BRB No. 92-2248

SAMUEL J. BOROODY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MAERSK CONTAINER SERVICE COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Lee E. Wilder (Rutter & Montagna), Norfolk, Virginia, for claimant.

Robert A. Rapaport (Knight, Dudley, Dezern & Clarke), Norfolk, Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (91-LHC-2455) of Administrative Law Judge Richard K. Malamphy denying 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 appeals a denial of benefits. Employer operated a container and chassis repair facility at 2601-M Trade Street in Chesapeake, Virginia.[1] Claimant, a repairman, sustained an injury to his left knee while he was breaking down a tire at employer's facility. The parties stipulated that compensation has been paid under the Virginia workers' compensation law. The sole issue addressed by the administrative law judge was coverage under the Act. The administrative law judge concluded that the situs requirement of Section 3(a), 33 U.S.C. §903(a), is not satisfied. Having found that employer's container repair shop, where the injury occurred, is not a site specifically enumerated in Section 3(a), the administrative law judge focused on whether it constituted an "adjoining area" within the meaning of the Act. Following a consideration of the relevant factors, the administrative law judge concluded that the facility is not an "adjoining area," and accordingly, denied the claim.

On appeal, claimant contends that the administrative law judge erred in finding that the site is not an adjoining area covered under Section 3(a) of the Act. Employer responds, urging affirmance.

In analyzing whether claimant was injured on an "adjoining area" under Section 3(a),[2] the administrative law judge employed the "functional relationship" test set forth by the United States Court of Appeals for the Ninth Circuit in *Brady-Hamilton Stevedoring v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). In *Herron*, the Ninth Circuit stated that in order to further the goal of uniform coverage, the phrase "adjoining area" in Section 3(a) should be read to describe a functional relationship between the site and navigable water that does not in all cases depend on physical contiguity with navigable waters. The court stated that in determining whether a site is an "adjoining area," consideration should be given to the following factors:

1. The particular suitability of the site for the maritime uses referred to in the statute;

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[1]The parties stipulated that subsequent to the date of injury, employer ceased to exist as a business entity and that the successor-in-interest is now located on Hampton Boulevard at the Norfolk International Terminal which borders on navigable water. The parties further stipulated that the change of business location occurred on August 1, 1991 and was brought about by the business interests of the new entity.

[2]Section 3(a) of the Act provides that:

> [C]ompensation shall be payable under this chapter...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)(1988).

2. Whether adjoining properties are devoted primarily to uses in maritime commerce;

3. The proximity of the site to the waterway; and

4. Whether the site is as close to the waterway as is feasible given all of the circumstances.

Herron, 568 F.2d at 141, 7 BRBS at 411. The United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, while not specifically adopting the *Herron* test, has referred to it as a "more practical approach," *Humphries v. Director, OWCP*, 834 F.2d 372, 20 BRBS 17 (CRT) (4th Cir. 1987), *aff'g Humphries v. Cargill, Inc.*, 19 BRBS 187 (1986) (*en banc*), *cert. denied*, 485 U.S. 1028 (1988), and it has affirmed decisions of the Board that rely on the *Herron* factors. *Id.*; *Davis v. Doran Co. of California*, 20 BRBS 121 (1987), *aff'd mem.*, 865 F.2d 1257, 22 BRBS 3 (CRT)(4th Cir. 1989).

In *Davis*, the Board affirmed the administrative law judge's finding that employer's ship propeller repair facility at 1038 W. 26th Street in Norfolk was not a covered situs. The administrative law judge therein concluded that the surrounding area was not primarily devoted to uses in maritime commerce and the site was not chosen for its proximity to navigable waters; rather, the lease was obtained because its existing structure would accommodate the movement of ship propellers in and out of the facility. The Board held that any test which focuses only upon whether the employer's facility is utilized for a maritime purpose would effectively eliminate the situs requirement, an approach which has been rejected by the Supreme Court. *Davis*, 20 BRBS at 125, *citing Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78 (CRT)(1985) and *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *see also Brown v. Bath Iron Works Corp.*, 22 BRBS 384 (1989) (situs inquiry looks to the relationship of the place of injury with navigable waters). The Fourth Circuit affirmed the holding in *Davis* in an unpublished decision. *See also Gonzalez v. Ocean Voyage Ship Repair*, 26 BRBS 12 (1992); *Felt v. San Pedro Tomco*, 25 BRBS 362 (1992) (Stage, C.J., dissenting), *appeal dismissed sub nom. Felt v. Director, OWCP*, 11 F.3d 951, 27 BRBS 165 (CRT) (9th Cir. 1993); *Lasofsky v. Arthur J. Tickle Engineering Works, Inc.*, 20 BRBS 58 (1987), *aff'd mem.*, No. 87-3836 (3d Cir. June 14, 1988).

In the present case, employer's facility is a repair shop located in a mixed-use area from which the nearest water is approximately two to three miles by public street. *See* Stipulations 6-8, 12. The parties stipulated that: the facility did not border water or any other enumerated situs; the neighboring businesses in the industrial park were Vanwin Coating, Ray Carr Tires, Watkins Trucking, General Electric and Indusco Welding, none of which was maritime in nature; directly in front of employer's facility was a Virginia Power substation and the St. Joe Paper warehouse; directly behind employer's facility is residential property; and the location of this facility was not chosen for its proximity to navigable waters, but rather it was selected on the basis of its access to the interstate, its size and its cost. *See* Stipulations 8, 9, 12.

Claimant asserts that the administrative law judge's application of the "functional

relationship" test in this case was improper, since his evaluation of the evidence focused on a bright line rule concerning only the proximity of the facility to navigable waters. Contrary to claimant's contention, the administrative law judge's evaluation of the relevant facts involved a consideration of each of the factors enunciated in *Herron*, and thus, the administrative law judge's application of the "functional relationship" test in this case is proper. *See* Decision and Order at 7-8.

Moreover, the parties' stipulations support the administrative law judge's finding that the container repair facility in the instant case is not a covered situs under the Act. Specifically, the administrative law judge determined, based on the undisputed facts in this case, that the site was not chosen for its proximity to navigable waters but on the basis of its access to the interstate, its size and its cost. *See Davis*, 20 BRBS at 124-125; *Lasofsky*, 20 BRBS at 61. Additionally, the administrative law judge found that none of the businesses in the industrial park was maritime in nature and that none of the businesses near or surrounding the facility was substantially or significantly involved in the maritime industry. *Id.* Moreover, the administrative law judge properly found that the site is not physically close to the water and that the chassis and containers repaired by claimant were brought from the terminal yard, repaired at the Trade Street facility and then returned to the terminal yard.[3] *See Brown*, 22 BRBS at 387; *Lasofsky*, 20 BRBS at 61. As the administrative law judge's finding is in accordance with law and supported by substantial evidence, we affirm the administrative law judge's conclusion that employer's facility is not a site covered under Section 3(a) of the Act.

[3]We further note that *Hagenzeiker v. Norton Lilly & Co.*, 22 BRBS 313 (1989), which claimant cites in support of his contention, is distinguishable from the instant case. In *Hagenzeiker*, the Board held that if the general area in which an accident or injury occurs is a "maritime area," then the requisite maritime nexus has been established. In that case, the employee was injured on a public street inside a port complex which consisted of terminals and warehouses. As the parties' stipulations establish, the composition of the surrounding area in the instant case clearly differs from what the Board held to be a "maritime area" in *Hagenzeiker*.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge