. 20 C.F.R. §802.104.

[2]According to the testimony of Mr. Ronald Brown, employer's plant manager, the switch yard is actually on the power plant site, but is under the complete operational jurisdiction of NNS. *See* Rodriquez Transcript at 56-57.

the switch yard to NNS in order to satisfy NNS's electrical requirements. Once these power requirements are met, excess electricity is sent back to the switch yard and sold to Virginia Power.

Claimants Rodriquez and Kerby each suffered injuries during the course of their employment with employer. Claimant Rodriquez was employed by employer as a boiler plant mechanic, whose responsibilities included the maintenance and repair of power plant equipment and machinery. On May 10, 1993, he suffered injuries to his hands and right elbow during the course of his employment with employer after performing sandblasting cleaning functions on a boiler. Subsequently, claimant Rodriquez underwent carpal tunnel releases on each hand, and a decompression of the radial nerve for his elbow condition. Claimant Rodriquez remained out of work for various periods in 1993 for his carpal tunnel releases, and in 1994 due to his elbow surgery.

In his Decision and Order, the administrative law judge concluded that claimant Rodriquez satisfied the situs requirement of Section 3(a) of the Act, 33 U.S.C. §903(a)(1988). The administrative law judge next found that since claimant Rodriquez maintained and repaired equipment which produced steam and electricity for NNS, the status element set forth in Section 2(3) of the Act, 33 U.S.C. §902(3)(1988), had also been established. Accordingly, the administrative law judge found that claimant Rodriquez established coverage under the Act and awarded temporary total disability benefits for both his hand and elbow injuries. 33 U.S.C. §908(b).

Claimant Kerby, who worked as a heavy equipment and overhead crane operator for employer at the power plant, suffered a work-related injury on August 1, 1994 when she stepped into a drainage ditch and fell backwards onto her left shoulder and back. Claimant Kerby completed her shift but subsequently experienced pain in her neck, back, hands and legs. She was diagnosed as suffering from cervical and lumbar strains, as well as carpal tunnel syndrome, and underwent a carpal tunnel release on September 30, 1994. Based on an MRI performed subsequent to the hearing, Dr. Snider opined that claimant Kerby had a pre-existing spinal cord compression on the nerve root which was aggravated by her fall on August 1, 1994, and that this cervical disc aggravation caused claimant's wrist symptomatology. According to Dr. Snider, claimant Kerby has been incapacitated from work since December 1, 1994.

At some point following her injury, claimant Kerby returned to work for employer in a light duty office position. However, she was terminated from this position on or about March 30, 1995, due to a dispute with her supervisor. Employer voluntarily paid to claimant Kerby temporary partial disability benefits from August 2, 1994 to August 27, 1994, temporary total disability benefits from September 28, 1994 to October 31, 1994, and temporary partial disability benefits from November 1, 1994 to April 15, 1995 and continuing. 33 U.S.C. §908(b), (e).

At the hearing, the administrative law judge accepted the parties' stipulation that the coverage finding made in claimant Rodriquez's case would apply to claimant Kerby's claim as well. Accordingly, in his Decision and Order, the administrative law judge found that claimant Kerby

established coverage under the Act. *See* Kerby Decision and Order at 3 n.2. The administrative law judge next found that claimant Kerby's wrist injury was aggravated by her work-related accident on August 1, 1994, and thus found that causation was established. After finding that claimant Kerby established a *prima facie* case of total disability, the administrative law judge determined that as employer failed to submit any evidence regarding suitable alternate employment, employer failed to establish the availability of suitable alternate employment. Consequently, the administrative law judge awarded claimant Kerby temporary total disability compensation from April 16, 1995 and continuing. 33 U.S.C. §908(b). Additionally, the administrative law judge ordered employer to provide such medical treatment as the nature of claimant Kerby's work-related disability shall require, pursuant to Section 7 of the Act, 33 U.S.C. §907.

Subsequent to the Decision and Order, claimant Kerby notified the administrative law judge that employer had refused to provide medical treatment. In a supplemental Order, dated August 7, 1996, the administrative law judge rejected employer's argument that, since the case was on appeal to the Board, it was not obligated to provide medical treatment and ordered employer to comply with his initial Decision and Order.

On appeal, employer contends that the administrative law judge erred in finding that claimants Rodriquez and Kerby established coverage under the Act. Specifically, employer, citing *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (CRT)(4th Cir. 1995), *cert. denied*, U.S. , 116 S.Ct. 2570 (1996), asserts that the even though the property on which the ship power plant is located is "formally a part of the Naval Base," it is not an "adjoining area" as the power plant is separated from NNS by chain link fences and railroad tracks and is thus not contiguous with navigable waters. Employer's Brief at 6-7. Therefore, employer argues, claimants were not injured on a covered situs under Section 3(a). Next, employer argues that the status test was not met in either case since the work of claimants Rodriquez and Kerby, indeed the work of the entire power plant, lacks a significant relationship to traditional maritime activity. Regarding claimant Kerby's claim, employer additionally appeals the administrative law judge's findings regarding the nature and extent of her disability, as well as its liability for medical expenses.[3] Claimants respond to employer's appeals, urging affirmance of the administrative law judge's decisions.

[3]Employer filed a supplemental appeal in claimant Kerby's case, appealing the administrative law judge's August 7, 1996 supplemental Order. The Board accepted this appeal on September 19, 1996, and consolidated it with employer's original appeal in *Kerby*. BRB No. 96-0705/S. Claimant Kerby thereafter filed a motion to dismiss this supplemental appeal, to which employer responded. In its Order dated December 10, 1996, the Board denied the motion to dismiss, and directed employer to show cause within 10 days of receipt of the Order why its supplemental appeal should not be dismissed for failure to file a Petition for Review and brief. In a letter dated December 16, 1996, employer responded to the Board's show cause order, stating that its supplemental appeal was merely a protective filing or a reaffirmation of its initial position, and that it had nothing to add to its position as stated in its original Petition for Review and brief in *Kerby*, dated April 17, 1996.

I. Status

Employer initially challenges the administrative law judge determination that claimants Rodriquez and Kerby satisfied the Act's "status" requirement. In order to be covered under the Act, a claimant must satisfy both the "situs" requirement of Section 3(a) and the "status" requirement under Section 2(3) of the Act. *See P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Section 2(3) defines an "employee" for purposes of coverage under the Act as "any person 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)(1988). While maritime employment is not limited to the occupations specifically enumerated in Section 2(3), claimant's employment must bear a relationship to the loading, unloading, building or repairing of a vessel. *See generally Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989). Moreover, an employee is covered under the Act if he or she spends "at least some of his time engaged in indisputably" covered activities. *Caputo*, 432 U.S. at 275-276, 6 BRBS at 165. Under *Caputo*, a claimant need not be engaged in maritime employment at the time of injury to be covered under the Act, as the Act focuses on occupation rather than on duties at the time of injury. *See, e.g., Dupree v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

In determining that claimant Rodriquez, and by extension claimant Kerby, satisfied the status requirement, the administrative law judge found that claimant Rodriquez's work in maintaining and repairing equipment which produced steam and electricity for NNS qualified as maritime employment within the meaning of Section 2(3) of the Act. In challenging the administrative law judge's conclusion that claimant Rodriquez satisfied the "status" requirement, employer contends that not all of the electricity and steam generated by the power plant is used by NNS for maritime purposes. Rather, employer notes that some of the generated electricity is directed out of NNS and sold to Virginia Power for general commercial, non-maritime use. Moreover, employer asserts that much of the steam provided by the power plant to NNS is used for "hotel service" for ships; that is to say, heat and hot water for showering, washing and other personal needs of the ships' crew members. It is therefore employer's contention that these uses of electricity and steam lack a significant relationship to traditional maritime activity involving navigation and commerce on navigable waters.

In the instant case, it is undisputed that the employment duties of claimants Rodriquez and Kerby involved the maintenance and operation of the power plant, which provided electricity and steam for shipbuilding and ship repair operations at NNS.[4] Ronald Brown, employer's plant

[4]Employer argues that it is a public service authority, and not an employer whose employees are engaged in maritime employment. However, the status test under Section 2(3) is a functional test, and the nature of claimant's work controls here just as it does in the case of any other employee employed by a private contractor to work on ships at the Naval Shipyard. If claimant meets the status test under Section 2(3), the employer is an employer under Section 2(4), 33 U.S.C. §902(4), as it necessarily employs workers engaged in maritime employment.

manager, testified that all of the electricity generated by the power plant goes to a switch yard under the control of the United States Navy. The system is designed so that all of NNS's electrical requirements must first be met; thereafter, the Navy has the discretion to transfer any surplus electricity to Virginia Power. *See* Rodriquez Transcript at 56-59. In view of the fact that NNS controls the output of the power plant and any sales of power for commercial use, the fact that some power may go out of NNS is not dispositive, as it is clear that the power is directed from the plant exclusively to NNS.

Moreover, it is indisputable that electricity and steam are mandatory components in the shipbuilding and ship repair process. *Compare Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, *reh'g denied*, 910 F.2d 1179 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991)(status test met where employee's connecting and disconnecting fuel hoses aided in loading process). On these facts, the administrative law judge properly relied on the decision of the United States Supreme Court in *Schwalb*, 439 U.S. at 40, 23 BRBS at 96 (CRT), where the Court held two janitorial employees covered on the basis that employees injured while maintaining equipment necessary to the loading and unloading process are maritime employees under Section 2(3). In similar cases, the Board has held that the maintenance of shipyard facilities is essential to the building and repairing of ships, and thus, such work is covered under Section 2(3) of the Act. *See, e.g., Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991). Work involving the repair and maintenance of an employer's marine facility is also covered under the Act. *See Eckhoff v. Dog River Marina & Boat Works, Inc.*, 28 BRBS 51 (1994); *Dupre*, 23 BRBS at 86; *see also Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981)(maintenance of structure housing shipbuilding machinery is essential, as is repair of machines themselves); *Price v. Norfolk & W. Ry. Co.*, 618 F.2d 1059 (4th Cir. 1980)(maintenance worker injured painting a structure essential to loading operations); *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 6 BRBS 229 (5th Cir. 1977)(sandblasting crane to remove rust is covered employment due to necessity for use of crane in shipbuilding). Based on this precedent, we hold that maintenance of the shipyard power plant is similarly covered as it is necessary to the operation of the shipyard.

Employer's reliance on *Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57 (CRT)(4th Cir. 1994)(Sprouse, J., dissenting), *cert. denied*, U.S. , 115 S.Ct. 1691 (1995), which concerned the same power plant as the one in question, is misplaced. In *Prevetire*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that a construction worker injured while engaged in construction of the power plant did not meet the status requirement under Section 2(3). The court reasoned that a worker's employment in only the construction of the power plant was not sufficient to confer coverage under Section 2(3) simply because the power plant being built would eventually provide steam and electricity to shipbuilding and ship repair operations. The court found claimant was thus not covered, as his construction work could not be converted into maritime employment merely by its location. In making this holding, however, the court noted the distinction between work involving the construction of the power plant, and work involving the power plant's "later operation or maintenance." *Id.*, 27 F.3d at 989-990, 28 BRBS at 61-62 (CRT). As claimants herein performed tasks related to operation and maintenance

of a facility essential to shipbuilding and ship repair, their duties are unlike those of claimant in *Prevetire*, and that case does not lead to the conclusion that claimants herein are not covered by the Act. Accordingly, we affirm the administrative law judge's determination that the employment duties of claimants Rodriquez and Kerby in maintaining and operating equipment at the power plant were sufficient to confer coverage under Section 2(3) of the Act, as that finding is supported by substantial evidence and is in accordance with law. *See Schwalb*, 493 U.S. at 47, 23 BRBS at 99 (CRT).

II. Situs

Employer next contends that the administrative law judge erred in finding that claimants Rodriquez and Kerby were injured on a covered situs. Section 3(a) provides that:

> Compensation shall be payable under this Act . . . only if the disability or death results 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)(1988)(emphasis added). In *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (CRT)(4th Cir. 1995), *cert. denied*, U.S. , 116 S.Ct. 2570 (1996), the United States Court of Appeals for the Fourth Circuit held that an area is "adjoining" navigable waters only if it is contiguous with or otherwise touches navigable waters. To be included as an "other area" under the Act, the area must be a discrete shoreside structure or facility which must be "customarily used by employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. §903(a)(1988); *Sidwell*, 71 F.3d at 1139, 29 BRBS at 143 (CRT); *see also Parker v. Director, OWCP*, 75 F.3d 929, 30 BRBS 10 (CRT)(4th Cir.), *cert. denied*, U.S. , 117 S.Ct. 58 (1996).

In finding that the power plant at issue herein "appears to be strategically located in an adjoining area," *see* Rodriquez Decision and Order at 7-8, the administrative law judge relied on several factors, including the facts that the power plant was built by the United States Navy and, like the shipyard, is owned by the Navy and located on property owned by the Navy. The administrative law judge further found that the location of the power plant was not fortuitous, but rather it was located on Naval property adjacent to NNS to efficiently provide steam and electricity to the shipyard. The administrative law judge found the facts that NNS and the power plant are separated by a privately owned railroad spur, and that each property is fenced off from the other and the railroad spur, to be incidental.

We reverse the administrative law judge's finding that the power plant is a "covered situs" as the facility is not an "adjoining area" as defined by the Fourth Circuit in *Sidwell*. In *Sidwell*, the court cautioned that reliance on conventional property lines must not be eschewed, stating "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.'" *Sidwell*, 71 F.3d at 1140, 29 BRBS at 144 (CRT). We agree with employer that even though the United States Navy owns the shipyard, the property on which the power plant and shipyard are located and the power plant itself, such ownership does not mandate a finding that the "situs" requirement of Section 3(a) has been satisfied in view of the clear separation of the two parcels of land.

In this regard, we do not consider it incidental that a private railroad spur separates NNS from the power plant, and that a chain link fence surrounds the perimeters of both NNS and the power plant, further separating the properties from each other. Rather, the location of this railroad spur and the presence of two mutually exclusive fenced areas indicates that the two properties are separate and distinct from one another. Rather than being part of the same property, the shipyard and power plant are on two distinct parcels of land. Moreover, the uncontroverted testimony of William Wrenn, a maintenance supervisor at the power plant, indicates that employer's personnel do not have immediate access to NNS by virtue of their employment status with employer. To enter the shipyard, employer's employees need to obtain a special pass from NNS; an employee who does not have such a pass must have an NNS staff member escort him into the shipyard. *See* Rodriquez Transcript at 29-31. Unlike NNS, the power plant and its employees are physically isolated from navigable waters and have no nexus with the Southern Branch of the Elizabeth River.

Thus, as the power plant at issue herein is separated from NNS by not only the fences that surround each property but by the privately owned railroad tracks which run between the two properties, as well as the personnel practices of NNS, the power plant must be considered to be located on land separate and distinct from NNS. As a separate and distinct piece of property, the power plant must be contiguous with navigable waters, in order to be considered an adjoining area under the Fourth Circuit's holding in *Sidwell*.[5] As it is uncontroverted that the power plant does not adjoin navigable waters, we reverse the administrative law judge's determination that claimants Rodriquez and Kerby were injured on a covered situs under Section 3(a), and the awards of benefits to claimants Rodriquez and Kerby are hereby vacated.[6]

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits, 94-LHC-2989, 2990, Decision and Order - Granting Benefits, 95-LHC-508, and Order, 96-LHC-248, are reversed.

SO ORDERED.

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[5]Claimant's reliance on *Weyer/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57 (CRT) (4th Cir. 1994), is misplaced, as the issue of situs was specifically not before the court in that case. Although statements by the court in that case indicate the court believed the power plant was on the NNS site, the facts were not developed in that case nor was situs argued. Moreover, the Fourth Circuit's decision in *Sidwell* was issued subsequent to that in *Prevetire*, and thus constitutes controlling case law within this circuit regarding the issue of situs.

[6]Based on the foregoing holding, the remaining issues raised by employer in its appeal of the administrative law judge's decisions in *Kerby* are moot.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge