EARL J. PARKER, JR.	)	BRB No. 92-982
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FARRELL LINES, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
ROYAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
	)	
	)	
GLENN C. REDMON	)	BRB No. 92-983
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
FARRELL LINES, INCORPORATED	)	
	)	
and	)	
	)	
ROYAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Lee E. Wilder and John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimants.

Gerard E.W. Voyer and Brian N. Casey (Taylor & Walker, P.C.), Norfolk, Virginia, for employer/carrier.

Before: DOLDER, Acting Chief Administrative Appeals Judge, BROWN and

McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimants appeal the Decision and Order (90-LHC-2369 and 91-LHC-467) of Administrative Law Judge Richard K. Malamphy denying benefits 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). 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).

Claimants appeal a denial of benefits.[1] Employer operates a container and chassis repair facility at 901 W. 24th Street in Norfolk, Virginia. Claimant Redmon, a container mechanic, tripped and fell on the steps to the office and injured his left wrist, and claimant Parker, an inspector, was injured when an electric saw kicked back while he was cutting the floor for a flat rack container and cut his left leg. 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 parties stipulated that claimants satisfy the status requirement under Section 2(3) of the Act, 33 U.S.C. §902(3). The administrative law judge concluded, however, that the situs requirement of Section 3(a), 33 U.S.C. §903(a), is not satisfied. Finding that employer's container repair shop where the injuries 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. After a consideration of the relevant factors, the administrative law judge concluded that the facility is not an "adjoining area," and accordingly, he denied the claims.

On appeal, claimants contend 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 claimants were injured on an "adjoining area" under Section 3(a),[2] the

[1]These cases were consolidated before the administrative law judge. By Order dated March 24, 1993, the cases were consolidated on appeal for purposes of decision. 20 C.F.R. §802.104.

[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).

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 indicated 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;

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 these cases arise, 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, 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); *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 five-bay garage located in a mixed-use area which is five miles from Norfolk International Terminal (NIT) and one mile from water. Evan Pierce, a real estate appraiser, testified that the area surrounding the facility includes a residential area, and

light industrial and commercial areas. Tr. at 30. Other businesses include a shopping center, small contractors, a real estate office, an engineer's office, and the office of an accountant. Tr. at 38-43. He also testified that although this was the best location in relation to NIT, there was no concentration of maritime-related business in the area. Tr. at 44.

James McDonald, employer's manager of maintenance and repair in the Norfolk area, testified that the 24th Street location was chosen for economic considerations such as convenience and cost of transporting employees to the NIT location for rotation. Tr. at 74. This location also was chosen because it already had a building on site that had been used to repair containers and offered a reasonable lease. Tr. at 73, 80.

Based on the facts of this case, there is substantial evidence to support the administrative law judge's finding that the container repair facility in the instant cases is not a covered situs under the Act. Contrary to the claimants' contention, the administrative law judge did not "ignore" testimony that this was the closest site feasible given all of the circumstances, but instead found that the other factors overrode this consideration. *See Gonzalez*, 26 BRBS at 16. Specifically, the administrative law judge determined, based on the testimony of record, that the site was not particularly suited for maritime uses, as, although there are other maritime concerns in the area, the adjoining properties were not devoted primarily to maritime commerce. *See Davis*, 20 BRBS at 124-125; *Lasofsky*, 20 BRBS at 61. The evidence also establishes that the site was chosen because of a favorable lease. *Id.* Moreover, the administrative law judge found that the site is not physically close to the water. *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 conclusion that employer's 24th Street facility is not a site covered under Section 3(a) of the Act.[3]

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

SO ORDERED.

NANCY S. DOLDER, Acting
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3]The administrative law judge's finding that the claimants had infrequent duty at the NIT location may be contradicted by the evidence that the claimants worked at least once a month at NIT, but this finding is harmless error, inasmuch as it is undisputed that the injuries occurred at the 24th Street facility.