

BRB No. 99-0726

RONALD P. FONTNETTE)	
)	
Claimant-Respondent)	
)	
v.)	
)	
RED FOX COMPANIES OF)	
NEW IBERIA)	DATE ISSUED:
)	
and)	
)	
LOUISIANA WORKERS')	
COMPENSATION CORPORATION)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Theodore M. Haik, Jr. (Haik, Minvielle & Grubbs), New Iberia, Louisiana, for claimant.

Paul D. Buffone (Egan, Johnson & Stiltner), Baton Rouge, Louisiana, for employer/carrier.

Before: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (98-LHC-2068) of Administrative Law Judge Larry W. Price 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).

Claimant worked as a fitter at employer's Port of Iberia facility, where his job involved the fabricating of corrugated metal sheets and septic tanks used on offshore oil rigs. Claimant alleges that materials he assisted in fabricating at employer's facility were also used on barges, which employer disputes. On March 3, 1997, claimant suffered a work-related injury when he fell from an elevated angle iron, injuring his neck and right arm. Claimant was diagnosed as suffering from cervical radiculopathy, with a herniation at the C6-7 level, but subsequently complained of additional pain in his lower back. Thereafter, claimant filed a claim for temporary total disability benefits under the Act as a result of the March 3, 1997 incident.

In his decision, the administrative law judge found that claimant satisfied the status and situs requirements for coverage under the Act. Specifically, the administrative law judge credited claimant's testimony that the metal sheets and septic tanks he fabricated were used for barges and mobile drilling rigs and not solely for fixed oil rigs. Thus, the administrative law judge found that as claimant spent at least some portion of his usual employment performing shipbuilding and ship repair, duties specifically enumerated under the Act, claimant established the status element under Section 2(3) of the Act, 33 U.S.C. §902(3)(1994). With regard to situs, the administrative law judge found that since employer's facility adjoined navigable water and was used for the fabrication of structures used on both vessels and fixed oil rigs, as well as for the repair of barges, claimant's injury occurred on a covered situs pursuant to Section 3(a) of the Act, 33 U.S.C. §903(a)(1994). Having found that claimant's cervical condition is related to his employment with employer, the administrative law judge awarded claimant temporary total disability compensation, 33 U.S.C. §908(b), as well as reasonable and necessary medical expenses, 33 U.S.C. §907.

On appeal, employer challenges the administrative law judge's determination that claimant satisfied the status and situs requirements for coverage under the Act. In the alternative, employer contends that if the administrative law judge's finding of coverage is affirmed, it should not be liable for the treatment rendered by Dr. Franklin, as claimant did not request authorization for this treatment. Claimant responds, urging affirmance of the administrative law judge's determinations regarding coverage and medical expenses, but contends that the administrative law judge erred in finding that his lumbar back condition is not work-related, and requests that the Board vacate this determination.

To be covered under the Act, a claimant must satisfy the "status" requirement of Section 2(3), and the "situs" requirement of Section 3(a). See *Northeast Marine Terminal Co. 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)(1994). 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 engaged in maritime employment as long as some portion of his job activities constitutes covered employment. *Caputo*, 432 U.S. at 275-276, 6 BRBS at 166. A claimant’s time need not be spent primarily in longshoring operations if the time spent is more than episodic or momentary. See *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981). 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., *Caputo*, 432 U.S. at 273, 6 BRBS at 164-166; *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

On appeal, employer contends that claimant’s testimony regarding status was equivocal, pointing out that on cross-examination, claimant stated that he had no personal knowledge of the destination or maritime end-uses of the items he fabricated, and it therefore maintains that the items claimant worked on were destined for non-maritime uses. See Tr. at 272-273. Thus, employer asserts that claimant failed to establish that his work constituted ship repair or shipbuilding, and therefore, the status requirement for coverage under Section 2(3) of the Act was not met. We reject employer’s contention. In determining that claimant satisfied the status requirement for coverage under the Act, the administrative law judge credited claimant’s testimony that he fabricated corrugated plates and septic tanks used for living quarters on barges, jack-up rigs and offshore rigs, and that 75 to 90 percent of his employment with employer was dedicated to this type of work.¹ See Tr. at 171-174, 267. The administrative law judge found that employer failed to refute claimant’s testimony. See Decision and Order at 21. He correctly noted that floating offshore rigs, known as “jack-up rigs,” are considered vessels under the Act, pursuant to *McCullough v. Marathon Letourneau Co.*, 22 BRBS 359 (1989).² See

¹Claimant testified that 60 to 70 percent of his time was spent fabricating septic tanks, and another 15 to 20 percent of his time was devoted to constructing corrugated plates. Tr. at 173-174.

²We reject employer’s contention that *McCullough* is distinguishable because claimant was not engaged in the construction of a jack-up rig or vessel at the time of his injury, as a claimant need not be engaged in maritime employment at the time of

also *Perrin v. v. C.R.C. Wireline, Inc.*, 26 BRBS 76, 78 n.1 (1992); cf. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78 (CRT)(1985)(fixed platforms are not vessels). The administrative law judge thus found that claimant's fabrication duties were sufficient to satisfy the status requirement.³

We hold that the administrative law judge's finding is supported by substantial evidence and is in accordance with law. Specifically, claimant's testimony is corroborated by the testimony of his supervisor, Rocky Fontnette, who stated initially that the items his crew fabricated, heliports, waste tanks and living quarters, were used for offshore modules, see Tr. at 28, but later conceded that these structures were used aboard vessels and offshore oil rigs. Tr. at 286. Inasmuch as claimant's duties as a fitter involved the fabrication of structures used aboard vessels and jack-up rigs, and the performance of these duties was a regular part of his overall duties, the administrative law judge properly found that claimant spent at least some of his time engaged in clearly maritime employment. See *Caputo*, 432 U.S. at 249, 6 BRBS at 150; *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994); *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999); *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997); *McGoey v. Chiquita Brands Int'l*, 30 BRBS 237 (1997); *Smith v. Universal Fabricators, Inc.*, 21 BRBS 83 (1988), *aff'd sub nom. Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104 (CRT)(5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990). Accordingly, we affirm the administrative law judge's finding that claimant satisfied the status requirement under Section 2(3) of the Act.

Employer further contends that the administrative law judge erred in finding that claimant's injury occurred on a covered situs, as employer's fabrication shop was not used to build or repair vessels. We disagree. Section 3(a) provides:

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 on the navigable waters of the United States (including any

his injury to be covered under the Act. See *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

³Although the administrative law judge credited claimant's testimony that he spent two weeks performing refit duties on a barge, he found that this work was episodic and did not provide the foundation for the establishment of the status requirement. See Decision and Order at 21. This finding is unchallenged on appeal.

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. *Melerine v. Harbor Constr. 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 (5th Cir. 1980)(*en banc*), *cert. denied*, 452 U.S. 905 (1981). In *Winchester*, the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, 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 has 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.⁴ *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729; see also *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978).

In the instant case, the administrative law judge considered both the geographic and functional aspects of employer’s facility. The administrative law judge found, and it is undisputed, that employer’s facility adjoins a navigable commercial canal.⁵ See Decision and Order at 22; Tr. at 24-26, 45, 103, 159, 280. Moreover, substantial evidence supports the administrative law judge’s finding that employer’s facility is used to fabricate equipment and structures used aboard both vessels and fixed oil rigs, and also used for the repair of barges.⁶ See Tr. at 28, 46,

⁴Using these guidelines, the Fifth Circuit held in *Winchester* 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 the loading process. See *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729.

⁵Claimant’s supervisor, Rocky Fontnette, testified that employer’s fabrication yard where claimant was injured is 350 to 375 feet from the water’s edge. Tr. at 25, 280.

⁶Employer’s facility also contains a dock area for barges. Tr. at 46, 159-160.

170-171. As an area which adjoins navigable water and is used for maritime activity clearly meets the Fifth Circuit's test, we affirm the administrative law judge's finding that claimant's injury occurred on a covered situs under Section 3(a) of the Act. See *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729; see also *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104 (CRT)(5th Cir. 1989), cert. denied, 493 U.S. 1070 (1990); *Gavranovic v. Mobil Mining and Minerals*, 33 BRBS 1 (1999).

Lastly, we reject employer's assertion that it should not be liable for the treatment rendered by Dr. Franklin because of claimant's failure to obtain authorization. Employer did not raise the issue of its liability for Dr. Franklin's treatment of claimant before the administrative law judge, and thus, the administrative law judge made no findings with regard to whether authorization for Dr. Franklin's treatment was required. Employer's objection to its liability for medical expenses before the administrative law judge extended only as to whether the surgery recommended by Dr. Cobb to correct claimant's disc herniation at the C6-7 level is medically necessary. See Decision and Order at 3, 26; Jt. Ex. 1. The administrative law judge's finding that this procedure is necessary for the improvement of claimant's work-related cervical condition is unchallenged on appeal. Because employer did not raise the Section 7 issue with regard to Dr. Franklin, we hold that this issue cannot be raised for the first time on appeal. See *Boyd v. Ceres Terminals*, 30 BRBS 218 (1997); *Maples v. Texports Stevedores Co.*, 23 BRBS 303 (1990), *aff'd sub nom. Texports Stevedores Co. v. Director, OWCP*, 931 F.2d 331, 28 BRBS 1 (CRT)(5th Cir. 1991). Therefore, we affirm the administrative law judge's award of medical benefits.⁷

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

⁷In his response brief, claimant contends that the administrative law judge erred in finding that his lumbar back condition is not work-related. We decline to address this issue, as issues which challenge the administrative law judge's findings must be raised in a cross-appeal, not a response brief. See *Garcia v. Nat'l Steel & Shipbuilding Co.*, 21 BRBS 314 (1988); *Shoemaker v. Schiavone & Sons, Inc.*, 20 BRBS 214 (1988).

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge