LEE C. GAVRANOVIC	)	BRB No. 98-741
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOBIL MINING AND MINERALS	)	DATE ISSUED: Feb 23, 1999
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
TOMMIE L. JONES	)	BRB No. 98-750
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOBIL MINING AND MINERALS	)	
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeals of the Decisions and Orders Granting Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Dennis L. Brown and Mike N. Cokins, Houston, Texas, for claimants.

Thomas C. Fitzhugh III, J. Corbin Van Arsdale and Matthew H.

Ammerman (Fitzhugh & Elliott, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decisions and Orders Granting Benefits (96-LHC-1932, 96-LHC-1954) of Administrative Law Judge James W. Kerr, Jr., rendered on two 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer is a fertilizer manufacturer whose facilities adjoin the Houston Ship Channel. Jt. Cl. Ex. 4.[2] It receives raw materials (sulphur, anhydrous ammonia, phosphate rock, and sulfuric acid) by truck, railway and barges, and it produces sulfuric acid, phosphoric acid, ammonium thiosulfate (liquid fertilizer), and two grades of solid fertilizer called dioammonium phosphate and monoammonium phosphate. Tr. at 281, 283. According to Ernest Gardner, a former area supervisor in shipping and receiving for employer who is now retired, the sulphur arrives by trucks, the ammonia and phosphate rock arrive by barge, and the sulfuric acid arrives by both railway and barges. With the exception of the sulfur, all materials are

[1]These cases were consolidated for purposes of the hearing before the administrative law judge, but separate decisions were issued. Due to the similarity of issues, we hereby consolidate them formally for decision. 20 C.F.R. §802.104(a).

[2]Jt. Cl. Ex. indicates Joint Claimants' exhibits; Emp. Ex. J and Cl. Ex. J identify Employer's and Claimant's exhibits in the *Jones* case; Emp. Ex. G and Cl. Ex. G identify Employer's and Claimant's exhibits in the *Gavranovic* case.

unloaded from their respective modes of transportation by employer's operators. *Id.* at 281. The finished product is shipped out by railway or trucks 80-85 percent of the time and by barges or ships 15-20 percent of the time. *Id.* at 284. Employer's personnel in "Shipping and Receiving" are divided into various "classes" of operators with "A" operators having the most seniority as well as being qualified for the most jobs.

Claimant Jones has worked for employer for over 23 years. He has spent over 13 years on the shipping docks and over 11 years as an "A" operator. Tr. at 209-210. As an "A" operator, Mr. Jones regularly worked the overhead cranes in Buildings 9 and 10,[3] unloaded the ammonia barges, operated the marine loader, loaded the "thio" barges, unloaded the acid barges, operated the Buhler[4] to unload the rock barges, and worked the acid rack. Tr. at 215. He also performed class "B" and "C" operator jobs when required or when he switched with "B" or "C" men to provide them with training on the "A" jobs. Tr. at 212-214, 216. On August 6, 1994, Mr. Jones was working in Building 10 as a rail helper, a class "C" job. He crossed the end of a hopper car and started to step off when his foot slipped, resulting in a fractured left foot. Emp. Ex. J 1; Tr. at 216. Mr. Jones received medical treatment, and state workers' compensation benefits, and eventually returned to work in his usual job. Cl. Ex. J 1; Tr. at 216-217. Thereafter, he filed a claim for benefits under the Act.

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[3]Buildings 9 and 10 sit adjacent to the Houston Ship Channel and they act as storing houses for the finished product (fertilizer). However, from Building 9, fertilizer is loaded by crane onto a conveyor belt which leads to the dock where a marine loader loads it onto barges or other sea-going vessels for shipment. From Building 10, fertilizer is loaded onto trucks or rail cars, or is transferred to Building 9 to replenish its supply.

[4]A Buhler is a scooping apparatus used to remove rock from barges. A front-end loader is on the barge to pile the rock for the Buhler to pick up.

Claimant Gavranovic started as a laborer hired to clean the shipping docks for employer. He later bid into operations and became a "C" operator. As a "C" operator, he was qualified to wash out hopper cars, act as a rail helper, and control railroad switching. Tr. at 51. Based on his experience and training, he also was qualified to perform some class "B" and "A" jobs. He testified he often worked as a "B" operator driving a front-end loader both in the rock barge and in Building 9, and, prior to his injury on February 6, 1996, he trained on and became qualified to perform certain "A" jobs such as driving the diesel locomotive, working in Buildings 9 and 10, and relieving "A" operators on the marine loader and the Buhler.[5] Tr. at 51-52, 54. On February 6, 1996, Mr. Gavranovic was working inside a railroad hopper car cleaning product off the car with a chipping gun when a piece of debris fell from the top of the car onto his foot. His injury also resulted in a fractured left foot. Emp. Ex. G 1; Tr. at 57-58. Mr. Gavranovic received medical treatment and state workers' compensation benefits and eventually returned to his usual work. Cl. Ex. G 1; Tr. at 60-61. Thereafter, he filed a claim for benefits under the Act.

Claimants and employer agreed that both claimants were injured during the course of their employment, that both claimants received medical and disability benefits pursuant to the Texas Workers' Compensation Act, and that both claimants returned to their regular employment after recovering from their respective injuries. Jones Decision and Order at 2-3; Gavranovic Decision and Order at 2-3. The parties also stipulated to the duration and amount of temporary total and permanent partial disability benefits to which claimants would be entitled under the Act should the administrative law judge find them to be covered employees. *Id.* at 3. The primary issue before the administrative law judge, therefore, involved coverage under the Act.[6]

The administrative law judge first found that, under the case law of the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction these cases arise, employer's entire facility meets the situs requirement of the Act, 33 U.S.C. §903(a), as it is in close proximity to the dock area where loading and unloading activities occur, and that Building 10, in which both claimants were injured, is not

[5]Sometime in 1996 after Mr. Gavranovic's injury, the company instituted a new policy, changing some of the "A" jobs to "B" jobs. Jt. Cl. Ex. 24 at 14; Tr. at 53. The new policy also created a more formalized training plan whereby "B" and "C" operators could train to become "A" operators. Further, at some point after his return to work, Mr. Gavranovic became a "B" operator. Jt. Cl. Ex. 24 at 10-11.

[6]In the *Gavranovic* case, the parties also disputed claimant's average weekly wage.

separate and distinct from the dock area. Jones Decision and Order at 12-13; Gavranovic Decision and Order at 14-15. With regard to Mr. Jones's status, the administrative law judge found that as an "A" operator, Mr. Jones was subject to regular maritime assignments. He credited Mr. Jones's testimony and found that those assignments included operating the Buhler to unload the rock barges and assisting with the ammonia and thio barges. Further, he credited the documentary evidence which showed that Mr. Jones also ran units 9 and 10 and operated a marine loader. Jones Decision and Order at 13-14. Therefore, he found that Mr. Jones "spent at least some of his time" in maritime activity and is covered under Section 2(3) of the Act, 33 U.S.C. §902(3). *Id.* at 14. Consequently, the administrative law judge awarded Mr. Jones disability benefits under the Act, as stipulated by the parties. *Id.*

With regard to Mr. Gavranovic's status, the administrative law judge found that he, too, was subject to regular maritime assignments. Although Mr. Gavranovic was classified as a "C" operator and not an "A" operator like Mr. Jones, the administrative law judge found that Mr. Gavranovic performed a variety of maritime work, including cleaning the dock area and the conveyor belts, tying up barges, operating the front-end loader in the rock barges, and operating unit 9 in the loading of vessels. Further, the administrative law judge credited Mr. Gavranovic's testimony and the evidence which showed that he was qualified to operate the Buhler and was training on the marine loader. Gavranovic Decision and Order at 16. Thus, he found that Mr. Gavranovic also met the status requirement, and he awarded benefits under the Act pursuant to the parties' stipulation, based on an average weekly wage of $926.11. *Id.* at 16-17.

Employer appeals the decisions in these cases. It contends in both instances that its facility is not a maritime situs. Moreover, even if part of the facility could be considered maritime in nature, employer contends that the area where claimants were injured, Building 10, is not a covered situs. Employer also contends that claimants are land-based workers who are not covered employees under the Act. It argues that they do not meet the status requirement as they were not performing maritime work at the time of their injuries. Claimants respond, urging affirmance of the administrative law judge's findings.

Situs

To be covered under the Act, a claimant must meet both the status requirement of Section 2(3) and the situs requirement of Section 3(a). 33 U.S.C. §§902(3), 903(a). Section 3(a) 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)(1994). Coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998); *Melerine v. Harbor Construction Co.*, 26 BRBS 97 (1992). To be considered a covered situs, a site must have a maritime nexus, but it need not be used exclusively or primarily for maritime purposes. *See Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981); *Melerine*, 26 BRBS at 97. The cases at bar arise within the jurisdiction of the Fifth Circuit, which has adopted a broad view of the situs test, refusing to restrict the test by fence lines or other boundaries. *See Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31 BRBS 199 (CRT) (5th Cir. 1998). Specifically, the court stated that the perimeter of an "area" is to be defined by function and that the character of surrounding properties is but one factor to be considered. Thus, an area can be considered an "adjoining area" within the meaning of the Act if it is in the vicinity of navigable waters, or in a neighboring area, and it is customarily used for maritime activity. *Winchester*, 632 F.2d at 504, 12 BRBS at 719; *see also Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). Using these guidelines, the Fifth Circuit has held that an administrative law judge properly found that a gear room located five blocks from the nearest dock constituted a covered situs because it was in the vicinity of the navigable waterway, it was as close to the docks as feasible, and it had a nexus to maritime activity in that it was used to store gear which was used in loading process. *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729.

In the present cases, both injuries occurred on employer's facility in Building 10 which is adjacent to navigable water. Building 10 is used to store finished product and to load rail cars and trucks. When the supply of fertilizer to be transported by barge or vessel in Building 9 runs low, product is transferred from Building 10 to Building 9. Neither building is used in manufacturing or processing fertilizer. Tr. at 117, 120. Employer contends that neither its facility nor Building 10 is a covered situs under the Act for a variety of reasons. We reject this contention. Initially, we reject employer's assertion that we should rely on the definition of "marine terminal" found in the Occupational Safety and Health Administration (OSHA) regulations, 29 C.F.R. §1917.2(u), as it is inapplicable in light of the fact that

the OSHA regulations were not developed at the same time or for the same purpose as the Act. *See Erlenbaugh v. United States*, 409 U.S. 239 (1972); *Powers v. Sea Ray Boats, Inc.*, 31 BRBS 206, 211 (1998).

Further, we decline to impose the more restrictive law established by the United States Court of Appeals for the Fourth Circuit upon cases arising within the Fifth Circuit, as the Fifth Circuit law is controlling.[7] *Sisson*, 131 F.3d at 555, 31 BRBS at 199 (CRT); *Winchester*, 632 F.2d at 504, 12 BRBS at 719. Under *Winchester*, the definition of "adjoining area" is a broad one. It includes areas in the vicinity of navigable waters which are used for maritime activity. *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729, and actual contiguity with navigable waters is not required. *Sisson,* 131 F.3d at 557, 31 BRBS at 200 (CRT). Thus, the geography and the function of an area are of utmost importance. *Stroup*, 32 BRBS at 154. The administrative law judge in this case found that Building 10 is "in close proximity" to the docks and that they are not "separate and distinct" areas. Gavranovic Decision and Order at 14; *see also* Jones Decision and Order at 12-13. Moreover, although he noted that Building 10 is not used directly to load vessels, he reasoned that his conclusion that the two areas are not separate and distinct is supported by the facts that conveyor belts link Building 10 to other areas, and fertilizer is transferred from it to Building 9 when Building 9 needs more fertilizer for shipments on vessels. Thus, he stated that because of its proximity to the water and because the facility is

[7]*See Parker v. Director, OWCP*, 75 F.3d 929, 30 BRBS 10 (CRT) (4th Cir. 1996), *cert. denied*, 117 S.Ct. 58 (1996); *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996). The Fourth Circuit has held that the situs test is limited to a strict interpretation of the language of the Act. In *Sidwell*, the Fourth Circuit held that a covered situs under the Act must actually adjoin navigable waters; *i.e.*, it must be contiguous to and actually touch the navigable water. With regard to "other adjoining areas," the court stated that non-enumerated areas must be similar to the enumerated ones and must be customarily used for maritime activity. Thus, the *raison d'etre* for the facility or structure must be for use in connection with the navigable waters. *Id.*, 71 F.3d at 1138-1139, 29 BRBS at 142-144 (CRT). Following its decision in *Sidwell*, the Fourth Circuit held that an injury sustained in a steel fabrication plant by an employee fabricating steel for an inland bridge did not occur on a covered situs. It held that the steel plant, located 1000 feet from the river, did not meet the geographical test and was not a facility the purpose of which was to serve the navigable water. *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86 (CRT) (4th Cir. 1998), *cert. denied,* 119 S.Ct. 590 (1998). In any event, this reasoning would not dictate a contrary result in these cases, as employer's facility actually adjoins navigable waters and is used for loading and unloading vessels.

"customarily used" for maritime purposes (albeit not exclusively), employer's entire facility is an "adjoining area" pursuant to Section 3(a) under the Fifth Circuit's interpretation in *Winchester*. Gavranovic Decision and Order at 14-15; *see also* Jones Decision and Order at 12-13.

In a recent case arising within the jurisdiction of the Fifth Circuit, the Board affirmed the administrative law judge's finding that a worker injured in a warehouse shipping bay at a steel manufacturing plant was not injured on a covered situs. *Stroup*, 32 BRBS at 155. The Board stated that the shipping bay, which was used to store steel and to load trucks which then transported the steel overland or carried it to barges or rails for further shipment, did not serve a maritime function, agreeing with the administrative law judge who stated that "there is nothing inherently maritime about storing and loading steel onto trucks. . . ." *Stroup*, 32 BRBS at 154. This lack of a maritime function in conjunction with the shipping bay's distance from the employer's dock facility where loading and unloading occurred,[8] led the Board to conclude that an injury in the shipping bay, even while loading a truck with steel bound for a barge, did not occur on a covered situs because it met neither the geographic nor the function criterion of *Winchester*. *Stroup*, 32 BRBS at 154-155; *see also Melerine,* 26 BRBS at 101.

The instant cases are distinguishable from *Stroup*. Although the facility at which claimants herein work is a manufacturing operation, and the building in which they were injured is not directly involved with the loading or unloading of barges or vessels, part of employer's business involves sending and receiving goods by barges or vessels -- a distinctly maritime activity. Moreover, the geography of the facility herein can be distinguished from the facility in *Stroup*, as here, the entire facility and the building in question are adjacent to navigable water and to the docks where barges are loaded and unloaded. *See* Jt. Cl. Ex. 4. In light of the location of employer's facility and because significant maritime activity (loading and unloading barges) occurs on the docks at employer's facility, we affirm the administrative law judge's determination that claimants' injuries in these cases occurred on a covered situs. *Smith v. Universal Fabricators, Inc.*, 21 BRBS 83 (1988), *aff'd*, 878 F.2d 843, 22 BRBS 104 (CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Winchester*, 632 F.2d at 504, 12 BRBS at 719.

Status

[8]The warehouse/shipping bay was situated 1/4 to 1/2 mile from the docks, separated therefrom by a levee and a public road.

Employer next argues that neither claimant satisfies the status requirement. Specifically, employer argues that both Mr. Jones and Mr. Gavranovic are land-based workers and neither was engaged in maritime activity at the time of his injury; therefore, the administrative law judge should not have awarded benefits. Generally, a claimant satisfies the "status" requirement if he is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See* 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989). To satisfy this requirement, he need only "spend at least some of [his] time in indisputably longshoring operations." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 273, 6 BRBS 150, 165 (1977); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). Under Fifth Circuit law, a claimant also may satisfy the status requirement by fulfilling the "moment of injury" test; that is, by being engaged in maritime employment at the time of injury. *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104 (CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 8 BRBS 787 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979); *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989).

We reject employer's arguments regarding the status of each of these employees. Initially, we note the error of employer's argument that because neither claimant was performing maritime work at the time of his injury, neither satisfies the status requirement. To the contrary, the Fifth Circuit uses the "moment of injury" test not to narrow but to broaden coverage under the Act. *See McGoey v. Chiquita Brands International*, 30 BRBS 237 (1997); *Thornton v. Brown & Root, Inc.*, 23 BRBS 75 (1989); *Henry v. Gentry Plumbing,* 18 BRBS 95 (1986). Therefore, the fact that both claimants herein were injured during the course of performing non-maritime work is insufficient in and of itself to deny them coverage. *See Caputo*, 432 U.S. at 273, 6 BRBS at 165 (a claimant cannot be excluded because of activities performed at the time of injury as the "status" test is occupational in nature).

With regard to the occupational nature of their work, we affirm the administrative law judge's conclusion that both claimants regularly engage in maritime work. The administrative law judge credited the testimony of both claimants and, although Mr. Jones, as an "A" operator, has more duties listed in his job description which constitute maritime work, Mr. Gavranovic clearly testified and established to the satisfaction of the administrative law judge that he, too, performed some of those same duties on a regular basis. For instance, both testified that they participated in loading fertilizer from unit 9. Specifically, Mr. Gavranovic stated that he controlled/monitored everything therein, except he did not operate the crane -- he worked the screens, the elevator, the conveyor belts, cleaning debris when

necessary, and Mr. Jones stated that, if assigned to Building 9, he would most likely be operating the crane. Tr. 56-57, 215-216, 220. Further, they both testified that they used the marine loader on the docks to load out-bound fertilizer onto barges and vessels, and they unloaded phosphate rock from in-coming barges. Tr. at 54, 89, 99, 215-216, 220; *see also* Jt. Cl. Ex. 2 at 18, 26. Moreover, the administrative law judge noted employer's concession that Mr. Jones had loaded and unloaded barges and that Mr. Gavranovic unloaded barges. This evidence is sufficient to support the administrative law judge's conclusion that claimants loaded and unloaded vessels "at least some of the time" and, therefore, meet the status requirement of Section 2(3). *Schwalb,* 493 U.S. at 40, 23 BRBS at 96 (CRT); *Caputo*, 432 U.S. at 249, 6 BRBS at 150; *Boudloche*, 632 F.2d at 1346, 12 BRBS at 732. As both claimants are covered employees, we affirm the administrative law judge's awards of benefits.

Accordingly, the administrative law judge's decisions awarding benefits are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge