

RANDALL THIBODEAUX)	
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Claimant-Respondent)	
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v.)	
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GRASSO PRODUCTION)	DATE ISSUED:Dec. 17, 2002
MANAGEMENT, INCORPORATED)	
)	
and)	
)	
SIGNAL MUTUAL INDEMNITY)	
ASSOCIATION)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Jennings Bryan Jones III (Jones Law Firm), Cameron, Louisiana, for claimant.

Edward S. Johnson (Johnson, Johnson, Barrios & Yacoubian), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2001-LHC-1433) of Administrative Law Judge Clement J. Kennington 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. 33 U.S.C. '921(b)(3); *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was injured on February 5, 1998, in the course of his employment as a pumper/gauger on a fixed oil and gas platform in the territorial waters of Louisiana. Claimant injured his hand when he fell through a small, wooden platform adjacent to the fixed oil platform onto a marshy area. As part of his duties, claimant piloted two vessels. The first was a 17-foot skiff, which claimant piloted to check the gauges on nearby wells. The second was the M/V KATIE ELIZABETH, a 24-foot vessel used to ferry employees to and from the platform, and to transport food, supplies and equipment between the platform and the dock in Venice, Louisiana. The round trips undertaken by this vessel could last between 12 hours to 3 hours, depending on the weather. During a full seven-day hitch, claimant would operate the KATIE ELIZABETH for one complete round-trip in order to transport crew members. Occasionally, claimant also would operate this vessel during his hitch to retrieve parts, supplies, and mail from Venice.

The parties presented their cases to the administrative law judge by way of motions for summary decision. The administrative law judge first found that claimant satisfies the Act=s status requirement, 33 U.S.C. '902(3). The administrative law judge found that claimant spent 6.65 percent of his overall work hours operating the KATIE ELIZABETH for the purpose of transporting personnel and their equipment, and supplies between the dock in Venice and the oil platform. The administrative law judge thus found that claimant was engaged in maritime activity for a sufficient amount of time, pursuant to *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249,

¹Claimant filed suit in federal district court against EEX Corporation, the owner of the platform where his injury occurred, under the Jones Act and under general maritime law. The district court found that claimant was EEX=s borrowed employee, but granted EEX=s motion for summary judgment in the Jones Act suit, finding that claimant=s primary responsibility was to work on the platform and was not in service of the vessels. *Thibodeaux v. EEX Corp.*, No. 98-3511 (E.D.La. Oct. 20, 1999). The court also granted EEX=s motion for summary judgment on the general maritime claim, on the ground that claimant=s injury occurred on land, as a fixed oil platform is like an island. *Thibodeaux v. EEX Corp.*, No. 98-3511 (E.D.La. Nov. 17, 1999), *aff=d*, 235 F.3d 1339 (5th Cir. 2000) (table).

6 BRBS 150 (1977). He found that this case is distinguishable from *Herb=s Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985), and *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 27 BRBS 103(CRT), *reh=g en banc denied*, 8 F.3d 24 (5th Cir. 1993), *cert. denied*, 511 U.S. 1086 (1994), because claimant was not transiently, fortuitously or fleetingly employed on the vessel on navigable waters, nor was he merely unloading his personal supplies from the vessel. Because claimant=s overall employment involved at least some indisputable maritime activity, the administrative law judge found that it is immaterial that claimant=s injury occurred during non-maritime activity on the fixed oil platform.

With regard to situs, 33 U.S.C. '903(a), the administrative law judge found that, pursuant to *Hurston v. Director, OWCP*, 989 F.2d 1547, 26 BRBS 180(CRT) (9th Cir. 1993), the oil platform where claimant=s injury occurred is a covered site because it was built on wooden pilings over land and water, and because it had a place for vessels to dock. He distinguished the case from the Board=s decision in *Munguia v. Chevron U.S.A., Inc.*, 25 BRBS 336 (1992) (decision on recon. *en banc*), because the vessels that docked at the platform were used to unload more than the claimant=s personal equipment.

On appeal, employer contends the administrative law judge erred in finding that claimant spent 6.65 percent of his time in covered activities, arguing that the administrative law judge misapplied *Herb=s Welding, Munguia, and Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir. 1999) (*en banc*). Employer further contends that even if the administrative law judge=s finding regarding the amount of time claimant spent in covered activities can be affirmed, the administrative law judge misapplied the law to find that this time is sufficient to confer coverage. Employer also contends that claimant is excluded from coverage under the Act because he is a Amaster or member of a crew,@ 33 U.S.C. '902(3)(G), and that the district court=s finding that claimant is not a Jones Act seaman is not determinative of this issue. Lastly, employer contends that the administrative law judge erred in finding claimant=s injury occurred on a covered situs. Claimant responds, urging affirmance of the administrative law judge=s decision. Employer has filed a reply brief.

In order to be covered by the Act, claimant must separately satisfy the Act=s status and situs requirements, 33 U.S.C. "902(3), 903(a). See, e.g., *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979). With regard to the situs requirement, claimant=s injury occurred when he attempted to fix a discharge line from which oil was dripping. To get to this discharge line, claimant had to lower himself five feet from the concrete deck of the oil platform to a wooden platform attached to the concrete deck. Both the oil platform and the wooden deck sat on pilings in the water. A ladder usually used for descents onto the lower deck was not available. Claimant sat down on the concrete platform and pushed himself onto the lower deck. The wooden deck shattered and claimant fell through it onto the marshy ground. The administrative law judge found that the platform was built partly on land and partly over the water, adjoining two navigable canals. Relying on *Hurston*, 989 F.2d 1547, 26 BRBS 180(CRT), the administrative law judge found that the platform resembled a pier because it was built on pilings. He further found that the structure was used as a pier, because the 17-foot skiff and the KATIE ELIZABETH docked

²Claimant was not injured on actual navigable waters and is thus not entitled to coverage on that basis under the decision in *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983).

and were loaded and unloaded there. The administrative law judge also stated that, in *Herb=s Welding*, the Supreme Court indicated in *dicta* that a fixed oil platform satisfies the situs requirement. Thus, the administrative law judge concluded that the situs test was satisfied. Decision and Order at 12. For the reasons that follow, we reverse the administrative law judge=s finding that claimant=s injury occurred on a covered situs.

Section 3(a) of the Act states:

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). Our analysis of this issue begins with the Supreme Court=s decisions in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), and *Herb=s Welding*, 470 U.S. 414, 17 BRBS 78(CRT). In *Rodrigue*, the Court held that a fixed oil platform is not an inherently maritime structure; thus, admiralty jurisdiction, of its own force, does not extend to accidents thereon, and it is to be viewed as if it were an island. *Rodrigue*, 395 U.S. at 360-361. In *Herb=s Welding*, the Court held that workers on fixed offshore oil platforms in state waters are not engaged in maritime employment within the meaning of Section 2(3) of the Act. The Court stated that the welding work performed by claimant on the platform was land-based work that is not significantly altered by the marine environment. This work is far removed from traditional LHWCA activities, notwithstanding the fact that [the claimant] unloaded his own gear upon arriving at a platform by boat. @ 470 U.S. at 425, 17 BRBS at 83(CRT). Relevant to our discussion, therefore, an offshore oil platform is not a site where maritime work is performed.

In *Munguia v. Chevron U.S.A., Inc.*, 23 BRBS 180 (1990), *aff=d on recon. en banc*, 25 BRBS 336 (1992), *aff=d on other grounds*, 999 F.2d 808, 27 BRBS 103(CRT), *reh=g en banc denied*, 8 F.3d 24 (5th Cir. 1993), *cert. denied*, 511 U.S. 1086 (1994), the Board addressed the situs issue in a case where the claimant was injured on an oil well on a fixed platform located in a marsh near the Mississippi River. The Board held that claimant=s injury did not occur on navigable waters, as the platform was fixed, nor did it occur on a site enumerated in Section 3(a). Thus, the Board held that, if it were to be a covered situs, the platform would have to be another adjoining @ area, which requires a maritime nexus. 23 BRBS at 184. Citing

³In contrast, a floating oil platform is viewed as a vessel.

the Supreme Court's decision in *Herb's Welding* that there is nothing inherently maritime about working on a fixed oil platform, and as the platform was not used in loading or unloading marine cargo, or for building or repairing ships, the Board held that the site lacked a maritime nexus. On reconsideration *en banc*, the Board addressed the contention that claimant Munguia's injury occurred on an adjoining area because he unloaded his tools and supplies from a boat at the oil platform. Again citing *Herb's Welding*, the Board held that since the tools and supplies unloaded were used solely for oil production purposes the site lacked a maritime nexus. *Munguia*, 25 BRBS at 339.

Similarly, in *Hurston v. McGray Constr. Co.*, 24 BRBS 94 (1990), *rev'd sub nom. Hurston v. Director, OWCP*, 989 F.2d 1547, 26 BRBS 180(CRT) (9th Cir. 1993), the Board held that a structure known as Elwood Pier No.1, used for separating oil well fluids and built on pilings extending from the beach into the ocean, is neither an other adjoining area nor a pier within the meaning of Section 3(a). The Board held that Elwood Pier No. 1 is not an adjoining area because loading, unloading, building and repairing of vessels did not occur there. The Board further held that although a pier, which is an enumerated situs, need not be customarily used for loading, unloading, building or repairing vessels, it still must have a maritime purpose: A nexus with maritime activity is a necessary attribute of coverage under the Act. *Hurston*, 24 BRBS at 98. As Elwood Pier No. 1 was used for oil production purposes, and had no facilities for vessels, the Board held that the situs element was not satisfied. The Board concluded that the facts that the structure is next to water and rests on pilings is insufficient to convert the structure into a pier. *Id.* at 98-99.

On appeal, the United States Court of Appeals for the Ninth Circuit reversed the Board's decision. The court stated, if it appears to be a pier, if it is built like a pier and adjoins navigable waters, it's a pier. *Hurston*, 989 F.2d at 1549, 26 BRBS at 184(CRT). The court held that as an enumerated situs, an adjoining pier need not be used for maritime purposes in order to be covered. The court held that unlike an other adjoining area, which must be used for loading, unloading, building, repairing vessels, no such qualifying language attaches to a pier. The court concluded that a structure built on pilings extending from land to navigable water is an adjoining pier within the meaning of [Section 3(a)]. This is

⁴⁴On appeal to the Fifth Circuit, the court addressed only the status issue, which the Board had not addressed. *Munguia*, 999 F.2d 808, 27 BRBS 103(CRT). The Fifth Circuit held, pursuant to *Herb's Welding*, that claimant was not engaged in maritime employment because his duties were intrinsically related to the servicing and maintenance of fixed platform wells. *Id.*, 999 F.2d at 813, 27 BRBS at 107(CRT).

an essentially factual test which depends on the structure's appearance and location. @ *Hurston*, 989 F.2d at 1553, 26 BRBS at 190(CRT). The Ninth Circuit addressed the employer's contention that its situs decision should be guided by *Herb's Welding*, but the court dismissed this contention on the ground that *Herb's Welding* addressed only the status element. 989 F.2d at 1552-1553, 26 BRBS at 189(CRT).

In the instant case, the administrative law judge relied on the Ninth Circuit's decision in *Hurston* in finding that claimant was injured on a covered situs, concluding that as the platform and deck where claimant was injured rested on pilings, it therefore is a Apier. @ The administrative law judge found that the structures were built on pilings over both land and water as in *Hurston*. Moreover, the deck had a docking place for vessels, and unlike *Munguia*, the administrative law judge found that more than claimant's personal tools and supplies were unloaded there.

Initially, as an oil rig is considered an island under *Rodrigue*, it is a covered site under Section 3(a) only if it is considered either one of the sites specifically listed in that section or is an Aother adjoining area. @ The administrative law judge found the site was a Apier @ under the rationale of the Ninth Circuit in *Hurston*. However, the record evidence does not support a conclusion that the concrete oil platform and wooden deck here resemble the Apier @ in *Hurston*. In *Hurston*, the structure was secured to the shore and extended onto pilings over the ocean. It was accessible from land and in fact was accessed by land vehicles. See *Hurston*, 989 F.2d at 1563, 26 BRBS at 205(CRT). In contrast, in the instant case the platform was accessible only by vessel, and the record in this case, the photographs and drawings in evidence, does not demonstrate that the platform and deck were secured to dry land. Exs. 1 and 2 to Ex. D; Ex. E; Cl. Exs. A-F. In his deposition, claimant was asked: (1) if the platform was built on land; (2) if it was up against the shore; (3) if it was connected to land; and (4) were the pilings driven into the land. Dep. at 81 (April 22, 1999). Claimant answered that ANo, it's all on pilings . . . with concrete slabs over them. [The pilings are driven into] a small bank. Not exactly the marsh, but it's on a small bank next to the canal. @ *Id.* Thus, as the record does not establish that the site of claimant's injury resembles a Apier, @ the administrative law judge's reliance on the alleged factual similarities between this case and *Hurston* cannot be affirmed.

Furthermore, we cannot affirm the administrative law judge's reliance on *Hurston*, as that decision focuses solely on the site's appearance without regard to its function. While the Board acknowledged in *Hurston* that the sites enumerated in

⁵⁵This case arises within the jurisdiction of the United States Court of Appeals

Section 3(a) need not be shown to be customarily used for loading, unloading, building or repairing vessels, in contrast to the general Aother adjoining areas@ covered by the Act, it does not follow that such a site is covered based solely on appearance where it clearly lacks a maritime purpose. The sites enumerated in Section 3(a) are all land-based structures or areas which adjoin navigable waters and are typically used in maritime activities. An enumerated site, like a pier or dry dock, is thus covered without the need for specific proof that the site in fact has a maritime use. Where, however, the record does contain evidence that a site does not serve a maritime function, the fact that it may look similar to a pier cannot control. In this case the administrative law judge=s findings would extend *Hurston* to provide coverage under Section 3(a) to any structure built on pilings over shallow water. The mere fact that the platform is located over water cannot alter the fact that its use as a drilling facility is a non-maritime use. Since an oil rig is analogous to an island, then like any landward facility, it must have a maritime function in order to be an area covered under Section 3(a).

Moreover, although status and situs are independent elements, precedent developed in addressing the status requirement for oil rig workers should not be ignored in addressing whether the oil rig itself has a maritime purpose. In this regard, the Board=s situs decisions in *Munguia*, holding that a fixed oil platform is not a covered situs, and the Fifth Circuit=s decision in *Munguia*, holding that the claimant therein was not a maritime employee under Section 2(3), are congruent with each other and with *Herb=s Welding*. In *Munguia*, the Board held that the fixed oil platform was not a covered situs because it did not have a maritime purpose. Addressing the status issue, the Fifth Circuit held that the claimant was not engaged

for the Fifth Circuit, and thus, the Ninth Circuit=s decision in *Hurston* is not binding precedent. In any event, the Ninth Circuit=s subsequent discussion of status in *Hurston* indicates the limits of its holding on situs. After the Ninth Circuit reversed the Board=s decision on situs, the court remanded the case for the Board to address the administrative law judge=s status findings. The Board stated that if, as the court held, Elwood Pier No. 1 is a covered pier, then a claimant who was injured repairing that pier is engaged in maritime employment. The Ninth Circuit reversed the Board=s holding that the status element was satisfied. *McGray Constr. Co. v. Director, OWCP*, 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999). While the court explained that the situs and status tests are independent, and thus the fact that the pier was a covered site did not establish claimant=s work there was maritime, it held that claimant Hurston was not a harbor-worker because the pier on which he worked was not used Ato accommodate ships,@ he did not work on Aany sort of shelter or facility for ships,@ *McGray Constr.*, 181 F.3d at 1013, 33 BRBS at 85(CRT). Thus, as the Apier@ lacked a maritime purpose, it is clear that the Ninth Circuit=s situs holding in *Hurston* rests only on the appearance and location of the site.

in maritime employment because the work performed by the claimant on the platform was not maritime employment pursuant to *Herb=s Welding*. The administrative law judge distinguished *Munguia* on the basis that the platform here had a docking area for the vessels servicing it and a crane apparatus used for offloading heavy equipment, concluding that this usage was different from the docking which occurred in *Munguia* because more was unloaded than personal tools and supplies.

We do not agree that these facts distinguish the instant case from the Board=s *Munguia* decisions. In *Munguia*, the claimant loaded and unloaded his personal supplies and tools from the boat when it docked at the platform. These items were used in furtherance of oil production on the platform. In the instant case, the workers on the platform embarked and debarked on the deck adjacent to the oil platform, and supplies for the platform were unloaded there as well. That more supplies, or heavier equipment, was needed here is a difference only in degree, as in both in *Munguia* and the instant case, the personnel, supplies and equipment were used solely to further the work of the fixed oil platform, which is a non-maritime venture. Where fixed oil platforms are accessible only by water, it follows that they will have areas where vessels can tie-up. A holding that the entire platform is a covered situs on the basis that it includes an area where vessels used to transport personnel, equipment and supplies are loaded and unloaded would accord a maritime nexus to a site where none exists under *Rodrigue* and *Herb=s Welding*.

In this regard, the administrative law judge=s statement that the Supreme Court in *Herb=s Welding* Aindicated@ that an oil platform is a covered situs is unfounded. First, the Court expressly stated, AWe need not determine whether [claimant] satisfied the Act=s situs requirement.@ *Herb=s Welding*, 470 U.S. at 427, 17 BRBS at 84(CRT). The administrative law judge relied on language such as:

With regard to the Act=s situs requirement, [the Fifth Circuit] noted that this Court had compared drilling platforms to wharves in *Rodrigue v. Aetna Casualty & Surety Co.*, *supra*. Given that the 1972 Amendments to the LHWCA extended coverage to accidents occurring on wharves, it would be incongruous if they did not also reach accidents occurring on drilling platforms.

Herb=s Welding, 470 U.S. at 418, 17 BRBS at 80(CRT). This passage, as the administrative law judge recognized, is a recitation of the Fifth Circuit=s decision in that case, which held oil platform workers covered under Sections 2(3) and 3(a). It thus does not reflect the Supreme Court=s view of situs. The Supreme Court further stated,

The rationale of the Court of Appeals was that offshore drilling is maritime employment and that anyone performing any task that is part and parcel of that activity is in maritime employment for LHWCA

purposes. Since it is doubtful that an offshore driller would pay and maintain a worker on an offshore rig whose job was unnecessary to the venture, this approach would extend coverage to virtually everyone on the stationary platform. We think this construction of the Act is untenable.

470 U.S. at 421, 17 BRBS at 81(CRT). The administrative law judge stated that this reasoning would not be true if the situs element were not satisfied. The statements the administrative law judge relied on, however, were made by the Court's majority in the context of rejecting the approaches of the Fifth Circuit and the dissenting members of the Court with regard to status. See 470 U.S. at 425, 17 BRBS at 83(CRT). Therefore, the court was simply assuming that the site was covered for purposes of the discussion of the arguments in that case. In any event, the court expressly reserved the situs issue. A holding that a fixed oil platform is not a situs covered under Section 3(a) is consistent with the holdings in *Rodrigue* and *Herb's Welding*, as well as the Board and Fifth Circuit decisions in *Munguia*, that there is nothing inherently maritime about fixed oil platforms.

¶In response to the dissenting opinion, the majority stated:

The dissent emphasizes that Gray was generally on or near the water and faced maritime hazards . . . To the extent this is so, it is relevant to Asitus, @ not Astatus. @ To hold that Gray was necessarily engaged in maritime employment because he was on the drilling platform would ignore Congress' admonition that not everyone on a covered situs automatically satisfies the status test. . .

Herb's Welding, 470 U.S. at 425, 17 BRBS at 83(CRT).

In summary, we reverse the administrative law judge's finding that claimant was injured on a covered situs. The structure where the injury occurred is a fixed oil platform which does not resemble a pier, and the instant case is indistinguishable on its facts from those presented to the Board in *Munguia*. The fact that the platform has a place for vessels to tie-up does not bestow a maritime connection to that site as the only purpose of the vessels is to further the oil work of the platform. The significance of the Supreme Court's decisions in *Rodrigue* and *Herb's Welding* cannot be overlooked in addressing the situs element, as these cases explain that fixed oil platforms lack an inherent maritime character.

⁷As we reverse the administrative law judge's finding that claimant's injury occurred on a covered situs, we need not address employer's challenge to the administrative law judge's finding that claimant satisfied the status test of Section 2(3).

Accordingly, we reverse the administrative law judge=s Decision and Order finding that the situs element of Section 3(a) of the Act is satisfied.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge