SECTION 3

Section 3(a)—Situs

In General

Prior to the 1972 Amendments, the situs requirement in Section 3(a), 33 U.S.C. §903(a), provided coverage for disability or death resulting from "an injury occurring upon the navigable waters of the United States (including any dry dock)." 33 U.S.C. §903(a)(1970)(amended 1972). The 1972 Amendments expanded this definition to include "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, or building a vessel)." 33 U.S.C. §903(a)(1982)(amended 1984). The 1984 Amendments added the word "dismantling" to the last phrase. *See Cendejas v. Nicolai Joffe Corp*., 8 BRBS 230 (1978) (holding failure to specifically include areas used for ship-breaking in 1972 Amendment is an inadvertent omission and such a situs is covered).

Claimant must satisfy the situs test as well as the status test of Section 2(3) in order to be covered under the Act. *Ne. Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249, 6 BRBS 150 (1977). Where an employee is injured on actual navigable waters in the course of his employment and would have been covered prior to the 1972 Amendments, he is covered under the Act. *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). Such an injury generally meets both the status and situs requirements for coverage. *See* Section 2(3) of the desk book.

Unlike the status inquiry which focuses on claimant's overall employment, the situs inquiry looks to the nature of the place of work at the moment of injury. *Cabaleiro v. Bay Refractory Co., Inc.*, 27 BRBS 72 (1993); *Williams v. Pan Marine Constr.*, 18 BRBS 98 (1986) *aff'd sub nom. Williams v. Director, OWCP*, 825 F.2d 246, 20 BRBS 25(CRT) (9th Cir. 1987); *Alford v. MP Indus. of Florida*, 16 BRBS 261 (1984). Thus, an employee who leaves a covered site and is injured in a non-maritime area is not covered by Section 3(a). Moreover, the site must meet the statutory requirements as of the time of injury. That it was used for a maritime purpose in the past or will be so used in the future does not suffice. *Tarver v. Bo-Mac Contractors, Inc.*, 37 BRBS 120 (2003), *aff'd,* 384 F.3d 180, 38 BRBS 71(CRT) (5th Cir. 2004), *cert. denied*, 544 U.S. 948 (2005).

Where the date of injury is before the effective date of the 1972 Amendments, the Board has applied the pre-1972 Act in determining coverage. *Bowman v. Riceland Foods,* 13 BRBS 747 (1981) (decedent drowned in Mississippi River). In occupational disease cases, the Board initially applied the law in effect at the time of the exposure to injurious stimuli giving rise to the disease. *See, e.g., Paul v. Gen. Dynamics Corp.,* 16 BRBS 290 (1984). However, in an occupational disease case in which the last exposure occurred prior to 1972,

the Ninth Circuit held that the date of manifestation of the disease controls which coverage provisions apply. As claimant's disease became manifest in 1980 and he was exposed on a "building way," an enumerated site under the 1972 Amendments (but not under pre-72 law), his injury occurred on a covered situs. *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 23 BRBS 113(CRT) (9th Cir. 1990); *see Martin v. Kaiser Co., Inc*., 24 BRBS 112 (1990) (Dolder, J., concurring in the result only) (entire shipyard or terminal facility covered under 1972 Act).

The Board subsequently acknowledged the trend in the case law defining the time of injury in an occupational disease case as the date of manifestation and adopted the holding in *SAIF Corp.* in all circuits, overruling *Paul* and similar cases applying an exposure rule. *Peterson v. Gen. Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Ins. Co. of N. Am. v. U. S. Dep't of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). The Second Circuit affirmed the Board's decision, noting the trend in applying the date of manifestation to other sections of the Act. *Ins. Co. of N. Am. v. U.S. Dep't of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993). As the employee was exposed to asbestos in the model and joiner ships at the shipyard, his injury occurred on a covered situs.

Contrary to claimant's argument that his satisfaction of the "status" requirement results in his claim being covered under the Act, claimant must satisfy both the "situs" and the "status" requirements for the Act to apply to his claim. Thus, while claimant's work as a crane operator/shipbuilder would satisfy the status requirement, the administrative law judge properly found that the site of claimant's injury is exempt from coverage under Section 3(d)(1) such that claimant's injury is not within the Act's coverage. *Koepp v. Trinity Indus., Inc.,* 46 BRBS 7 (2012).

Navigable Waters

The Act was initially adopted to apply coverage to employees who the Supreme Court had held could not be covered under state worker's compensation laws because they were injured seaward of the water's edge. *See S. Pac. Co. v. Jensen*, 244 U.S. 205 (1917). As a result, the original coverage provision required an injury "upon the navigable waters of the United States (including any dry dock)." 33 U.S.C. §903(a)(1970)(amended 1972). In the ensuing years, litigation addressed the "*Jensen* line" and attempted to define the reach of the Act's coverage. In this regard, the site of injury controlled; thus, injuries occurring on water were covered by the Act, subject to the "maritime but local" exception permitting state coverage, and those on land by the states. The result was a "twilight zone" of concurrent jurisdiction. *See Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983); *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969); *Calbeck v. Travelers Ins. Co.,* 370 U.S. 114 (1962); *Davis v. Dep't of Labor*, 317 U.S. 249 (1942); *Parker v. Motor Boat Sales*, 314 U.S. 244 (1941).

In a case involving a death in 1969, the Board applied the pre-1972 Act to affirm a finding that the death was covered. Decedent fell from a dock into the Mississippi River and his body was recovered two days later. The administrative law judge held that the only rational inferences supported a conclusion that he died in or over the river; there was no evidence his actual injury occurred on the dock. *Bowman v. Riceland Foods*, 13 BRBS 747 (1981).

The 1972 Amendments expanded the coverage afforded by Section 3(a) landward to specified sites and other adjoining areas and added Section 2(3) so that only "maritime employees" injured on those areas would be covered. Concurrent state and federal jurisdiction exists under the amended Act. *Sun Ship, Inc. v. Pennsylvania*, 447 U.S. 715, 12 BRBS 890 (1980).

In *Perini*, 459 U.S. 297, 15 BRBS 62(CRT), the Supreme Court held that in enacting the 1972 Amendments, Congress expanded coverage and did not withdraw it from injured workers who would have been covered prior to the amendments by virtue of an injury upon actual navigable waters. Thus, an employee injured on actual navigable waters meets both the situs and status tests and need not prove his work was maritime in nature. Therefore, an employee injured on a cargo barge on the Hudson River while building a sewage treatment plant was covered under the Act based on his injury on actual navigable waters. Section 2(3) contains a thorough discussion of the status aspect of this decision, including specific exclusions from coverage and a possible exception where the employee is transiently or fortuitously on navigable waters.

A number of cases address whether a specific waterway is part of the navigable waters of the U.S. Waterways are navigable in fact "when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce." *The Daniel Ball*, 77 U.S. 557, 563 (1871).

Injuries on the high seas may be covered as occurring on the navigable waters of the U.S. In *Cove Tankers Corp. v. United Ship Repair, Inc.*, 683 F.2d 38, 14 BRBS 916 (2d Cir. 1982), the Second Circuit held that the Act applied to injuries on the high seas, although it limited its holding to the facts of the case which involved two ship repairmen injured when a boiler exploded on a voyage from New York to Philadelphia; at the time of injury, claimants' ship had deviated onto the high seas 135 miles offshore. The court stated first that the question was not whether a federal, as opposed to a state, compensation act applied; rather the question was whether the federal or no scheme applied. The court then reasoned that if the Act could never apply to injuries occurring on the high seas, employers could "walk" employees in and out of coverage by deviating back and forth from territorial waters to the high seas and could prevent employees from recovering compensation merely by changing course. Such a holding would be inconsistent with the express purpose of the Act. The Fifth Circuit reached the same result in *Reynolds v. Ingalls Shipbuilding Div., Litton Sys., Inc.*, 788 F.2d 264, 19 BRBS 10(CRT) (5th Cir.), *cert. denied*, 479 U.S. 885 (1986), *citing Cove Tankers*. In *Reynolds*, the employee was injured beyond the three mile limit during sea trials. The court stated that Congress did not intend to limit "navigable waters" to ''territorial waters" as it could have chosen the narrower definition if it wished. In keeping with the intent of the 1972 Amendments to broaden coverage, the court held the Act applicable to an injury occurring on the high seas, as otherwise "ships could easily and purposefully sail beyond" the three mile limit. *Reynolds,* 788 F.2d at 272, 19 BRBS at 17(CRT). *See also Kollias v. D & G Marine Maint.*, 29 F.3d 67, 28 BRBS 70(CRT)(2d Cir. 1994), *cert. denied*, 513 U.S.1146 (1995), *infra.*

The Board affirmed an administrative law judge's finding that a landlocked lake, which was used to supply drinking water, was not navigable, and therefore claimant, a commercial diver injured in the lake, was not injured on a covered situs. The Board rejected claimant's argument, based on *Cove Tankers*, that the Act should be liberally construed to cover him to prevent walking in and out of coverage even if the waters where he was injured are technically outside the Act's coverage; the Board stated that there was no danger that employer could deviate in and out of a covered situs to escape liability in this case. The Board also rejected claimant's argument that he should not be denied coverage based on one day's work at this lake when the majority of his work was covered, as the Act requires an injury on a covered situs in order to comply with Section 3(a). *Williams v. Pan Marine Constr.*, 18 BRBS 98 (1986), *aff'd sub nom. Williams v. Director, OWCP,* 825 F.2d 246, 20 BRBS 25(CRT) (9th Cir. 1987). *Accord George v. Lucas Marine Constr.*, 28 BRBS 230 (1994), *aff'd mem. sub nom. George v. Director, OWCP*, 86 F.3d 1162 (9th Cir. 1996) (table); *Elia v. Mergentime Corp.*, 28 BRBS 314 (1994).

The Board held that a claimant injured within a cofferdam satisfied the situs requirement based on injury on actual navigable waters. *Ransom v. Coast Marine Constr., Inc.*, 16 BRBS 69 (1984). A cofferdam is a watertight enclosure from which water is pumped to expose the bottom of a body of water to permit construction. The area within the cofferdam remained actual navigable waters because there was only a temporary rather than

permanent withdrawal of water. In *Ransom*, the Board relied on the holdings in *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 12 BRBS 681 (5th Cir. 1980); *Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980); and *Travelers Ins. Co. v. McManigal*, 139 F.2d 949 (4th Cir. 1944).

In *Abrahamsen v. Perini North River Associates*, 9 BRBS 1041 (1979), a claimant who was injured on a temporary construction platform about 200 feet from shore was held injured over actual navigable waters because the platform was not permanently affixed to the shore. However, in cases involving injuries on land during construction of a structure which will eventually be flooded and used for a maritime purpose, it has been held that the future use does not control and thus the injuries did not occur on a covered situs. *Tarver v. Bo-Mac Contractors, Inc.*, 37 BRBS 120 (2003), *aff'd,* 384 F.3d 180, 38 BRBS 71(CRT) (5th Cir. 2004), *cert. denied*, 544 U.S. 948 (2005) (construction of barge slip on land); *Nelson v. Guy F. Atkinson Constr. Co.*, 29 BRBS 39 (1995), *aff'd mem. sub nom. Nelson v. Director, OWCP*, 101 F.3d 706 (9th Cir. 1996)(table) (construction of a lock).

An offshore drilling platform which is permanently affixed to the ocean floor is akin to an island, albeit an artificial one, and thus an injury upon it is not upon the navigable waters of the United States. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969). *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 424 n.10, 17 BRBS 78, 83 n. 10(CRT) (1985). However, floating rigs or other structures have been treated as vessels. *Herb's Welding*, 470 U.S. at 416 n.2, 17 BRBS at 79 n. 2(CRT). *See Walker v. PCL Hardaway/Interbeton*, 34 BRBS 176 (2000). Moreover, a floating structure need not meet the criteria for "vessel" status in order for an injury on it to occur on navigable waters for purposes of coverage under the Act. *Morganti v. Lockheed Martin Corp.*, 37 BRBS 126 (2003), *aff'd,* 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006). *Cf. Wall v. Huey Wall, Inc.*, 16 BRBS 340 (1984) (barge used as an oilfield compressor station held a covered situs under Fifth Circuit's holding that offshore drilling was maritime employment and platforms thus were covered sites prior to the Supreme Court's decision in *Herb's Welding;* therefore, no need to determine whether it was a vessel).

Digests

Where claimant was employed as a rigger, a traditional maritime job, and was injured on a vessel which was *en route* from Newark, N.J. to Baltimore, Md., with no planned deviation into the territorial waters of any foreign nation, claimant's injury 14 miles from shore occurred on the "navigable waters of the U.S." and therefore is covered under the Act pursuant to *Cove Tankers*, 683 F.2d 38, 14 BRBS 916. *Larsen v. Golten Marine Co.*, 19 BRBS 54 (1986).

Board affirmed an administrative law judge's holding that an injury on the high seas was not upon the navigable waters of the U.S. The administrative law judge rationally relied on the factors enunciated in *Cove Tankers*. As the trip departed from Texas *en route* to California via Cape Horn with planned stops at foreign ports and claimant had a state workers' compensation remedy, the Board held that *Cove Tankers* was distinguishable and claimant's injury 1500 miles off the U.S. coast was not covered by the Act. *Kollias v. D & G Marine Maint.*, 22 BRBS 367 (1989), *rev'd*, 29 F.3d 67, 28 BRBS 70(CRT) (2d Cir. 1994), *cert. denied*, 513 U.S.1146 (1995).

The Board affirmed the administrative law judge's finding that claimant was injured on the navigable waters of the United States, where the injury occurred in the Gulf of Mexico 200 miles offshore, citing *Cove Tankers*, 683 F.2d 38, 14 BRBS 916, and *Reynolds*, 788 F.2d 264, 19 BRBS 10(CRT). The Board rejected employer's contention that waters beyond the three mile territorial limit cannot constitute navigable waters of the U.S. Although the ship upon which claimant was injured was of Bermudian registry, employer was based in New York and claimant was a U.S. resident. Moreover, although the ship made a scheduled deviation into a foreign port, claimant boarded the ship in Texas and was on his way to another Texas port when the injury occurred. Finally, the circumstances of claimant's receipt of state workers' compensation benefits were unclear. *Gouvatsos v. B & A Marine Co.*, 26 BRBS 38 (1992), *aff'd sub nom. Kollias v. D & G Marine Maint.*, 29 F.3d 67, 28 BRBS 70(CRT) (2d Cir. 1994), *cert. denied*, 513 U.S.1146 (1995).

The Second Circuit reversed the Board's decision in *Kollias* and affirmed the decision in *Gouvatsos*, holding that the Act covers injuries on the high seas without qualification. The court found that the Act, in Section 39(b), indicates congressional intent to cover the high seas and that this intent overcomes the general presumption against extraterritorial application of U.S. statutes. The court further stated a claimant's eligibility for state benefits is now irrelevant, and it eliminated the exceptions to extending coverage to the high seas which it created in *Cove Tankers*. *Kollias v. D & G Marine Maint.*, 29 F.3d 67, 28 BRBS 70(CRT) (2d Cir. 1994), *cert. denied*, 513 U.S.1146 (1995).

The Board held that claimant, who was injured in the port of Kingston, Jamaica, is covered under the Longshore Act. The Board first noted the decision in *Kollias* extending the Act to the high seas without qualification. The Board next found instructive cases arising under

the Jones Act and the Death on the High Seas Act which have extended coverage to injuries and deaths occurring in the territorial waters of a foreign nation. The Board held that adoption of this policy provides uniform coverage and protection for American workers working in foreign waters when all contacts except the site of the injury are with the U.S. Further, no choice of law issue was raised by the parties. *Weber v. S.C. Loveland Co.*, 28 BRBS 321 (1994). Relying on the law of the case doctrine, following remand the Board reaffirmed its prior decision that claimant, who was injured in the port of Kingston, Jamaica, was injured on a covered situs. The Board examined the exceptions to the doctrine and found none applicable, including that involving intervening case law; therefore, it held, in light of developing case law, that "navigable waters" includes injuries on the high seas and in foreign territorial waters when all contacts except the site of injury are with the United States. *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff'd on recon.*, 35 BRBS 190 (2002).

The Board rejected claimant's argument that he was a covered employee while he was working in ports and on waters in Asia. The Board distinguished its decisions in *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001) and 28 BRBS 321 (1994), and held that this case involves a long-term contractual worker based overseas whereas *Weber* involved an American-based worker temporarily sent to Jamaica to unload a vessel that had been loaded in the U.S.. In this case, there was no U.S.-based voyage with a deviation onto the high seas or foreign waters; rather, none of claimant's work occurred on navigable waters of the U.S. The Board affirmed the administrative law judge's determination that *Weber* does not apply and that claimant was not a covered employee during his employment with Global between 1999 and 2002. Accordingly, the Board affirmed the administrative law judge's finding that the prior covered employer is responsible for claimant's hearing loss and upper extremity injuries. *J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009), *aff'd sub nom. Keller Found./Case Found. v. Tracy,* 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 570 U.S. 904 (2013).

The Ninth Circuit held that foreign territorial waters and their adjoining ports and shore-based areas are not the "navigable waters of the United States" as defined by the Act, 33 U.S.C. §903(a). There is a strong presumption that acts of Congress do not apply extraterritorially. The court declined to defer to the Director's position on this issue, and affirmed the Board's decision that claimant's injuries as a worker in the ports of Indonesia and Singapore do not satisfy the situs test for coverage under the Act. *Keller Found./Case Found. v. Tracy*, 696 F.3d 835, 46 BRBS 69(CRT) (9th Cir. 2012), *cert. denied*, 570 U.S. 904 (2013).

Contrary to claimant's argument that his satisfaction of the "status" requirement results in his claim being covered under the Act, claimant must satisfy both the "situs" and the "status" requirements for the Act to apply to his claim. Thus, while claimant's work as a crane operator/shipbuilder would satisfy the status requirement, the administrative law judge properly found that the site of claimant's injury is exempt from coverage under

Section 3(d)(1) such that claimant's injury is not within the Act's coverage. *Koepp v. Trinity Indus., Inc.*, 46 BRBS 7 (2012).

The Board held that the territorial waters of Guam are included in the "navigable waters of the United States" pursuant to Section 3(a). The fact that Guam was first a "possession" and then an "unincorporated territory" of the U.S., rather than a "Territory" is not dispositive given the ambiguities in the meaning of the terms. Moreover, the Act applies to the Virgin Islands, and Guam is a similar entity; the Board therefore held that a system of concurrent jurisdiction better comports with the purposes of the Act. The Board noted that Puerto Rico is not covered by the Act, but that it is a different kind of "territory." *Tyndzik v. Univ. of Guam*, 27 BRBS 57 (1993) (Smith, J., dissenting on other grounds), *rev'd on other grounds sub nom. Tyndzik v. Director, OWCP*, 53 F.3d 1050, 29 BRBS 83(CRT) (9th Cir. 1995).

After discussing the history of the political status of the Commonwealth of the Northern Mariana Islands and the various implications of the term "territory," the Board held that the territorial waters of the CNMI are included in the "navigable waters of the United States" under Section 3(a). The Board determined that, although the Act does not apply to Puerto Rico, a politically similar entity, the provisions of the Covenant establishing the CNMI and the commission report thereto necessitate finding that the Act applies to the CNMI because it applies to Guam. The Board also rejected employer's argument that its decision in *Tyndzik*, 27 BRBS 57, that the Act is applicable to Guam is *dicta*. Additionally, the Board stated that concurrent jurisdiction over maritime employees by state and federal workers' compensation laws may exist and is not dispositive of the issue, and it noted its rejection of employer's "practical" challenges to the application of the Act over such a great distance. *Uddin v. Saipan Stevedore Co., Inc.*, 30 BRBS 117 (1996), *aff'd sub nom. Saipan Stevedore Co., Inc. v. Director, OWCP*, 133 F.2d 717, 31 BRBS 187(CRT) (9th Cir.1998).

The Ninth Circuit affirmed the Board's holding in *Uddin* that the Longshore Act applies to the Commonwealth of the Northern Mariana Islands, based on, *inter alia,* the Act and the history of the Commonwealth. Section 2(9) defines the United States as including "Territories." The Commonwealth is a lower case "territory" as it is unincorporated, but this is not determinative, as the term "territory" when used in the Act is comprehensive and Congress intended the Act to apply to the fullest extent possible with no restrictions on federal coverage short of the limits of maritime jurisdiction. The court further noted that the Act applies to Guam, and the Covenant of the CNMI states that federal laws applicable to Guam apply to the Marianas. *Saipan Stevedore Co., Inc. v. Director, OWCP*, 133 F.2d 717, 31 BRBS 187(CRT) (9th Cir.1998).

The Board stated that as the Republic of the Philippines is not a territory of the United States pursuant to Sections 2(9) and 3(a), the Longshore Act, of its own force, does not

apply to the Philippines. *A.P. [Panaganiban] v. Navy Exch. Serv. Command*, 43 BRBS 123 (2009).

The Ninth Circuit upheld the Board's determination that where the claimant had been working on a non-navigable lake at the time of his injury, the Act's situs requirement was not satisfied. The Court accordingly did not address the administrative law judge's findings regarding status. *Williams v. Director, OWCP,* 825 F.2d 246, 20 BRBS 25(CRT) (9th Cir. 1987), *aff'g Williams v. Pan Marine Constr.*, 18 BRBS 98 (1986).

The Board held that the American River in Sacramento at the accident site is not navigable. The Act derives its legitimacy from the Constitution's grant of admiralty jurisdiction. The Supreme Court has held that the admiralty definition of navigability depends on the water's capability of commercial use and not on the mode or extent of that use; the Ninth Circuit has required a showing of present commercial use or susceptibility to future commercial use. Past commercial use alone is not relevant. In this case, there is no evidence that the river is navigated; the water at the site is shallow due to an upstream dam. The barges used on the project in question were trucked to the site and assembled there. The fact that the barge could float in the river is insufficient, standing alone, to confer jurisdiction. *George v. Lucas Marine Constr.*, 28 BRBS 230 (1994), *aff'd mem. sub nom. George v. Director, OWCP*, 86 F.3d 1162 (9th Cir. 1996) (table).

The Board affirmed the administrative law judge's finding that the Croton Reservoir is not navigable, as it is a landlocked body of water. The fact that the Croton River may have been navigable prior to 1841 is insufficient to establish jurisdiction under admiralty which looks to present or future commercial interstate use of the water. *Elia v. Mergentime Corp.*, 28 BRBS 314 (1994).

The Board discussed the varying concepts of "navigability," and, citing *George*, 28 BRBS 230, reiterated that the appropriate test for navigability under the Longshore Act is the "navigability in fact" test established in admiralty law. Thus, a claimant injured when his air boat became stuck in marsh vegetation was not injured on navigable waters, as the area in which he was injured was separated from the Atchafalaya River, the main waterway in the area, by a levee. While the fact that a waterway is navigable by air boat may, in some cases, make it navigable in fact, in this case the evidence demonstrates that navigability by any vessel was impeded by vegetation. *Haire v. Destiny Drilling (USA), Inc.*, 36 BRBS 93 (2002).

The Board affirmed the administrative law judge's determination that Thompson Brook is not a navigable body of water as it does not support commerce and is not adaptable for future commercial use. Thus, EBMF could not be considered an "adjoining area" with respect to that body of water. *Cunningham v. Bath Iron Works Corp.*, 37 BRBS 76 (2003) (Hall, J., concurring in relevant part and dissenting on other grounds), *aff'd sub nom. Cunningham v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42(CRT) (1st Cir. 2004).

Affirming the Board's determination in this regard, the First Circuit held that the administrative law judge correctly applied the definition of "navigable" derived from admiralty law. Pursuant to this definition, the administrative law judge's finding that Thompson Brook is not navigable is supported by substantial evidence. *Cunningham v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42(CRT) (1st Cir. 2004).

After discussing at length the concept of "navigability" under the Act, the Board rejected the economic viability test espoused by employer and affirmed the administrative law judge's finding that Cayuga Lake, New York, is navigable water for purposes of establishing coverage under the Act since that lake is connected to the Erie Canal, can accommodate most of the vessels that travel through inland waterways, and in fact was recently used in interstate commerce. The Board reversed the administrative law judge's finding that claimant's work on the *Pagnelli* was not on navigable waters because it was affixed to land, holding that it was a floating platform and thus not a fixed platform akin to an island. Claimant was thus entitled to coverage under *Perini* for time spent on this platform. *Morganti v. Lockheed Martin Corp.*, 37 BRBS 126 (2003), *aff'd,* 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006). Affirming the Board's decision, the Second Circuit held that the appropriate test for navigability depends on the physical rather than the economic characteristics of the waterway in question. In this case, because Cayuga Lake is physically capable of supporting shipping, it is possible at any time for an interstate commercial vessel to enter the lake. The court therefore affirmed the Board's conclusion that Cayuga Lake is navigable for purposes of establishing jurisdiction under the Act. The court also affirmed the conclusion that the *Pagnelli* was not a fixed platform, as it was floating, and claimant thus spent sufficient time on navigable waters for coverage under *Perini. Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006).

The Board affirmed the administrative law judge's finding that claimant, who was injured on a pontoon in a flume containing water which circulated into and out of the heating and cooling system of the World Trade Center, was not injured on actual navigable waters. The water in the flume is not capable of supporting commerce and had been permanently withdrawn from the Hudson River. The Board also affirmed the finding that the flume could not be made navigable again with reasonable improvements. *LePore v. Petro Concrete Structures, Inc.*, 23 BRBS 403 (1990).

The Board reversed the administrative law judge's finding that claimant, who was injured while diving into a reservoir tank in the basement of a paper factory was injured on actual navigable waters. The reservoir was surrounded by walls, was not designed to support commerce by water, and could not be navigated. The administrative law judge erred in focusing on the navigability of the river that flows into the tank. Moreover, as this area is not an enumerated site and is not an adjoining area, situs is not otherwise established. *Rizzi v. Underwater Constr. Corp.*, 27 BRBS 273 (1994), *aff'd on recon.*, 28 BRBS 360 (1994), *aff'd*, 84 F.3d 199, 30 BRBS 44(CRT) (6th Cir. 1996), *cert. denied*, 519 U.S. 931 (1996).

Affirming the Board's decision, the Sixth Circuit held that claimant, employed as a diver, did not meet the situs requirement as the reservoir located under the paper plant where he was injured was not a navigable waterway. The court agreed with the reasoning of the Board that a navigable waterway ends where underground pipes and vents remove water from a river to a reservoir or tank for manufacturing or storage purposes. In addition, the court affirmed the Board's holding that claimant did not meet the situs requirement under Section 3(a) as the site is also not an enumerated site or an adjoining area. *Rizzi v. Underwater Constr. Corp.*, 84 F.3d 199, 30 BRBS 44(CRT) (6th Cir. 1996), *cert. denied*, 519 U.S. 931 (1996).

The Board affirmed the administrative law judge's finding that the storm channel and Los Angeles River are not navigable at the site of claimant's land-based injury as there is no evidence of any present commercial use of this section of that river or of its susceptibility for future commercial use as an interstate artery of commerce. The Board noted that the fact that employer deployed small skiffs on the water is not sufficient to satisfy the "navigability" test, as the boats are not used in interstate commerce. Consequently, the Board affirmed the administrative law judge's finding that employer's land-based worksite along the Los Angeles River did not adjoin "navigable water." *O'Donnell v. Nautilus Marine Protection, Inc.*, 48 BRBS 67 (2014).

Claimant contended his deep-vein thrombosis was caused by prolonged sitting during flights between Virginia and Hawaii where he was sent by employer to install sheet metal on a vessel. The Board held that claimant did not meet the situs requirement. Specifically, the Board held that the commercial plane in which claimant flew over the continental U.S. and the Pacific Ocean was not a covered situs prior to the 1972 Amendments, was not an enumerated area, and was not an "other adjoining area" within the meaning of Section 3(a). In holding that it was not an area covered prior to 1972, the Board distinguished this case from *Zapata Haynie Corp. v. Barnard*, 933 F.2d 256, 24 BRBS 160(CRT) (4th Cir. 1991), which involved an injury to a fish-spotter who flew at low altitudes in a plane to direct fishing boats to large schools of fish. The Board held that the fish-spotting job was a traditional maritime job that required the employee to work over navigable waters. However, the purpose of claimant's flight over navigable waters was merely to commute to a specific job – it was not a regular part of claimant's work. *C.C. v. Tecnico Corp.*, 41 BRBS 129 (2007), *aff'd*, 294 F. App'x 58 (4th Cir. 2008).

The Board rejected the argument that claimant's injury on a seawall occurred on actual navigable waters. Claimant asserted that the seawall was below water at high tide, but the administrative law judge found claimant was not injured on navigable waters based on claimant's testimony that his injury occurred on top of the wall and not in the water. *Silva v. Hydro-Dredge Corp.,* 23 BRBS 193 (1989).

The Board affirmed the administrative law judge's finding that decedent's work on a dry dock constitutes work on actual navigable waters under *Perini*, as the pre-1972 Act definition of navigable waters includes a dry dock. *Maes v. Barrett & Hilp*, 27 BRBS 128 (1993).

A building way is not equivalent to a dry dock and thus an injury on it is not covered under pre-1972 law. Reversing the Board on this basis for coverage, the Ninth Circuit affirmed the finding of coverage based on claimant's injury on an enumerated site under the 1972 Amendments. *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 23 BRBS 113(CRT) (9th Cir. 1990).

The Board reversed the administrative law judge's finding that decedent, a bridge construction worker who was killed when he fell to the base of the bridge structure, was injured upon navigable waters. The Board relied on the precedent that bridges are extensions of land despite the flow of navigable waters beneath them, *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969). After distinguishing cases where bridge builders were covered because they worked on vessels upon actual navigable waters and *LeMelle v. B.F. Diamond Constr. Co.,* 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), which held a bridge construction worker covered but did not address the situs issue, the Board held that claimant did not satisfy the pre-1972 Amendment requirement for situs. As the Eleventh Circuit previously held that claimant was not covered under the post-1972 provision, the Board held that decedent's death is not compensable under the Act. *Kehl v. Martin Paving Co.*, 34 BRBS 121 (2000).

The Board affirmed the administrative law judge's finding that claimant's injury did not occur on a covered situs. Claimant was injured on a bridge over the Potomac River permanently affixed to land. Thus, his injury would not have been covered prior to the 1972 Amendments, pursuant to *Nacirema*, 396 U.S. 212, and is not covered post-1972 pursuant to *Perini*, as the injury did not occur on navigable waters. The Board also held that *LeMelle*, 674 F.2d 296, 14 BRBS 609, was distinguishable in this Fourth Circuit case. *LeMelle* addressed the status element as situs was agreed to, and the claimant was injured on a bridge piling in the middle of a river. In contrast, claimant herein was injured on a bridge deck permanently attached to and accessible by land. As a bridge is not an enumerated situs, it is not covered under the Act, pursuant to *Nacirema. F.S. [Smith] v. Wellington Power Co.*, 43 BRBS 111 (2009).

The Board held that claimant's injury, which occurred under the seabed of the Atlantic Ocean while claimant was digging a sewage tunnel, did not occur on navigable waters, regardless of whether the rock in which he was tunneling was under the ocean or if it sloped upward above the surface of the water. The bedrock was at all times dry land. *Morrissey v. Kiewit-Atkinson-Kenny*, 36 BRBS 5 (2002).

Claimant was injured on a construction trestle attached to a bridge spanning San Francisco Bay. The Board affirmed the administrative law judge's finding that claimant was not injured on navigable waters, as the trestle was attached to a permanent, non-covered structure. The trestle, although not "everlasting," was not a removable structure that temporarily displaced navigable waters due to its attachment to both spans of the bridge and support on pilings. *Gonzalez v. Tutor Saliba*, 39 BRBS 80 (2005).

The Board affirmed the administrative law judge's finding that an injury on a construction site where a lock was being constructed adjacent to the Columbia River did not occur on navigable waters. That the site of the injury will be under navigable water at some point in the future does not control. As the site had been dry land at all times in the past and was such at the time of injury, the Board distinguished *Ransom,* 16 BRBS 69, and *Joyner,* 607 F.2d 1087, 11 BRBS 86. *Nelson v. Guy F. Atkinson Constr. Co.*, 29 BRBS 39 (1995), *aff'd mem. sub nom. Nelson v. Director, OWCP*, 101 F.3d 706 (9th Cir. 1996)(table).

The Board reversed the administrative law judge's finding that claimant was injured on a covered situs where he was injured on dry land adjacent to the intracoastal waterway, where barge slips were being constructed. Upon completion, the slips would be filled with water and used to house barges being loaded and unloaded. At the time of the injury, however, the construction site had been cleared and the barge slips had been excavated, but the land between the holes and the waterway had not yet been removed. The Board distinguished *Joyner* and similar cases and relied on *Nelson*, 29 BRBS 39, stating that the area had not been navigable waters or an enumerated site in the past and that its future use was not relevant. *Tarver v. Bo-Mac Contractors, Inc.*, 37 BRBS 120 (2003), *aff'd*, 384 F.3d 180, 38 BRBS 71(CRT) (5th Cir. 2004), *cert. denied*, 544 U.S. 948 (2005). Affirming the Board, the Fifth Circuit held that because the construction site was not serving a maritime purpose at the time of claimant's injury and had not previously facilitated navigation, the site is not covered. *Tarver v. Bo-Mac Contractors, Inc.*, 384 F.3d 180, 38 BRBS 71(CRT) (5th Cir. 2004), *cert. denied*, 544 U.S. 948 (2005).

The Board rejected employer's assertion that the fixed oil platform in this case, which was used for loading crude oil as well as production, was not a covered situs because it is entirely in state waters. The Board explained that this is an irrelevant distinction, as the Act covers coastal shipyards and ports in state waters. Moreover, the Board rejected employer's implied argument that claimant's injury is not covered because the platform was not on the Outer Continental Shelf, as the Outer Continental Shelf Lands Act is not applicable to state waters. *Hudson v. Coastal Prod. Services, Inc.*, 40 BRBS 19 (2006), *aff'd*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009).

Claimant, a bridge vacuumer, spent three days working on a barge because his vacuum was being repaired. The Board affirmed the administrative law judge's finding that claimant did not contract histoplasmosis while on the barge and thus did not sustain an injury on navigable waters. Substantial evidence supported the administrative law judge's finding that claimant was exposed to contaminated pigeon droppings in the containment area on the bridge and not in the open air on the barge. Accordingly, the Board affirmed the administrative law judge's conclusion that claimant was not covered by the Act pursuant to *Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). *Hough v. Vimas Painting Co., Inc.*, 45 BRBS 9 (2011).

The Board reversed the administrative law judge's finding that claimant's injury was not covered by the Act because he did not work for a "maritime employer." Claimant was injured while performing his usual work on a floating hull over navigable waters, and the administrative law judge found that his presence over navigable waters was neither transient nor fortuitous. Nevertheless, the administrative law judge found that employer, an electrical contractor, was not a "maritime employer" and that this precluded coverage. The Board held that claimant's injury

would have been covered prior to the 1972 Amendments to the Act and therefore is covered pursuant to *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), as claimant was engaged in employment on navigable waters when he was injured. By virtue of claimant's work, employer is a "maritime employer" with at least one employee engaged in maritime employment. *Flores v. MMR Constructors, Inc.*, 50 BRBS 47 (2016)), *aff'd sub nom. MMR Constructors, Inc. v. Director, OWCP [Flores]*, 954 F.3d 259, 54 BRBS 13(CRT) (5th Cir. 2020).

The Fifth Circuit affirmed the Board's holding that claimant's injury occurred on actual navigable waters and therefore within the Act's coverage under *Perini*. The platform floated in Corpus Christi Bay on pontoons connected to land by steel cables and utility lines. As the platform was not permanently affixed to land, the water underneath was not removed from navigation. *MMR Constructors, Inc. v. Director, OWCP [Flores]*, 954 F.3d 259, 54 BRBS 13(CRT) (5th Cir. 2020).

The plaintiff filed a FELA negligence action in district court for an injury sustained a railroad bridge over the Elizabeth River in Norfolk. The district court granted the employer's motion to dismiss on the ground that the Longshore Act was the plaintiff's exclusive remedy. On appeal, the Fourth Circuit reversed, holding that the injury did not occur on navigable waters as a bridge was not a covered situs prior to 1972; an employee working on a bridge over navigable waters is not working "upon navigable waters." Moreover, the employee did not work from a vessel. The decision in *Zapata* is distinguished. In addition, the bridge is neither an enumerated situs nor "an other adjoining area" under Section 3(a) as amended. *Muhammad v. Norfolk S. Ry. Co.*, 925 F.3d 192, 53 BRBS 29(CRT) (4th Cir. 2019).

Claimant was injured while working from a "saddle," which was attached to a bridge pier anchored to the Hudson River riverbed. The bridge under construction, part of the Tappan Zee Bridge project, was not yet affixed to either shoreline at the time of claimant's injury. The Board affirmed the administrative law judge's finding that claimant was not injured on navigable waters, since the saddle, although "over" the river, was attached to the bridge pier, an extension of land. Claimant's injury therefore occurred on a fixed platform, not navigable waters. *Long v. Tappan Zee Constructors, LLC*, 53 BRBS 27 (2019).

Claimant was injured while working from float stages on the Route 3 bridge project at river mile 11.8 of the Passaic River in New Jersey. The Board affirmed the administrative law judge's finding that this stretch of the Passaic River is not navigable in fact because the credited evidence does not establish current commercial use of the river. The Board administrative law judge found that the depth of the river limits its use by commonly-used large commercial ships and significant changes would be necessary in order to make commercial interstate navigation feasible. The Board therefore affirmed the denial of benefits as claimant was not injured on navigable waters. *Wilson v. Creamer-Sanzari Joint Venture*, 53 BRBS 19 (2019), *rev'd sub nom. Wilson v. Director, OWCP*, 984 F.3d 265, 54 BRBS 91(CRT) (3d Cir. 2020).

The Third Circuit reversed the Board's decision, holding the administrative law judge and the Board erred in finding the Lower Passaic River was not navigable in fact at the site of claimant's injury. The Third Circuit clarified that the standard for establishing navigability is whether a waterway is capable of sustaining any type of interstate or foreign commerce. The court held the

evidence establishes that commercial vessels could navigate within the physical constraints of the Lower Passaic River and therefore, the River was navigable in fact at RM 11.8. The court stated the record shows there are no impediments blocking the navigation channel between its confluence with the Newark Bay and the Route 3 bridge and at all points in between the channel was at least four feet in depth and seventy-two feet in width. There is evidence that commercial vessels ply the waters with these characteristics at RM 2.5 and 4.5. The court therefore reversed the denial of benefits and remanded for a determination of whether claimant is entitled to benefits. *Wilson v. Director, OWCP*, 984 F.3d 265, 54 BRBS 91(CRT) (3d Cir. 2020).

Enumerated Sites

The Act covers the following specific sites: any adjoining pier, wharf, dry dock, terminal, building way, or marine railway. While Section 3(a) goes on to state "or other adjoining area customarily used by an employer in loading, unloading, repairing dismantling or building a vessel," a grammatical construction of this language supports a conclusion that the "customarily used" phrase modifies only "other adjoining area. *See Ne. Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 280, 6 BRBS 150, 170 (1977); *Hurston v. Director, OWCP*, 989 F.2d 1547, 26 BRBS 180(CRT) (9th Cir. 1993); *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 1218 n.8, 12 BRBS 681, 684 n.8 (5th Cir. 1980); *Rhodes v. Healy Tibbits Constr. Co*., 9 BRBS 605 (1979) (Miller, dissenting on other grounds).

In *Caputo*, 432 U.S. at 280, 6 BRBS at 170, the Court found no dispute with respect to claimant Caputo as he was injured while loading a truck inside the terminal area; as employer conceded, the site was covered as it adjoined navigable waters and was used for loading and unloading. Claimant Blundo was injured on a pier used for stuffing and stripping containers and storage; it was within a facility containing another pier where ships docked for unloading. The Court rejected employer's argument that the site of injury was not covered as it was not "customarily used" by an employer for loading or unloading a vessel. The Court initially stated that it is not at all clear that the phrase "customarily used" was intended to modify more than the "other areas," referencing the legislative history which showed little concern regarding how the specifically enumerated sites would be used. Regardless, the Court held Blundo covered because he worked in an adjoining terminal customarily used in loading or unloading. The Court explained that the entire terminal facility adjoined the water, one of its two finger-piers was used for loading and unloading vessels, and Congress intended to cover such facilities.

The Second and Ninth Circuits and the Board have explicitly held that "customarily used" modifies only "other adjoining area" and therefore, the enumerated sites need not be used in loading, unloading, building or repairing a vessel. *Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied*, 525 U.S. 981 (1998); *Hurston*, 989 F.2d 1547, 26 BRBS 180(CRT); *Rhodes v. Healy Tibbits Constr. Co*., 9 BRBS 605 (1979) (Miller, dissenting on other grounds). In *Hurston,* the Ninth Circuit concluded that a structure with the physical characteristics of a pier was a pier regardless of the lack of any maritime use. The Second Circuit adopted this holding. The Fifth Circuit, however, declined to accept the *Hurston* focus on structure and stated that it was unnecessary to determine whether the enumerated sites must be "customarily used" for the specified vessel-related purposes as the meaning of the term "pier" as derived from its context in a maritime statute supports a conclusion that it must be used for some maritime purpose. *Thibodeaux v. Grasso Prod. Mgmt., Inc.*, 370 F.3d 486, 38 BRBS 13(CRT) (5th Cir. 2004). The Eleventh Circuit also found it unnecessary to decide whether a pier must be customarily used for vessel activity, finding that a seawall did not meet even the *Hurston* test. *Brooker v. Durocher Dock & Dredge*, 133 F.3d 1390, 31 BRBS 212(CRT) (11th Cir.), *cert. granted*, 524 U.S. 982, *cert. dismissed*, 525 U.S. 957 (1998).

In *Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980), and *Trotti & Thompson*, 631 F.2d 1214, 12 BRBS 681, dry docks and piers under construction were held covered. In *Joyner,* the Fourth Circuit held that the site of a dry dock,

formerly navigable waters and to be used again in support of navigation, remains part of the navigable waters during construction. The court also noted the adjacent shipyard was covered. In *Trotti & Thompson,* the Fifth Circuit noted that while claimant's work constructing a pier was performed 90 percent from barges, his actual injury occurred on the uncompleted pier and would not have been covered prior to 1972. Citing *Joyner*, the court held that construction of a pier at an already covered site, *i.e.,* on navigable water, was covered. *See also Christoff v. Bergeron Indus., Inc*., 748 F.2d 297, 299 n.2,17 BRBS 11, 12 n.2(CRT) (5th Cir. 1984) (marine railway covered under the Act); *Castro v. McLean Indus.*, 12 BRBS 911 (1980) (container freight station located 150 yards from navigable waters used for loading and unloading is a terminal); *Dantes v. W. Found. Corp. Ass'n*, 10 BRBS 541 (1979), *appeal dismissed*, 614 F.2d 299, 11 BRBS 753 (1st Cir. 1980) (graving dock under construction covered); *Rhodes*, 9 BRBS 605 (injury while working on a pier to be used for recreational fishing and to carry a sewer pipe met situs requirements, as a pier is a covered situs regardless of whether it is customarily used in loading, unloading, repairing or building a vessel); *Bakke v. Duncanson-Harrelson Co.*, 8 BRBS 36 (1978) (pier used by Coast Guard vessels covered).

In *Herb's Welding, Inc. v. Gray*, 703 F.2d 176, 15 BRBS 126(CRT) (5th Cir. 1983), *aff'g* 12 BRBS 752 (1980), the Fifth Circuit held that fixed offshore drilling platforms are covered sites, analogizing them to wharves over navigable waters, which are covered. The Supreme Court, reversing the Fifth Circuit's status holding, did not address the situs issue. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985). The Fifth Circuit subsequently held a drilling platform was not a covered site, rejecting the analogy to a pier, as the site was not used for any maritime purpose. *Thibodeaux,* 370 F.3d 486, 38 BRBS 13(CRT).

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The Board held that the breakwater upon which claimant was injured sheltered a dock as well as a nuclear facility's intake structure, thus forming a harbor, and was, therefore, the equivalent of a pier. Accordingly, since claimant was injured while standing on an area specifically enumerated in Section 3(a), claimant was injured on a covered situs regardless of whether it was customarily used in loading, unloading, repairing or building a vessel. *Olson v. Healy Tibbits Constr. Co.*, 22 BRBS 221 (1989)(Brown, J., dissenting).

The Board held that a structure used solely for oil production and with no connection to navigation and commerce over navigable water is not a "pier" within the meaning of Section 3(a) and thus is not a situs covered under the Act. In reversing the administrative law judge's decision, the Board held that to be a "pier" under Section 3(a), a structure need not be used for loading, unloading, building or repairing a vessel, but it must have a relationship to maritime activity. In the present case, the structure rested on pilings but was used solely in oil production and could not accommodate vessels; therefore, it was not a pier. *Hurston v. McGray Constr. Co.*, 24 BRBS 94 (1990), *rev'd sub nom. Hurston v. Director, OWCP,* 989 F.2d 1574, 26 BRBS 180(CRT) (9th Cir. 1993). In reversing the Board's decision, the Ninth Circuit held that a structure built on pilings extending from land to navigable waters is a pier, even if it is not used for a traditional maritime activity. The court held that an oil production pier is a covered situs, as it is the type of structure

rather than the function it serves that defines whether the situs is covered. *Hurston v. Director, OWCP,* 989 F.2d 1574, 26 BRBS 180(CRT) (9th Cir. 1993).

The Board affirmed an administrative law judge's finding that claimant was not injured on a "pier" as defined in *Hurston*, 989 F.2d 1547, 26 BRBS 180(CRT). The construction trestle on which claimant was injured was attached to the two spans of a bridge. Although the trestle rested on pilings, at the time of claimant's injury the trestle was not attached to land, and therefore did not meet the definition of a pier set out in *Hurston.* The Board also affirmed the administrative law judge's finding that the trestle was not an enumerated site under construction. The trestle was never going to become a pier or an "adjoining area" used for loading, unloading, building, or dismantling vessels but was used only for the seismic retrofitting project on the bridge. *Gonzalez v. Tutor Saliba*, 39 BRBS 80 (2005).

The Fifth Circuit affirmed the Board's holding that claimant, a pumper/gauger who worked on a fixed oil and gas production platform, was not injured on a covered situs. Specifically, the court held that the platform, which was built on pilings over marsh and water and was inaccessible from land, does not constitute a "pier" within the meaning of the Act. In arriving at this conclusion, the court rejected the Ninth Circuit's broad definition of "pier" in *Hurston*, 989 F.2d 1547, 26 BRBS 180(CRT), and adhered to the functional approach of *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 4 BRBS 482 (5th Cir. 1976) (subsequent history omitted). The Fifth Circuit stated that it is not enough for structures to have the appearance of the terms enumerated in Section 3(a). The court found it unnecessary to determine whether the phrase "customarily used" also modifies the enumerated sites as the meaning of "pier" in the context of its use in a maritime statute supports the conclusion the structure must serve some maritime purpose. The Supreme Court's decision in *Herb's Welding*, 470 U.S. 414, 17 BRBS 78(CRT) (5th Cir. 1985), and the Fifth Circuit's decision in *Munguia,* 999 F.2d 808, 27 BRBS 103(CRT) (5th Cir. 1993), support the holding that fixed oil platforms are not maritime concerns. The court also affirmed the holding that the site is not an "other adjoining area" under Section 3(a) as it is not used for maritime activity. *Thibodeaux v. Grasso Prod. Mgmt., Inc.*, 370 F.3d 486, 38 BRBS 13(CRT) (5th Cir. 2004).

The Board rejected employer's argument that *Thibodeaux,* 370 F.3d 486, 38 BRBS 13(CRT), applies to this case to preclude coverage because claimant was injured on a fixed platform. The Board held that, because the fixed platform had a docking facility used to load crude oil onto barges, it was distinguishable from *Thibodeaux,* and as it was used to load vessels, it is an "adjoining area." Further, because the platform facility is a configuration of connecting pipelines with no distinct separation between the processing and the loading areas, the entire facility is covered. Thus, the Board affirmed the administrative law judge's finding that claimant was injured on a covered situs even though he was not injured in the docking area. *Hudson v. Coastal Prod. Services, Inc.*, 40 BRBS 19 (2006), *aff'd*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009).

Affirming the Board's holding that claimant was injured on a covered situs, the Fifth Circuit held that the fixed platform on which claimant was injured is in the "general area" used as part of the "overall loading process." The court observed that the fixed platform is directly and permanently connected to a docking facility used to load oil onto transport barges, and that the platform serves as a temporary holding station for the already produced oil until it is further transferred 30-40 feet to the loading facility where it is held until being shipped ashore by barge. The "area" need be only "customarily" used in loading, not exclusively or predominantly. The court distinguished the platform in this case from the drilling platform in *Thibodeaux*, 370 F.3d 486, 38 BRBS 13(CRT), as the latter platform involved no loading or unloading and, thus, did not qualify as an "other adjoining area." *Coastal Prod. Serv. Inc. v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009).

The Board reversed the administrative law judge's finding that claimant failed to satisfy the functional component of the situs inquiry and held, as a matter of law, that claimant was injured on an "adjoining area" under Section 3(a). Claimant was injured in the loading area of the Black Bay Central Facility, a fixed platform that supported the operations of satellite oil and gas production platforms. Supplies and equipment were shipped by vessel from the mainland to the Central Facility where they were unloaded and stored in the warehouse. When supplies were needed on the satellite platforms, they were loaded onto vessels at the Central Facility and shipped to the satellite platforms. The Board held that, based on the plain language of Section 3(a), the Central Facility, which was customarily used by employer in loading and unloading vessels, qualifies as a covered situs. The Board distinguished the platform in this case from the production platform in *Thibodeaux*, 370 F.3d 486, 38 BRBS 13(CRT), which was not customarily used for loading and unloading vessels. Contrary to the administrative law judge's analysis, the fact that the cargo loaded and unloaded at the Central Facility consisted of supplies and equipment used for oil and gas drilling does not divest the platform of a maritime purpose. *Malta v. Wood Grp. Prod. Services*, 49 BRBS 31 (2015), *aff'd sub nom*. *Wood Grp. Prod. Services v. Director, OWCP*, 930 F.3d 733, 53 BRBS 35(CRT) (5th Cir. 2019).

The Fifth Circuit affirmed the Board's finding that claimant was injured on a covered situs. Although the Central Facility is a fixed platform whose purpose is to provide support services for oil and gas production platforms, it contains vessel docking facilities and cranes used to load and unload vessels. The court rejected the contention that the overall purpose of the facility overrides the fact that loading and unloading takes place where claimant was injured. The court further rejected employer's contention that claimant did not unload "cargo," stating the Act does not have a "maritime cargo" requirement; the nature of the items loaded and unloaded is not determinative. The court distinguished *Munguia*, noting claimant used a crane to unload vessels, and dicta in *Hudson*, *Thibodeaux*, and *Martin* as to any "cargo" requirement. *Wood Grp. Prod. Services v. Director, OWCP*, 930 F.3d 733, 53 BRBS 35(CRT) (5th Cir. 2019).

In this case, claimant was injured while repairing a bulkhead which had collapsed into the water after the land behind it washed into the water during several storms. A private residence abutted

the area, and the water contained a floating dock to which a boat was tied. Once completed, the bulkhead would prevent erosion of the land into the water. The new bulkhead was built by driving piles deep into the canal. The Second Circuit adopted the Ninth Circuit's reasoning in *Hurston*, 989 F.2d 1547, 26 BRBS 180(CRT), and concluded that the bulkhead, which was built on pilings and extended into the water, is a pier within the meaning of the Act. Therefore, the court held that claimant satisfied the situs requirement. *Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied*, 525 U.S. 981 (1998).

In this case involving construction of a public park along the Hudson River where claimant spent one day working on a bulkhead but was injured the next day while working 85 to 90 feet away from the bulkhead, the Board rejected claimant's argument that the entire area around the bulkhead is a covered area. No loading, unloading, building, repairing, or dismantling of vessels occurred in this area, and absent customary maritime activity, a site cannot be a covered "adjoining area." The Board also rejected claimant's assertion that the bulkhead he worked on is similar to the covered pier-like bulkhead in *Fleischmann*, 137 F.3d 131, 32 BRBS 28(CRT). The bulkhead here was made of concrete and granite blocks and did not extend over navigable water but, rather, rested along the land's edge. Thus, it was more akin to the seawall in *Silva*, 23 BRBS 123, which was not a covered situs. Accordingly, the Board affirmed the administrative law judge's order granting employer's motion for summary decision, as claimant failed to establish that his injury occurred on a covered situs. *R.V. [Villaverde] v. J. D'Annunzio & Sons*, 42 BRBS 63 (2008), *aff'd sub nom. Villaverde v. Director, OWCP*, 335 F. App'x 79 (2d Cir. 2009).

Claimant satisfied the situs requirement as he was exposed on a ship and on a pier adjacent to navigable waters to jet fuel which caused a lung injury. *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, *reh'g denied*, 910 F.2d 1179 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991).

Board affirmed a finding that claimant, who was injured when he fell from a tree overhanging a pier while in the process of moving a sailboat along the pier and struck either the side of the pier or the sailboat before hitting the ground, was injured on a covered situs under Section 3(a). It is not relevant that the portion of the pier which claimant struck was not over water or that the pier was under construction. *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

Inasmuch as claimant was injured while working on a pier which was built and maintained for the mooring of boats, the Board reversed the administrative law judge's finding that the situs test was not met. A pier is an enumerated situs under Section 3(a). Thus, the fact that the pier was at the company president's home is not controlling, and the administrative law judge erred in denying coverage on the basis that the home was not customarily used in loading, unloading or working on vessels. *Eckhoff v. Dog River Marina & Boat Works, Inc.*, 28 BRBS 51 (1994).

Applying the jurisdictional law in effect at the time of the manifestation of claimant's disease rather than that in effect at the time of his exposure to asbestos, the Ninth Circuit held that claimant's work in the 1940's on a building way was on a covered situs, as a building way is specifically enumerated in Section 3(a) as amended in 1972. *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 23 BRBS 113(CRT) (9th Cir. 1990).

The Board affirmed the administrative law judge's finding that decedent's work on a dry dock constitutes work on actual navigable waters under *Perini*, as the pre-1972 Act definition of navigable waters includes a dry dock. *Maes v. Barrett & Hilp*, 27 BRBS 128 (1993).

The Board affirmed the administrative law judge's situs finding in this asbestosis death benefits case based on substantial evidence. Claimant's testimony and the decedent's *inter vivos* disability claim forms establish that the decedent was exposed to asbestos while working in dry docks for employer and this evidence was not contradicted or refuted by employer. *Blanding v. Oldam Shipping Co.*, 32 BRBS 174 (1998), *rev'd on other grounds sub nom. Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999).

The administrative law judge weighed the conflicting evidence and determined that claimant's injury occurred on employer's dock in Harvey, rather than in a field in Baton Rouge. Thus, the Fifth Circuit affirmed the administrative law judge's finding that claimant was injured on a covered situs pursuant to Section 3(a) as it was supported by substantial evidence. *Louisiana Ins. Guar. Ass'n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5th Cir. 2000).

The Board affirmed the administrative law judge's finding that claimant, who was injured while working on a "float bridge" at a railroad facility which abuts the Chesapeake Bay, was injured on a covered situs. The Board held that the "float bridge" satisfies the situs criteria using either the administrative law judge's analogy with a pier or by identifying it as an "other adjoining area," as the float bridge is used only to load and unload railcars from barges. Regarding the analogy with a pier, the Board, in a footnote, rejected employer's assertion that enumerated areas must also be "customarily used" in the loading process. *Turk v. E. Shore R.R., Inc.*, 34 BRBS 27 (2000).

The Board rejected claimant's contention that he was injured on a "marine railway," as this term refers specifically to a structure located at the water's edge used to raise a ship out of the water for inspection or repairs. The railway used in the sewage treatment tunnel under the Atlantic Ocean was not used for this purpose. Moreover, claimant's injury did not occur at any other enumerated site or on an "adjoining area." *Morrissey v. Kiewit-Atkinson-Kenny*, 36 BRBS 5 (2002).

The Board affirmed the administrative law judge's conclusion that employer's Gretna Facility is a maritime situs under Section 3(a). The definition of "terminal" used by the administrative law judge describes both the physical attributes of the area and the maritime purpose of the docks, pipelines and storage tanks at the facility, which is to move waterborne shipments from vessel to shore and product from shore to vessel. Substantial evidence of record supports the finding that the facility ships and receives the overwhelming majority of its liquid bulk product from vessels at a dock on its property, and has 60 storage tanks for the liquid bulk product that is unloaded directly from ship to tanks and stored there. *Victorian v. International-Matex Tank Terminals*, 52 BRBS 35 (2018), *aff'd sub nom. International-Matex Tank Terminals v. Director, OWCP*, 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019).

The Fifth Circuit affirmed the finding that the claimant was injured at a maritime terminal, an enumerated situs under Section 3(a). Employer's facility adjoins navigable waters of the Mississippi River; therefore, claimant's injury within the boundaries of the facility renders irrelevant its distance from navigable waters. The multi-functional facility also is within the

industry and regulatory definitions of "terminal" as well as the definition found "useful" by the Supreme Court in *Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Substantial evidence supports the administrative law judge's finding that the facility is customarily used for loading and unloading vessels; therefore, the manufacturing activity also conducted at the facility is an insufficient basis to hold the facility lacks a maritime purpose. *International-Matex Tank Terminals v. Director, OWCP [Victorian]*, 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019).

The Board affirmed the administrative law judge's finding that claimant's injury occurred on a covered situs where claimant was injured in the living quarters located at a marine terminal used for the loading and unloading of vessels. The Board rejected the contention that the living quarters should be considered separate from the marine terminal because of internal security fences separating the loading operations from the rest of the port, noting that the living quarters were designated for use only by people working at the port and were not separated from the loading operations by any structures or a public road. *Spain v. Expeditors & Prod. Serv. Co., Inc.*, 52 BRBS 73 (2018), *aff'd sub nom. Expeditors & Prod. Serv. Co., Inc. v. Director, OWCP*, 792 F. App'x 279, 53 BRBS 75(CRT) (5th Cir. 2019).

The Board affirmed the administrative law judge's finding that the chassis yard where claimant was injured is a part of the terminal. The Board agreed that the following facts regarding the functional and geographic relationship between the chassis yard and the terminal were significant in concluding that "the chassis yard is part of the terminal" and that the terminal "includes the chassis yard:" trains loaded with cargo pass through the chassis yard into the terminal daily and then depart the facility; Gate 22, located on the eastern fence line of the chassis yard, is routinely used to move equipment essential to the handling of intermodal cargo containers into and out of the terminal; the port authority police, though not responsible for guarding the main entrance to the chassis yard on Lee Avenue, is responsible for opening the gates which provide access for trains to move through the chassis yard to the terminal and for opening Gate 22 to enable heavy equipment to move between the chassis yard and the terminal; and employer's movement of the fence line separating the chassis yard and terminal to create an express lane for outbound trucks establishes the "fluidity" of the area and that the chassis yard "is not a discrete parcel, independent from the remainder of the terminal." Consequently, because the terminal is an enumerated site, the Board affirmed the administrative law judge's conclusion that claimant's injury at the chassis yard occurred on a covered situs under Section 3(a) of the Act. *Harris v. Virginia Int'l Terminals, LLC*, 53 BRBS 23 (2019).

The plaintiff filed a FELA negligence action in district court for an injury sustained a railroad bridge over the Elizabeth River in Norfolk. The district court granted the employer's motion to dismiss on the ground that the Longshore Act was the plaintiff's exclusive remedy. On appeal, the Fourth Circuit reversed, holding that the injury did not occur on navigable waters as a bridge was not a covered situs prior to 1972 and is not an enumerated situs under the 1972 Act. In addition, the bridge is not "an other adjoining area" under Section 3(a) as amended. *Muhammad v. Norfolk S. Ry. Co*., 925 F.3d 192, 53 BRBS 29(CRT) (4th Cir. 2019).

Other Adjoining Area

The greatest number of situs cases involve whether a particular site is covered as an "other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." 33 U.S.C. §903(a). Noting that the 1972 Amendments specifically included adjoining areas used for "repairing or building," a vessel but did not mention ship-breaking, which was included in the definition of "maritime employee" for the status inquiry, the Board held that this is an inadvertent omission and found such a situs covered. *Cendejas v. Nicolai Joffe Corp*., 8 BRBS 230 (1978). The 1984 Amendments rectified this omission, including the word "dismantling" after "repairing."

The Fifth Circuit has held that the adjoining area is covered if it is customarily used for loading unloading, repairing or building a vessel by *any* statutory employer, not necessarily by claimant's employer. *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (en banc), *cert. denied*, 452 U.S. 905 (1981), *overruled on other grounds by New Orleans Depot Services, Inc. v. Director, OWCP*, 718 F.3d 384, 47 BRBS 5(CRT) (5th Cir. 2013)(en banc); *Odom Constr. Co. v. U.S. Dep't of Labor*, 622 F.2d 110, 12 BRBS 396 (5th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981). *Accord Wood v. Universa1 Dredging Corp,* 11 BRBS 210 (1979) (reversing administrative law judge's finding of no coverage where claimant was working at a pipe storage facility on naval base 6-8 miles from site of dredging job).

Addressing an argument that an enumerated site must be customarily used for vessel loading, the Supreme Court observed that it is not clear that the phrase "customarily used" was intended to modify more than the immediately preceding phrase "other areas." *Ne. Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 280, 6 BRBS 150, 170 (1977). This issue is discussed in the section on enumerated sites.

The courts of appeals have devised various tests for determining whether an adjoining area is a covered situs.

In *Stockman v. John T. Clark & Son of Boston, Inc*., 539 F.2d 264, 4 BRBS 304 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977), the First Circuit held that claimant was injured on a covered situs where he was injured while stripping a container at the Boston Army Base, a facility two miles by land or 700-800 feet by water from the area where the container was off-loaded from a vessel. The container had travelled by truck between the two sites. The court concluded claimant was injured in a terminal adjoining navigable waters, albeit not the one where the vessel his container was on had berthed, and was thus covered by Section 3(a). Citing *Stockman*, the Board held in *Turner v. Seattle Crescent Container Service*, 5 BRBS 172 (1976), that claimant was injured on a covered situs, where the container storage terminal in which claimant was injured was 2.2 road miles from the terminal where the containers were loaded aboard the vessel. The terminal was enclosed by a security fence and was inaccessible from the adjoining Duwamish Waterway.

Nevertheless it adjoined a navigable waterway and was an essential part of employer's operation. Thus, it was an adjoining area customarily used for loading.

In *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 12 BRBS 808 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981), the First Circuit held a claimant injured at a scrap metal facility, which moved processed metal via conveyors or trucks for loading onto vessels, was covered under Section 3(a). Claimant fell from a conveyor leading to the mill approximately 100 feet from the water's edge. The court initially held that the Board's analysis, holding the site of claimant's injury covered because it was immediately next to the mill and near dock and loading facilities adjacent to a river, was inadequate as the site of an injury must adjoin navigable waters, not a loading area. The situs requirement is not satisfied merely because the injury occurred "near" a covered area. The court determined, nevertheless, that claimant was injured on a covered situs, stating that an expansive construction should be given to the phrase "adjoining area." The court then held that as claimant was injured in an adjoining area used for loading, as well as for manufacturing, he met the situs requirement.

In a pre-*Caputo* decision, the Third Circuit indicated that an employee need only be injured during the course of maritime employment in order to be covered. *Sea-Land Service, Inc. v. Director, OWCP [Johns]*, 540 F.2d 629, 4 BRBS 289 (3d Cir. 1976). In holding that claimant must establish both status as a maritime employee and injury on a covered situs in *Caputo*, 432 U.S. at 279 n. 40, 6 BRBS at 168 n. 40, the Supreme Court noted that the Third Circuit "appears to have essentially discarded the situs test, holding that only 'an employment nexus (status) with maritime activity is necessary' and that the situs of the maritime employee at the time of injury is irrelevant." While *Sea-Land* has not been explicitly overruled, the Third Circuit has applied the situs requirement in post-*Caputo* cases. *See Nelson v. Am. Dredging Co.*, 143 F.3d 789, 32 BRBS 115 (CRT) (3d Cir. 1998); *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112(CRT) (3d Cir. 1992); *Cabaleiro v. Bay Refractory Co., Inc.*, 27 BRBS 72 (1993).

The Ninth Circuit was the first to adopt a comprehensive test addressing a site's location with regard to navigable waters and its "functional relationship" with a body of water, and its test has been frequently cited by the Board and other courts. In *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978), the court stated:

> In order to further Congress's goal of uniform coverage, the phrase "adjoining area" should be read to describe a functional relationship that does not in all cases depend upon physical contiguity. Consideration should be given to the following factors, among others, in determining whether or not a site is an "adjoining area" under Section 903(a): the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the

> proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case.

568 F.2d at 141, 7 BRBS at 411.

For many years, the Fifth Circuit held a broad view of situs as enunciated in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (en banc), *cert. denied*, 452 U.S. 905 (1981). The court rejected the argument that coverage requires that the point of injury not be separated from the water by a building used by a non-maritime purpose; the character of surrounding properties is but one factor to consider in determining whether a site is an "adjoining area." A site need not be contiguous with navigable water; an "adjoining area" can mean a neighboring area. As long as a site is close to or in the vicinity of navigable waters or in a neighboring area, it can come within the Act. The overall area is covered, and the perimeter of an ''area" is defined by its function. The overall area must be customarily used in loading, unloading, building or repairing a vessel. An area's exclusive use, however, need not be maritime, and it is sufficient if it is customarily used by any maritime employer. This factual determination is made by an administrative law judge guided by Section 20(a). To the extent that *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 4 BRBS 482 (5th Cir. 1976), *vacated and remanded*, 433 U.S. 904 (1977), *reaff'd*, 575 F.2d 79, 8 BRBS 468 (5th Cir. 1978), is inconsistent with this broad view of the covered "area," it was overruled. *Perdue* involved five consolidated cases, and the *Winchester* court focused on claimant Perdue, who was injured after travelling by bus about one mile from the waterfront to punch out for the day at the yard's administrative offices. The court in *Perdue* held he was not covered, focusing on the administrative nature of the specific site of injury within the yard, and thus this part of the *Perdue* opinion is at odds with the *Winchester* holding that the nature of the entire area controls. The court thus affirmed the finding that a gear room, located five blocks from the waterfront but not within the port authority property, was a covered situs. The court stated specifically that the gear room operations were part of the ongoing overall loading process, that the gear room was in the most desirable position for servicing the docks and that the building was not clearly outside the waterfront area customarily used for loading.

The Board relied on the *Winchester* test in *Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196 (1984). In *Davenport*, claimant was injured in a cottage which was located in employer's boat yard adjacent to navigable waters. The Board determined that claimant was covered even though the cottage itself was not used for construction and repair purposes. The Board held that the precise location of the injury need not be used for vessel construction or repairs as long as it was part of a facility used for this purpose. Citing *Winchester*, the Board also has stated that Section 3(a) simply requires the existence of an area on or adjoining navigable waters used customarily for significant maritime purposes. *Thornton v. Brown & Root, Inc.*, 16 BRBS 311 (1984). *Thornton* involved a case on remand after a Fifth Circuit holding that, as offshore drilling is maritime commerce, platform

construction is also maritime activity. While this specific holding was subsequently reversed by *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985), the platforms were loaded onto barges and thus similar areas have been held covered on this basis. *See Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990), and cases cited, *infra*.

The Fifth Circuit discussed the scope of *Winchester* in addressing a case where the claimant was injured on a fixed platform connected to docking facility used to load oil onto transport barges. The court stated that the situs inquiry as set out in *Winchester* involves "a simple functional inquiry." The "area" that adjoins navigable waters is that area "customarily used by an employer is loading, unloading, repairing, or building a vessel." The "area" is not an uncovered site simply because a vessel cannot dock for loading and unloading at the precise location. Rather, "if a particular area is associated with items used as part of the loading process, the area need not itself be directly involved in loading or unloading a vessel or physically connected to the point of loading or unloading." As the platform is adjacent to navigable waters and is used in the overall loading process, it is a covered situs. *Coastal Prod. Serv. Inc. v. Hudson,* 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009), *aff'g* 40 BRBS 19 (2006).

However, in *New Orleans Depot Services, Inc. v. Director, OWCP [Zepeda]*, 718 F.3d 384, 47 BRBS 5(CRT) (5th Cir. 2013) (en banc), the Fifth Circuit overruled Winchester, and adopted the reasoning of *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 Fifth Circuit thus held that "adjoining" means "to border on" or "be contiguous with," stating that this definition is more faithful to the plain language of the statute. As the claimant's injury occurred in a small industrial park that was not contiguous with navigable waters, the court held that the situs element was not met.

The Act specifically covers an entire adjoining area used in loading and unloading a vessel. *Caputo*, 432 U.S. 249, 280, 6 BRBS 150. In *Cooper v. John T. Clark & Son of Maryland, Inc.*, 11 BRBS 453 (1979) (S. Smith, dissenting), *aff'd*, 687 F.2d 39, 15 BRBS 5(CRT) (4th Cir. 1982), the Board affirmed the administrative law judge's finding that decedent was injured on a covered situs because the rail head terminal's primary function was to provide a place for loading and unloading vessels and for temporary storage of containers and other water-borne cargo. The Board has also affirmed a finding that a waterfront facility containing loading facilities for grain shipment as well as a grain elevator where grain was processed into pellets and stored was an "adjoining area used for loading and unloading vessels." *Cuellar v. Garvey Grain Co.*, 11 BRBS 441 (1979), *aff'd sub nom. Garvey Grain Co. v. Director, OWCP*, 639 F.2d 366, 12 BRBS 821 (7th Cir. 1981). The Board stated that the Act does not require that the area be used exclusively for loading and unloading vessels.

In *Dravo Corp. v. Banks*, 567 F.2d 593, 7 BRBS 197 (3d Cir. 1977), the Third Circuit found Dravo's entire Neville Island shipbuilding facility was a covered situs "because the entire area comprises a comprehensive shipbuilding operation." 567 F.2d at 595, 7 BRBS at 199. *Accord Morgan v. Ingalls Shipbuilding Corp.*, 3 BRBS 310 (1976), *aff'd*, 551 F.2d 61, 5 BRBS 754 (5th Cir. 1977), *cert. denied*, 434 U.S. 966 (1977). Similarly, in *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 8 BRBS 241 (4th Cir.), *cert. denied*, 439 U.S. 979 (1978), the Fourth Circuit concluded that the shipyard's submarine shop located 1,200 feet from the water,

and the foundry located 3,000 feet from the water met the situs requirement because they were integral parts of the shipyard and were in an adjoining area customarily used by the employer in repairing or building a vessel. In *Alford v. Am. Bridge Div.*, 642 F.2d 807, 13 BRBS 268 (5th Cir. 1981), *modified*, 655 F.2d 86, 13 BRBS 837 (5th Cir. 1981), *cert. denied*, 455 U.S. 927 (1982), the court reversed the Board conclusion that a facility used to fabricate parts was not a covered situs. The court held the steel fabricator's facility on a peninsula jutting into the river was a covered situs, because the fabricator had historically been a shipbuilder, and its current operation involved fabrication of component parts of vessels, which were loaded onto barges at the facility and transported to shipyards for installation in vessels.

Thus, the courts agree that with regard to shipyards and areas used in loading operations, the entire facility is covered. Different results may apply where mixed use facilities, for example, a manufacturing operation with separate dock facilities where supplies or finished products are unloaded or loaded, have clearly defined and separated manufacturing and loading areas. *See Bianco v. Georgia Pac. Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002), and cases cited, *infra*.

There is disagreement on the question of whether an "adjoining area" must be contiguous. The Ninth Circuit and the Board have held that an "adjoining area" need not be contiguous to navigable waters, nor a prescribed distance from the water's edge. *See Herron*, 568 F.2d 137, 7 BRBS 409; *Palmer v. Delta Marine Indus.*, 12 BRBS 957 (1980). The Fifth Circuit also held this view until 2013. *See Winchester*, 632 F.2d 504, 12 BRBS 779, overruled by *Zepeda*, 718 F.3d 384, 47 BRBS 5(CRT). The Eleventh Circuit follows *Winchester*, based on its adoption of all Fifth Circuit decisions prior to October 1, 1981, as binding precedent. *Bianco v. Georgia Pac. Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002). The First and Second Circuits have also relied on the *Herron* factors in addressing the situs inquiry. *See Cunningham v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42(CRT) (1st Cir. 2004); *Triguero v. Consolid. Rail Corp.*, 932 F.2d 95 (2d Cir. 1991). The Third Circuit adopted a liberal view of the situs requirement in holding that a beach reclamation project on Fenwick Island was a covered situs. *Nelson v. Am. Dredging Co.*, 143 F.3d 789, 32 BRBS 115(CRT) (3d Cir. 1998).

However, the Fourth Circuit declined to follow the decisions in *Winchester*, 632 F.2d 504, 12 BRBS 719, and *Herron*, 568 F.2d 137, 7 BRBS 409, and held that an "adjoining area" under Section 3(a) must actually be adjacent to navigable waters and not merely in general geographic proximity to the waterfront in order to meet the situs test. An area is "adjoining" navigable waters only if it is contiguous with or otherwise touches navigable waters. To be included under the Act as an "other area" under the Act, the area must be a discrete shoreside structure or facility, and it must be "customarily used by employer in loading, unloading, repairing, dismantling, or building a vessel." Applying this test, the court affirmed the result reached by the Board, which had found that the situs test was not met under the *Herron* factors, and held that claimant was not covered as he was injured eight-tenths of a mile from the ship terminal and the facility does not adjoin navigable waters. *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996). *Accord Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 85(CRT) (4th Cir. 1998), *cert. denied*, 525 U.S. 1040 (1998); *Parker v. Director, OWCP*, 75 F.3d 929, 30 BRBS 10(CRT) (4th Cir. 1996), *cert. denied*, 519 U.S. 812 (1996).

The *Sidwell* test has been rejected by other courts. In *Cunningham,* the First Circuit assumed without deciding that the functional approach of *Herron* was correct as even under this flexible approach, it agreed with the Board that the situs requirement was not met. However, the court emphasized that it was not employing the Fourth Circuit's strict "adjoining" standard or holding that all intervening property must be maritime in nature in holding that a satellite facility 3.5 to 4 miles from employer's main shipyard was not covered. In *Nelson*, the Third Circuit rejected the *Sidwell* requirement that an area must be a discrete structure or facility, finding that the plain meaning of the statute does not support this interpretation.

The Board follows the law of the circuit in which the case arises, which is based on the location of the injury, 33 U.S.C. §921(c). Thus, *Sidwell* and its progeny are controlling only in the Fourth Circuit. *See generally Dryden v. The Dayton Power & Light Co.*, 43 BRBS 167 (2009). As discussed above, the Fifth Circuit overruled *Winchester* and adopted *Sidwell*. *Zepeda*, 718 F.3d 384, 47 BRBS 5(CRT).

In *Wood v. Universal Dredging Corp.*, 11 BRBS 210 (1979), claimant, who was working on a dredging project at the Ventura Marina, a yacht basin, was injured while loading pipe onto a truck at employer's pipe storage area on a Navy base. The Board reversed the administrative law judge's finding that the site of injury was not covered under *Herron.* The Board held that there is no requirement that a site be "customarily used" by claimant's employer; a site is covered where used for a maritime purpose by any employer. The Board relied on *Stockman* and also concluded that the administrative law judge misapplied *Herron* as the site was adjacent to navigable waters and the record established that circumstances required employer to store the pipe in that area. The Board relied on *Wood* in holding a claimant injured at a similar storage site while loading pilings onto a truck was injured on a covered situs in *Laput v. Blakeslee, Arpaia, Chapman, Inc.*, 11 BRBS 363 (1979). Pilings were delivered to the area by rail, stored there and then loaded onto barges for transport to a pier construction job. Although it had no pier or dock, the site had a bulkhead where barges could be tied up for loading.

In *Short v. Sea Train Shipbuilding Corp*., 9 BRBS 166 (1978) (Miller, dissenting), claimant was injured in a public park, which was separated from employer's shipyard by a public street and several city blocks, while playing in a company-sponsored softball league. The situs requirement of Section 3(a) was not met as the park was not used in loading, unloading, building or repairing a vessel.

In *Nalej v. H. W. Ramberg, Inc*., 8 BRBS 640 (1978), the situs test was met by a machinist injured in employer's truck on a public street in the Brooklyn water-front district while transferring parts between two clearly covered areas located one mile to one and three-quarter miles apart. The Board held that to deny claimant coverage would be to allow claimant to walk in and out of federal jurisdiction during the regular performance of his maritime duties, contrary to the intent of the Act. In *Alford v. MP Indus. of Florida, Inc.*, 16 BRBS 261 (1984), however, the Board rejected claimant's contention that once an employee is engaged in maritime employment, that employee is covered wherever his employment sends him. Thus, claimant who had been sent by employer to pick up supplies for its ship repair business and who was injured on a public highway in a downtown area was not covered. The Board stated that the concern about employees walking in and out of coverage caused Congress to expand the situs requirement and to add the status

requirement, but the 1972 Amendments did not eliminate the Section 3(a) requirement that the injury occur on a maritime situs. *Cf. Cove Tankers Corp. v. United Ship Repair, Inc*., 683 F.2d 38, 14 BRBS 916 (2d Cir. 1982) (court relied on employer's ability to deviate onto the high seas, thus walking the employees in and out of coverage, to find the high seas covered as navigable waters of the U.S.).

In *Sawyer v. Tideland Welding Serv.*, 16 BRBS 344 (1984), claimant was injured on a short stretch of public road located immediately off employer's facility, which was customarily used by employer's employees to travel from employer's east bank facility to employer's west bank facility. The Board held that this area was a covered situs as the injury occurred in a maritime area and as the road serves a maritime purpose as the only land route between the east and west bank facilities.

One of the factors cited by the Ninth Circuit in *Herron*, 568 F.2d 137, 7 BRBS 409, i.e., whether the facility is as close to the water as is feasible given all the circumstances in the case, has been applied by the Board in several cases. In *Ballard v. Newport News Shipbuilding & Dry Dock Co*., 8 BRBS 676 (1978), the Board concluded that a sheet metal shop located two and one-half miles away from the shipyard and surrounded by city streets, private dwellings and commercial structures was a covered situs because the building was located in an area which was particularly suitable for expansion by the shipyard and it was as close to the waterway as feasible given the shipbuilder's rapid expansion. The Board found that the situs test was met in *Gentile v. Golten Marine Co., Inc*., 13 BRBS 65 (1981), when employer, a repairer of marine and non-marine diesel engines, was located as close as feasible to navigable waters (500 to 1,000 feet) between two piers and across the street from shipyard used by another employer. *See Dixon v. John J. McMullen & Associates, Inc.*, 13 BRBS 707 (1981), *decision after remand*, 19 BRBS 243 (1986). In *Dixon,* the Board held that an office building housing a marine architectural firm, located one-half mile from the shipyard and about 30 feet from navigable waters, was as close as feasible and therefore was a covered situs. The Board also determined that as ship design obviously is a necessary step for shipbuilding, the building was "customarily" used for shipbuilding. Following remand, the Board affirmed this decision based on the law of the case.

In *Bennett v. Matson Terminals, Inc.*, 14 BRBS 526 (1981), *aff'd sub nom. Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982), however, the Board found that employer's container refurbishment facility located 12 miles from its terminal was not a covered adjoining area. The Board noted the facility did not require a site particularly suited to maritime uses; the site was not as close as feasible to the terminal and it was chosen on the basis of economic factors considered by businesses generally; and the areas adjoining the facility were not primarily devoted to maritime business pursuits. The Board determined further that the site lacked a functional relationship with the Port of Richmond, which was located within one-half mile of the facility. Citing *Herron*, 568 F.2d at 141, 7 BRBS at 411, and *Bennett*, the Board in *Palma v. California Cartage Co.*, 18 BRBS 119 (1986), affirmed the administrative law judge's finding that claimant failed to satisfy the situs requirement where his work at a container freight station was performed 5 to 8 miles from the port facilities. The site of the freight station was not as close as feasible to the harbor, was not particularly suited to maritime commerce and was chosen because of a favorable lease.

Entire Shipyard Covered

Employer's yard adjoined navigable waters and was used for the fabrication and repair of component parts used on fixed oil platforms as well as drilling barges and vessels used in laying pipe; these parts were also loaded and unloaded onto vessels at the yard. Since the yard was customarily used for loading and unloading activities as well as the fabrication and repair of parts for vessels, the Board affirmed the administrative law judge's conclusion that claimant was injured on a covered situs although he was injured while performing work on a part for a fixed oil platform. *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). The Fifth Circuit affirmed the Board's holding that claimant was injured on a covered situs, stating that where claimant was engaged in maritime activities in employer's yard, an area adjoining navigable water, the requirements of Section 3(a) were met. The court rejected employer's argument based on its decision in *Mills v. Director, OWCP*, 877 F.2d 356, 22 BRBS 97(CRT) (5th Cir. 1989), as this case does not arise under OCSLA. *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

The Board affirmed the administrative law judge's finding that employer's fabrication yards which fabricated parts for oil rigs and where claimant performed load-out operations were "adjoining areas" under Section 3(a) because they meet the functional and geographic nexus test of the Fifth Circuit in *Winchester*, 632 F.2d 504, 12 BRBS 719, as the yards are adjacent to navigable waters and used for loading vessels. That these yards were held insufficient to meet the situs requirement of the OCSLA in *Mills*, 877 F.2d 356, 22 BRBS 97(CRT), is irrelevant as this claim is brought under the Longshore Act. *Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998).

The Board affirmed the administrative law judge's finding that claimant's injury occurred on a covered situs, where employer's facility, used in building and repairing parts for offshore rigs, was on an island surrounded by navigable water, the site of the injury was four or five blocks from the water's edge, and the facility served a maritime function in that oil rig platforms were loaded and unloaded from barges and electrical hookups and repairs were performed on the barges. *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999).

Pursuant to the Ninth Circuit's decision in *SAIF Corp*., 908 F.2d 1434, 23 BRBS 113(CRT), and Section 3(a) as amended in 1972, claimant's work in the 1940s at the Swan Island and Vancouver shipyards was on a covered situs, as it is well established that under the 1972 Act, an entire shipyard or terminal facility is considered a covered situs. *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990).

Decedent's employment at the Electric Boat shipyard satisfied the situs test as an entire shipyard facility is considered to be a covered situs pursuant to the 1972 Amendments to the Act. *Peterson v. Gen. Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Ins. Co. of N. Am. v. U. S. Dep't of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993).

The Board affirmed the administrative law judge's finding that decedent's work satisfied the situs requirement, based on the reasonable inference that a naval shipyard is a maritime facility adjoining navigable waters, and is used for shipbuilding and ship repair. *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991).

Affirming an administrative law judge's decision applying the *Herron* factors, the Board held that employer's scrap field where claimant suffered his injury, which was 500 feet from the water's edge, was customarily used by employer in the overall process of unloading vessels and part of employer's waterfront facility. Employer stored scrap at the field for further shipment after it was unloaded from barges. Accordingly, the Board held that the scrap field was part of a general "maritime area" sufficient to constitute an "adjoining area" under Section 3(a) of the Act, and affirmed the administrative law judge's determination that claimant satisfied the situs requirement under the Act. *Waugh v. Matt's Enterprises, Inc.*, 33 BRBS 9 (1999).

Claimant worked as a carpenter repairing and remodeling buildings and was hurt while using a man-lift to repair the building at employer's facility adjacent to navigable waters. The Board affirmed the administrative law judge's determination that claimant was injured on a covered situs. The building was situated in an enclosed, contiguous property, adjacent to a navigable waterway, and at the time of claimant's injury in 2006, the entire property was used for maritime purposes in that employer unloaded log barges and repaired the unloading equipment on the property. The Board rejected employer's assertions that the property is no longer used for maritime purposes, as the issue is not the current state of the property but the state at the time of claimant's injury. *Wakeley v. Knutson Towboat Co.*, 44 BRBS 47 (2010), *aff'd*, 660 F. App'x 487 (9th Cir. 2016).

The Board affirmed the administrative law judge's finding that claimant's injury occurred on a covered situs where claimant was injured in the living quarters located at a marine terminal used for the loading and unloading of vessels. The Board rejected the contention that the living quarters should be considered separate from the marine terminal because of internal security fences separating the loading operations from the rest of the port, noting that the living quarters were designated for use only by people working at the port and were not separated from the loading operations by any structures or a public road. *Spain v. Expeditors & Prod. Serv. Co., Inc.*, 52 BRBS 73 (2018), *aff'd sub nom. Expeditors & Prod. Serv. Co., Inc. v. Director, OWCP*, 792 F. App'x 279, 53 BRBS 75(CRT) (5th Cir. 2019).

The Board reversed the administrative law judge's finding that the parking lot where claimant was injured, within employer's shipyard, is not a covered situs. The Board held that the shipyard is an "other adjoining area," as it is contiguous with navigable water and its function is to build ships, and it is covered in its entirety. The parking lot within the shipyard's boundaries is also covered, and it is unnecessary to address the parking lot's function separately merely because it is separated from the production areas by a fence. The Board held that *Williams*, 45 BRBS 57, provides guidance because situs law in the Fourth and Fifth Circuits is now congruent. The Board distinguished those situations where injuries occurred off-property or on the grounds of mixed-use facilities. *Church v. Huntington Ingalls, Inc., Pascagoula Operations*, 53 BRBS 1 (2019).

Construction/Future Use

The Board affirmed the administrative law judge's finding that the situs element was met, based on the cumulative nature of decedent's injury. Decedent suffered a stroke and collapsed at a dock facility being readied for a casino ship under construction at the Avondale Shipyard. The administrative law judge found that decedent's stroke was due, in part, to stresses he suffered while working at the shipyard and dock facility. The Board held it was unnecessary to determine whether the dock facility was covered as decedent was subjected to work stresses at the shipyard; as he was subject to stress in areas that are indisputably maritime sites, claimant's injury occurred on a covered situs. *Bazor* v. *Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev'd*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003). Reversing the Board, the Fifth Circuit focused solely on the site of the stroke, holding that decedent was not injured at an "adjoining area." At the time of decedent's injury, employer's facility had yet to be used for loading, unloading, or repairing a vessel. "Adjoining area" is determined not only by geographic proximity to navigable waters, but also by the nature of the work performed there at the time of injury. *Boomtown Belle Casino v. Bazor*, 313 F.2d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003).

The Board affirmed the administrative law judge's finding that the situs test is not met. Claimant was injured on dry land adjoining navigable waters during the construction of a lock. The area will have a future maritime use, but that is not determinative, and the situs test is not met merely because the injury occurred adjacent to water. As there is no current maritime use of the site by any employer, the site is not an "adjoining area" under Section 3(a). *Nelson v. Guy F. Atkinson Constr. Co.*, 29 BRBS 39 (1995), *aff'd mem. sub nom. Nelson v. Director*, *OWCP*, 101 F.3d 706 (9th Cir. 1996).

The Board reversed the administrative law judge's finding that claimant was injured on a covered situs where claimant was injured on dry land adjacent to the intracoastal waterway, where barge slips were being constructed. At the time of the injury, the construction site had been cleared and the barge slips had been excavated, but the land between the holes and the waterway had not yet been removed. The Board stated, based on the Fifth Circuit's decisions in *Trotti & Thompson*, 631 F.2d 1214, 12 BRBS 681, and *Bazor*, 313 F.3d 300, 36 BRBS 79(CRT), and the Board's decision in *Nelson*, 29 BRBS 39, that because the site had no current maritime use, was not a previously covered situs such as navigable waters, and the surrounding areas are not used for a maritime purpose, the site is not covered. The fact that the project involved construction of an inherently maritime structure is not sufficient to confer coverage absent a present maritime use of the site. *Tarver v. Bo-Mac Contractors, Inc.*, 37 BRBS 120 (2003), *aff'd*, 384 F.3d 180, 38 BRBS 71(CRT) (5th Cir. 2004), *cert. denied*, 544 U.S. 948 (2005). Affirming this decision, the Fifth Circuit held that because the construction site was not serving a maritime purpose at the time of claimant's injury and had not previously facilitated navigation, the site is not covered. *Tarver v. Bo-Mac Contractors, Inc.*, 384 F.3d 180, 38 BRBS 71(CRT) (5th Cir. 2004), *cert. denied*, 544 U.S. 948 (2005).

***Herron/Winchester*:[1] Geography and Function**
In General

The Board affirmed the administrative law judge's determination that employer's facility did not constitute an "adjoining area" under Section 3(a) under the functional relationship test set forth in *Herron,* 568 F.2d 137, 7 BRBS 409, and employed by the Board in *Bennett,* 14 BRBS 526, where its location 2-3 miles from the water was not particularly suitable for use in maritime commerce, adjoining properties had not been used primarily in maritime commerce, employer had chosen the site largely for economic reasons, and employer had not attempted to locate as close to the water as possible. The Board noted that the facts presented were virtually indistinguishable from those present in *Palma*, 18 BRBS 119. *Lasofsky v. Arthur J. Tickle Eng'g Works, Inc.*, 20 BRBS 58 (1987), *aff'd mem.*, 853 F.2d 919 (3d Cir. 1988).

The Second Circuit held that claimant's injury occurred on a covered situs, when the injury occurred 1 1/4 miles from the water, as claimant's job required that he move containers between the water's edge and the rail facility over a mile away, and as this travel was necessitated by geography. The court recited the *Herron* factors for "adjoining area." *Triguero v. Consol. Rail Corp.*, 932 F.2d 95 (2d Cir. 1991).

The administrative law judge properly found that the evidence failed to satisfy the situs requirement of the Act because the area which surrounded employer's facility was not primarily devoted to uses in maritime commerce and the site was not chosen for its proximity to navigable waters. Board additionally rejected claimant's contention that the situs requirement was not met solely because employer's facility was customarily used and particularly suited for its ship-repair work since any test which focused only upon whether claimant is a maritime employee would effectively eliminate the situs requirement of Section 3(a). *Davis v. Doran Co. of California*, 20 BRBS 121 (1987), *aff'd mem.*, 865 F.2d 1257 (4th Cir. 1989).

Where claimant was injured in the course of his maintenance duties at employer's administrative facility located in an industrial complex, the Board affirmed the administrative law judge's finding, based on the application of *Herron,* that the facility failed to qualify as an "adjoining area" and that the situs requirement was not satisfied. The Board rejected the argument that the situs requirement is automatically met where the site is used for a maritime purpose. *Anastasio v. A.G. Ship Maint.*, 24 BRBS 6 (1990).

The Board affirmed the administrative law judge's finding that claimant's injury did not occur on a covered situs using the *Herron* factors as a guide. Although employer's warehouse was close to the waterway, the location was not chosen out of maritime concerns but simply because the owner inherited the property. Moreover, the surrounding properties were not devoted primarily to uses in maritime commerce. *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).

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[1] In view of *New Orleans Depot Services, Inc. v. Director, OWCP [Zepeda]*, 718 F.3d 384, 47 BRBS 5(CRT) (5th Cir. 2013) (en banc), which overruled *Winchester*, some of the Fifth Circuit cases are now of historical interest only.

The Board affirmed the administrative law judge's conclusion that under the "functional relationship" test of *Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978), employer's ship repair and fabrication shop was not an "adjoining area" under Section 3(a). Even though it was located one mile from the waterfront, it was in an area not primarily devoted to maritime commerce, it was not as close to the water as feasible, and the surrounding properties were not devoted primarily to maritime commerce. Employer's requirement of a 15 to 20 minute drive to the waterfront did not convert the facility into a site with the requisite relationship to navigable waters. *Gonzalez v. Ocean Voyage Ship Repair*, 26 BRBS 12 (1992).

The Board affirmed the administrative law judge's finding that the proximity of employer's facility to the port provided an economic benefit for employer, but vacated the administrative law judge's finding that employer's facility is a covered situs under the Act, as the administrative law judge did not address the weight of the other *Herron* factors, and erred in stating that the rail lines at employer's facility go to the port. *Arjona v. Interport Maint. Co., Inc.*, 31 BRBS 86 (1997). After remand, the Board affirmed the administrative law judge's finding that claimant was not injured on a covered situs based on an application of the *Herron* factors. Employer's property does not have a sufficient functional nexus to maritime activity to warrant a finding of coverage under the Act. Citing *Gonzalez*, 26 BRBS at 12, the Board noted that while the proximity of the site to the port and the economic benefit it allows employer in lowering its customers' costs of transporting containers between the port and the yard supports a finding of coverage, this factor alone is insufficient to support a finding of a covered situs. The site was chosen for its low cost, the surrounding businesses are not maritime in nature, and the site is not particularly suited for maritime purposes. *Arjona v. Interport Maint. Co.*, *Inc.*, 34 BRBS 15 (2000).

Affirming an administrative law judge's decision applying the *Herron* factors, the Board held that employer's scrap field where claimant suffered his injury, which was 500 feet from the water's edge, was customarily used by employer in the overall process of unloading vessels and part of employer's waterfront facility. Employer stored scrap at the field for further shipment after it was unloaded from barges. Accordingly, the Board held that the scrap field was part of a general "maritime area" sufficient to constitute an "adjoining area" under Section 3(a) of the Act, and affirmed the administrative law judge's determination that claimant satisfied the situs requirement under the Act. *Waugh v. Matt's Enterprises, Inc.*, 33 BRBS 9 (1999).

The Board held that it is undisputed that claimant's injury occurred on a beach --a site that is "adjoining" and "contiguous" to navigable water-- but nevertheless, the site of claimant's injury was not a covered situs pursuant to Section 3(a). The Board held that the record in this case is devoid of evidence demonstrating that the unimproved beach fronting the ocean was "customarily used for loading, unloading, repairing, dismantling, or building a vessel." Because the administrative law judge reasonably found that the customary use of the beach is recreational, the Board rejected claimant's contentions that his duties unloading sand from a dredge constitute the "discharge" of sand onto the beach, making it an area "customarily" used for unloading a vessel. *Nelson v. Am. Dredging Co.*, 30 BRBS 205 (1996), *rev'd in pert. part*, 143 F.3d 789, 32 BRBS 115(CRT) (3d Cir. 1998). Reversing the Board, the Third Circuit held that the Board too narrowly defined the word "customarily" in Section 3(a) in this case, by construing it to mean that the *customary* use of the *beach* had to be for some maritime purpose. Rather, the word "customarily" in Section 3(a) modifies the phrase "adjoining area . . . used by an employer," not simply the phrase

"adjoining area," and thus, the dispositive question is whether "an *employer customarily*" *uses the beach* for "loading, unloading . . ." The court rejected the Fourth Circuit's requirement in *Sidwell*, 71 F.3d 1134, 29 BRBS 138(CRT), regarding a "discrete shoreside structure or facility," finding it inconsistent with the plain language of the statute. The court thus held that under the circumstances of this case, the beach at Fenwick Island constituted an adjoining area where employer customarily unloaded sand from its vessels and as such it constituted a covered maritime situs under the Act. *Nelson v. Am. Dredging Co.*, 143 F.3d 789, 32 BRBS 115(CRT) (3d Cir. 1998).

The Third Circuit affirmed the Board's holding that claimant's injury occurred on a covered situs. The court adopted an expansive view of the phrase "adjoining area" in a geographical sense, holding that an area adjoins navigable waters if it is "close to" or "near" those waters. In this case, the court affirmed the finding that the garage where claimant repaired equipment used in the loading process, which was 300 feet from the river, "adjoins" navigable waters. The court further affirmed the finding that the garage has a functional nexus with maritime activities because repair of equipment used in the loading process takes place there. The site need not be used exclusively for an enumerated purpose and thus the fact that other equipment also is repaired there is not dispositive of the coverage issue. In addition, that another part of employer's facility is not a covered site, *see Maraney*, 37 BRBS 97 (2003), is not dispositive in this case as the two cases are factually distinguishable. *Consolidation Coal Co. v. Benefits Review Board,* 629 F.3d 322, 44 BRBS 101(CRT) (3d Cir. 2010), *aff'g D.S. [Smith] v. Consolidation Coal Co.*, 42 BRBS 80 (2008).

The Board affirmed the administrative law judge's finding that decedent's work was performed at a covered situs, as employer's entire work site, as was the case in *Nelson,* 143 F.3d 789, 32 BRBS 115(CRT), was customarily used for its dredging operation, and thus was used in the loading and unloading of the dredged material. *Loyd v. Ram Indus., Inc.*, 35 BRBS 143 (2001).

After discussing *Winchester*, 632 F.2d 504, 12 BRBS 719, the Board affirmed the administrative law judge's determination that claimant's injury at employer's "clean shed" occurred on a covered situs. The site is used to repair devices used on vessels, and thus has a functional nexus with maritime activity. Moreover, the geographic criterion of *Winchester* is satisfied, as the site is approximately 300-400 feet from the navigable St. John's River and is adjacent to a canal which leads to the river. Thus, the injury occurred "within the vicinity" of a navigable body of water, notwithstanding that there are non-maritime businesses and residences in the surrounding area. *Stratton v. Weedon Eng'g Co.*, 35 BRBS 1 (2001) (en banc).

The Board held that employer's Hardings facility is not a covered situs. This facility, used for steel fabrication for employer's shipyard, is located 4 miles from the nearest navigable waters and is in a mixed residential/commercial area. As there is no evidence that the site is as close as feasible to navigable waters or is particularly suitable for maritime uses, it is not an "adjoining area" within the meaning of Section 3(a). *Brown v. Bath Iron Works Corp.*, 22 BRBS 384 (1989).

Finding that the First Circuit has held that the site of an injury must "adjoin navigable waters," but has not addressed the situs inquiry with regard to a site that is not immediately adjacent to navigable waters, the Board held that administrative law judge rationally looked to the tests

espoused in *Winchester*, 632 F.2d 504, 12 BRBS 719, and *Herron,* 568 F.2d 137, 7 BRBS 409. Although EBMF is only 1,400 feet from the New Meadows River, a navigable body of water, and its function is to produce pre-fabricated piping for installation on ships constructed at employer's main shipyard in Bath, Maine, on the Kennebec River, the Board affirmed the administrative law judge's determination that EBMF is not an "adjoining area" with regard to the New Meadows River, as it has no functional relationship with that body of water. The Board held that the functional and geographical criteria must be satisfied in relation to the same body of water, though that water need not be the closest body of water to the facility. Consequently, the Board rejected claimant's assertion that EBMF is a covered situs because it is 1,400 feet from the navigable New Meadows River and has a functional relationship with the Kennebec River, 4-5 miles away. With regard to the Kennebec River, the Board held that while the functional relationship is clearly established, the geographic nexus is absent as EBMF is 4-5 miles inland from the Kennebec River and is separated from it by non-maritime commercial businesses and residences. Thus, EBMF is not within the perimeter of a general maritime area around the Kennebec River. As EBMF did not satisfy both criteria in relation to the same body of water, the Board held that EBMF is not a covered situs, and it affirmed the administrative law judge's denial of benefits. The Board rejected claimant's assertion that its holding effectively revived the *Jensen* line and narrowed coverage to its pre-1972 state. Further, the Board rejected the contention that its holding will result in disparate treatment of similar employees. Rather, in determining coverage, employees are properly distinguished by where the injuries occur. *Cunningham v. Bath Iron Works Corp.*, 37 BRBS 76 (2003) (Hall, J., dissenting), *aff'd sub nom. Cunningham v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42(CRT) (1st Cir. 2004).

Affirming this decision, the First Circuit initially assumed without deciding that the administrative law judge and the Board correctly applied the functional relationship test espoused in *Herron*, 568 F.2d 137, 7 BRBS 409, to determine if a site is an "adjoining area" pursuant to Section 3(a). The court noted that this test provides greater flexibility for determining situs than the test enunciated by the Fourth Circuit in *Sidwell*, 71 F.3d 1134, 29 BRBS 138(CRT). However, the court did not need to decide which test was applicable as the situs element is not met even under the *Herron* approach. The First Circuit held that EBMF is not an "adjoining area" with regard to the New Meadows River, as the site in question must have both a geographic and functional nexus with the same body of water. In this case, the New Meadows River has no functional connection with employer's maritime activities. EBMF is also not an adjoining area in relation to the Bath shipyard and the Kennebec River. The Board correctly concluded that the nature of the area between EBMF and the Kennebec waterfront, in addition to the lack of proximity, compelled the conclusion that the EBMF is outside the perimeter of an "adjoining area" within the meaning of Section 3(a), notwithstanding the functional relationship between the two facilities. In so holding, the court emphasized that it was not "employing the Fourth Circuit's strict "adjoining" standard or holding that *all* intervening property must be maritime in nature." *Cunningham v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42(CRT) (1st Cir. 2004).

The Board affirmed the administrative law judge's finding that claimant's injury, at employer's warehouse, did not occur on an "adjoining area." Employer's warehouse was located near the Mississippi River, but there are no docks at this location and employer does not utilize the River in its business. Rather, employer trucks goods to the Gulf Coast, 65-70 miles away. The Board held that the administrative law judge rationally found that the proximity of employer's facility to

the Mississippi River was not dictated by maritime concerns and that there is no functional relationship between employer's warehouse and the Mississippi River in that the area is not used for loading, unloading, building or repairing vessels. *Charles v. Universal Ogden Services*, 37 BRBS 37 (2003).

In this case arising within the Eleventh Circuit, the Board reversed the administrative law judge's application of the more stringent standard for situs enunciated by the Fourth Circuit. Rather, the Board held that under the controlling standard set out in *Winchester* and followed in *Bianco*, 304 F.3d 1053, 36 BRBS 57(CRT), claimant's injury occurred on a covered situs as the undisputed facts establish both the geographic and functional nexus required by that standard. Specifically, the record establishes that employer's business is "within the vicinity" of the Brunswick River, *i.e.*, it relocated to the Brunswick River to facilitate its maritime business, and did, in fact, use the river on a number of occasions in furtherance of its business, and that its facility is used to fabricate and construct marine parts. *Pearson v. Jered Brown Bros.*, 39 BRBS 59 (2005), *aff'd on recon. en banc*, 40 BRBS 2 (2006).

The Board affirmed the administrative law judge's finding that decedent's death did not occur on a covered situs. Employer's facility, an oil flocculation plant at which petroleum is processed, was not used for loading, unloading, repairing, dismantling, or building vessels, and the location of the site was not dictated by maritime concerns. There is no functional relationship with the Pacific Ocean, which is 300 feet away from the plant. Accordingly, the administrative law judge's grant of summary decision for employer on this issue was affirmed. *L.V. [Valladolid] v. Pac. Operations Offshore, LLP*, 42 BRBS 67 (2008), *aff'd in pert. part and rev'd on other grounds,* 604 F.3d 1126, 44 BRBS 35(CRT) (9th Cir. 2010), *aff'd*, 565 U.S. 207, 45 BRBS 87(CRT) (2012).

The Ninth Circuit affirmed the Board's decision that decedent's death at an onshore oil processing facility was not covered by the Longshore Act. The Ninth Circuit applied the *Herron* factors to conclude that the facility did not have a functional relationship to the ocean, which was 250-300 feet from the facility. The facility was separated from the ocean by a road and railroad tracks and there were no piers, docks, or other loading facilities nearby. No nearby businesses were maritime in nature. The facility also was not used for "intermediate steps" in the unloading process. The scrap metal would be offloaded at pier three miles away, trucked to the facility, and left there for up to two years. The maritime activities ended at the pier three miles away. Thus, the death did not occur on a covered situs. *Valladolid v. Pac. Operations Offshore, L.L.P.*, 604 F.3d 1126, 44 BRBS 35(CRT) (9th Cir. 2010), *aff'd on other grounds*, 565 U.S. 207, 45 BRBS 87(CRT) (2012).

After review of the relevant *Cunningham/Herron/Winchester* factors, the Board held that employer's 95 Fargo St. facility, where claimant sustained his injury, had a functional and geographic nexus with navigable waters such that it is an "adjoining area" under Section 3(a). The record establishes that this facility is as close to the Reserved Channel and Boston Harbor as is feasible (one mile), that employer's relocation of its chassis repair work from the Conley Terminal to the 95 Fargo St. facility was dictated by maritime concerns, and that the 95 Fargo St. facility is in the general geographic area of the Boston Harbor. The facility is used for the repair of chassis used to transport shipping containers and is a common geographic area with the Conley Terminal. Consequently, the Board reversed the administrative law judge's finding that claimant's injury did not occur on a covered situs, vacated her denial of claimant's claim, and remanded the case for

consideration of the remaining issues. *S.W. [Wallace] v. Atl. Container Serv.*, 43 BRBS 118 (2009).

The Board affirmed the administrative law judge's finding that claimant's injury occurred on a covered situs. The yard where the injury occurred was approximately 300 yards from the Industrial Canal, which is a navigable waterway. It did not directly adjoin the waterfront, but the waterfront was accessible by road. Thus, the site had a geographic nexus with navigable waters. It also had a functional nexus as the site was used to repair and store containers, some of which were used in marine transportation. The Board held that it is sufficient that the area is associated with items used in the loading and unloading process, even if the site is not directly used for the loading process itself. This result is consistent with the Fifth Circuit's decisions in *Winchester*, 632 F.2d 504, 12 BRBS 719 and *Hudson*, 555 F.3d 426, 42 BRBS 68(CRT). *Zepeda v. New Orleans Depot Services, Inc.*, 44 BRBS 103 (2010), *aff'd sub nom. New Orleans Depot Services, Inc. v. Director, OWCP*, 689 F.3d 400, 46 BRBS 41(CRT) (5th Cir. 2012), *rev'd on reh'g en banc*, 718 F.3d 384, 47 BRBS 5(CRT) (5th Cir. 2013).

The Fifth Circuit affirmed the finding that claimant, who worked as a container and chassis repairman, was injured on a maritime situs under Section 3(a). Claimant was injured while working for employer at a facility 300 yards from navigable water, and employer stipulated that this site satisfied the geographic requirement of the situs test. The court determined that substantial evidence supported the finding that the containers on which claimant worked were used in the loading process; accordingly, the site had a functional relationship to maritime activity. *New Orleans Depot Services, Inc. v. Director, OWCP [Zepeda]*, 689 F.3d 400, 46 BRBS 41(CRT), *rev'd on reh'g en banc*, 718 F.3d 384, 47 BRBS 5(CRT) (5th Cir. 2013).

The Fifth Circuit overruled *Winchester*, and adopted the reasoning of *Sidwell,* 71 F.3d 1134, 29 BRBS 138(CRT) (4th Cir. 1995). The Fifth Circuit thus held that "adjoining" means "to border on" or "be contiguous with," stating that this definition is more faithful to the plain language of the statute. As the claimant's injury occurred in a small industrial park that was not contiguous with navigable waters, the court held that the situs element was not met. *New Orleans Depot Services, Inc. v. Director, OWCP [Zepeda]*, 718 F.3d 384, 47 BRBS 5(CRT) (5th Cir. 2013) (en banc).

The Board reversed the administrative law judge's finding that claimant's injury at the Alta Drive facility occurred on a covered situs. The administrative law judge found that facility is over three miles from another facility on the river and that the neighboring properties were of mixed use, with none being maritime. Nevertheless, he found that it is as close as feasible, and thus is a covered "adjoining area." A facility must have a geographic nexus and a functional nexus with navigable water, and even a facility that "is as close as feasible" must be "within the vicinity" of that navigable water or within the geographic perimeter of sites involved in maritime commerce. As the facility was over three miles from the river, over bridges and highways, in an area that was not used by other maritime enterprises, and as employer rejected other properties closer to the river and as the TraPac facility was not operational at the time of claimant's injury, the Board relied on *Cunningham* and *Lasofsky* and held that the Alta Drive facility was not within the vicinity of navigable water and, thus, did not satisfy the geographic element of the situs requirement. *Ramos*

v. Container Maint. of Florida, 45 BRBS 61 (2011), *aff'd sub nom. Ramos v. Director, OWCP*, 486 F. App'x 775 (11th Cir. 2012).

The Board affirmed the administrative law judge's finding that the site of claimant's injury is not an "adjoining area" as the evidence is insufficient to establish that employer's temporary facility had any functional nexus with the maritime purposes of the Act. Specifically, the Board noted that the record contains evidence establishing that the purpose of employer's business, to place a boom across the Los Angeles River to collect trash and other debris, had no relationship to the loading and unloading of vessels and thus, that the administrative law judge rationally found no evidence that employer's temporary facility was being used for the maritime purposes of the Act, i.e., the loading, unloading, repairing, dismantling, or building of a vessel, or that it had any relationship to such activities at the Port of Long Beach. *O'Donnell v. Nautilus Marine Protection, Inc.*, 48 BRBS 67 (2014).

Claimant was injured at the Union Pacific Intermodal Facility (UPIF) in Seattle during the course of his work as a commercial truck driver with employer. The administrative law judge, based upon a weighing of the *Herron* factors, found that the UPIF is essentially a railyard where trucks load and unload containers. The administrative law judge concluded that claimant was not injured on a covered situs. The Board held substantial evidence supported the findings that the UPIF is not located in, and does not function as, an area of maritime commerce, as it is surrounded by mixed-use properties, it is located several miles from the Port of Seattle, and it is not customarily used in the loading or unloading of any vessels. The Board, therefore, affirmed the finding that the UPIF is not an "adjoining area," and his consequent conclusion that claimant's injury did not occur on a covered situs under Section 3(a). *Ahmed v. W. Ports Transp., Inc.*, 50 BRBS 41 (2016), *aff'd*, 731 F. App'x 661 (9th Cir. 2018).

Mixed Used Facilities

The Board, applying *Winchester*, 632 F.2d 504, 12 BRBS 719, affirmed the administrative law judge's finding that the steel mill where claimant was injured did not qualify as a situs covered under Section 3(a) of the Act. Although the mill was located only one-quarter of a mile from its own dock facility on the Mississippi River at which loading and unloading activities occurred, this dock area was separate and distinct from the mill; thus, unlike *Prolerized New England Co. v. BRB*, 637 F.2d 30, 12 BRBS 808 (1st Cir. 1980), the line between the mill's manufacturing and loading operations is clearly drawn. Therefore, as the mill area is not used for traditional maritime activity but rather involves manufacturing products which are not used for maritime purposes, the mill is not a covered situs. *Melerine v. Harbor Constr. Co.*, 26 BRBS 97 (1992).

Applying *Winchester*, 632 F.2d 504, 12 BRBS 719, and *Melerine*, 26 BRBS 97, the Board held that claimant's injury in a warehouse shipping bay at employer's steel production facility, while loading steel onto a truck bound for a barge, did not occur on a covered situs. The Board stated that both geography and function are necessary considerations in determining whether a site constitutes a covered adjoining area under Section 3(a). Although the facility where claimant was injured is only ¼ to ½ mile from navigable water, the administrative law judge properly concluded it was geographically separate from the barge loading docks. Further, the Board held that the administrative law judge correctly determined that the area in which claimant was injured does not serve a maritime function. The shipping bay in this case is used only to load trucks, and there is nothing inherently maritime about loading steel onto trucks. Therefore, the Board rejected claimant's argument that *Melerine* is distinguishable and held that it is controlling law, and, consequently, that claimant is not entitled to benefits under the Act. *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998).

The Board rejected employer's argument that its fabrication yards, where parts for oil rigs were made, was not a covered situs, as the parts were loaded onto barges at this facility Claimant performed load-out operations at these facilities which were adjacent to navigable waters and thus meet the functional and geographic nexus test of the Fifth Circuit in *Winchester*, 632 F.2d 504, 12 BRBS 719. *Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998).

The Board affirmed the administrative law judge's determination that claimants, who were injured in Building 10 of employer's fertilizer manufacturing facility where finished product was stored and then either loaded onto truck or rail cars or transferred to Building 9 for loading via conveyor onto barges, were injured on a covered situs. These buildings, which adjoin the navigable waters of the Houston Ship Channel, satisfy the function and geography test of the Fifth Circuit, *Winchester*, 632 F.2d 504, 12 BRBS 719. The administrative law judge found that Building 10 is in close proximity to the docks and they are not separate and distinct areas. While Building 10 is not directly used in loading

vessels, the conclusion that it is not a separate and distinct area is supported by the fact that it is linked by conveyors to other areas. As part of employer's business involves sending and receiving goods by water, the facility has a maritime function and geographically, the entire facility and the building in which claimants were injured are adjacent to navigable waters and the docks. *Gavranovic v. Mobil Mining & Minerals*, 33 BRBS 1 (1999).

The Board held that claimant, who was injured in a warehouse while unloading angle irons from a rail car, was injured on a covered situs, as the warehouse and employer's facility are located within the Port of Houston and five percent of the cargo en route through the warehouse is transported by ship, notwithstanding that it may first be stored in a lot ("point of rest" rejected). The Board held that employer's warehouse, therefore, satisfied the Fifth Circuit's geographic and functional requirements for situs under the Act pursuant to *Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980). *Uresti v. Port Container Indus., Inc.*, 33 BRBS 215 (Brown, J., dissenting), *aff'd on recon.,* 34 BRBS 127 (2000) (Brown, J., dissenting). On employer's motion for reconsideration, the Board reaffirmed its holding that claimant's injury occurred on a maritime situs. The warehouse where claimant was injured is customarily used for maritime purposes because five percent of the materials passing through the warehouse traveled within maritime commerce. The Board distinguished its decision in *Stroup*, 32 BRBS 151 (1998), because the facility therein was physically separate from a maritime facility, and the finished product from the steel manufacturing plant in that case had yet to begin its maritime travel at the point where the claimant was injured in the shipping bay. Here, however, and also in *Gavranovic,* 33 BRBS 1 (1999), the materials which passed through the warehouse were already in maritime commerce, and the overall area in which the injury occurred was a maritime facility. *Uresti v. Port Container Indus., Inc.*, 34 BRBS 127 (2000) (Brown, J., dissenting), *aff'g on recon.* 33 BRBS 215 (2000) (Brown, J., dissenting).

Decedent in this case worked at a facility which manufactured aluminum. It was adjacent to navigable waters and a portion of the facility was used for loading and unloading materials which were transported by a conveyor system. Claimant was a maritime employee by virtue of his work with conveyors. The Board discussed its decisions in *Gavranovic,* 33 BRBS 1, *Stroup*, 32 BRBS 151, and *Uresti*, 33 BRBS 215, *on recon.,* 34 BRBS 127, in holding that the portions of employer's facility used in loading and unloading are covered while areas devoted to the manufacturing process are not. As the manufacturing plant itself lacks the functional nexus, it cannot be brought into coverage merely because goods are shipped from another area of the facility. The Board held that in order for the death to be compensable, decedent's exposure to asbestos must have occurred, at least in part, on a covered situs, that is, a covered portion of employer's facility. Thus, while it is neither necessary that the last exposure nor the majority of the exposure comes from the covered areas, *some* exposure must have occurred within a covered area for employer to be held liable. Where there is conflicting testimony as to whether decedent was exposed to asbestos while working on the covered portions of employer's facility, the case must be remanded for a determination by the administrative law judge of where

decedent's injury occurred and, thus, whether the injury is compensable. *Jones v. Aluminum Co. of Am.*, 35 BRBS 37 (2001).

Citing *Jones*, 35 BRBS 37 (2001), and *Stroup,* 32 BRBS 151 (1998), the Board initially rejected claimant's contention that the administrative law judge erred by "dividing" employer's manufacturing facility into maritime and non-maritime sites. The Board stated that the issue of coverage concerns whether claimant was injured while working at the maritime or manufacturing portion of employer's facility. The Board held that, as was the case in *Jones*, employer's manufacturing plant, consisting of the wallboard and gypcrete departments, is not a covered situs, since, as the administrative law judge found, it is not an area used for maritime activity but rather involves the manufacturing of products which are not used for maritime purposes. In so holding, the Board relied on the administrative law judge's rational factual determinations that: the areas where claimant's injuries occurred are within a separate facility and not a part of the port area; the maritime activity of unloading the gypsum from the ships continued along employer's conveyor belt until it was received in the rock shed for storage but did not continue beyond that into employer's manufacturing facilities; and the specific buildings where the injuries occurred, *i.e.*, the wallboard and gypcrete departments, were used solely in the manufacturing process rather than as a step in the chain of unloading raw materials. *Bianco v. Georgia Pac. Corp.*, 35 BRBS 99 (2001), *aff'd,* 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002). Affirming this decision, the Eleventh Circuit held that the sheet rock production department where claimant was injured is not an "other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel" because it is not an area customarily used for maritime purposes although it may adjoin navigable waters. The court rejected claimant's contention that it must hold that the entire facility is a covered situs since a portion of its use is maritime, stating that if it did so hold, it would be writing out of the Act the requirement that the adjoining area where the injury occurred must be customarily used for maritime purposes. *Bianco v. Georgia Pac. Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002).

The Board, applying *Winchester*, 632 F.3d 504, 12 BRBS 719, affirmed the administrative law judge's finding that claimant's place of injury, a phosphoric acid plant in a fertilizer manufacturing facility, does not satisfy the situs requirement under the Act. Although the plant was geographically close to navigable water where ships are unloaded, the plant itself was not used for loading and unloading. The Board rejected the contention that the entire facility must be a covered situs, citing *Bianco,* 35 BRBS 99, *Jones,* 35 BRBS 37, *Stroup,* 32 BRBS 151, and *Melerine,* 26 BRBS 97. The Board distinguished *Gavranovic,* 33 BRBS 1, as in that case the claimant was injured in a building related to the area where fertilizer products were loaded onto vessels via conveyor belts. *Dickerson v. Mississippi Phosphates Corp.*, 37 BRBS 58 (2003).

The Board affirmed the administrative law judge's finding that claimant's injury did not occur on a covered situs. The Board held that the site of claimant's injury, a slurry pond

at employer's Robena coal preparation plant is not an "adjoining area" under Section 3(a), since it is functionally and geographically separate from employer's unloading/loading operations and it is not used for any maritime purpose. In its decision, the Board explicitly rejected claimant's contention that employer's entire coal preparation facility must be a covered situs under *Winchester*, 632 F.2d 504, 12 BRBS 719, since much like the circumstances in *Bianco*, 35 BRBS 99, *Jones*, 35 BRBS 37, and *Dickerson,* 37 BRBS 58, the facility herein contains distinct areas used for loading and unloading, and for non-maritime manufacturing purposes. *Maraney v. Consolidation Coal Co.*, 37 BRBS 97 (2003).

The Board affirmed the administrative law judge's finding that claimant's injury at employer's Robena facility occurred on an "adjoining area" under Section 3(a). Claimant was injured at a repair and maintenance facility that serviced equipment used in loading and unloading coal onto and from barges. The injury site need not be exclusively used for loading, unloading, repairing, dismantling, or building a vessel to constitute an adjoining area. Moreover, employer's facility need not repair and service heavy equipment that is exclusively used in loading and unloading coal; the fact that the garage has a functional nexus with the loading process on navigable waters is sufficient to bring it within the scope of Section 3(a). This case is distinguishable from *Maraney*, 37 BRBS 97 (2003), where the Board affirmed the administrative law judge's finding that claimant's injury at employer's Robena facility did not occur on a covered situs. In *Maraney*, the injury site, a slurry pond, had no functional relationship with navigable water where employer's unloading/loading operations occurred. In this case, employer's garage where claimant was injured is located approximately 100 yards from navigable waters and 50 yards from the de-stock hopper used in the loading of stockpiled coal stored adjacent to the garage. The garage is also located next to Quonset huts that store steel cable used in the unloading/loading process. Thus, in addition to a maritime function, the site has a geographic nexus to the loading site on the river. *D.S. [Smith] v. Consolidation Coal Co.*, 42 BRBS 80 (2008), *aff'd sub nom. Consolidation Coal Co. v. Benefits Review Board*, 629 F.3d 322, 44 BRBS 101(CRT) (3d Cir. 2010).

The Third Circuit affirmed the Board's holding that claimant's injury occurred on a covered situs. The court adopted an expansive view of the phrase "adjoining area" in a geographical sense, holding that an area adjoins navigable waters if it is "close to" or "near" those waters. In this case, the court affirmed the finding that the garage where claimant repaired equipment used in the loading process, which was 300 feet from the river, "adjoins" navigable waters. The court further affirmed the finding that the garage has a functional nexus with maritime activities because repair of equipment used in the loading process takes place there. The site need not be used exclusively for an enumerated purpose and thus the fact that other equipment also is repaired there is not dispositive of the coverage issue. In addition, that another part of employer's facility is not a covered site, *see Maraney*, 37 BRBS 97 (2003), is not dispositive in this case as the two cases are

factually distinguishable. *Consolidation Coal Co. v. Benefits Review Board*, 629 F.3d 322, 44 BRBS 101(CRT) (3d Cir. 2010).

The Board rejected employer's argument that *Thibodeaux,* 370 F.3d 486, 38 BRBS 13(CRT), applies to this case to preclude coverage because claimant was injured on a fixed platform. The Board held that, because the fixed platform had a docking facility used to load crude oil onto barges unlike in *Thibodeaux*, it was used for a maritime purpose and thus is an "adjoining area." Further, because the platform facility is a configuration of connecting pipelines with no distinct separation between the processing and the loading areas, the entire facility is covered, as in *Gavranovic*, 33 BRBS 1. Thus, the Board affirmed the administrative law judge's finding that claimant was injured on a covered situs even though he was not injured in the docking area. *Hudson v. Coastal Prod. Services, Inc.*, 40 BRBS 19 (2006), *aff'd*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009).

The Fifth Circuit affirmed the Board's holding that claimant was injured on a covered situs. The court observed that the fixed platform is directly and permanently connected to a docking facility used to load oil onto transport barges, and that the platform serves as a temporary holding station for the already produced oil until it is further transferred 30-40 feet to the loading facility where it is held until being shipped ashore by barge. The court discussed the "mixed use facilities" cases and stated that *Gavranovic,* 33 BRBS 1, supports the Board's decision that the platform and the oil storage barge are part of the same facility used in the overall loading process. *Coastal Prod. Serv. Inc. v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009).

The Board discussed the "mixed use facility cases" in this case which arises in the Sixth Circuit. Claimant was injured at an outdoor site located within a conveyor belt system and between employer's power plant and the Ohio River. Coal is unloaded from river barges and transported by conveyor belts from the barges to the plant. The Board held that claimant was injured within the part of employer's facility used for unloading coal and thus in an "adjoining area." Claimant's injury within the vicinity of employer's conveyor belt system was in an area used for a maritime activity, the unloading of coal barges, and not within the electricity generating area of employer's facility. The outdoor area of employer's conveyor belt system has a functional relationship with the Ohio River, as it is adjacent to the river, and is customarily used for the maritime activity of unloading coal from barges. There is no basis in the existing circuit court law for apportioning this conveyor unloading system outside of the power plant into covered and uncovered situses. The Board thus affirmed the administrative law judge's finding that the site of claimant's injury is an "adjoining area" under Section 3(a) and his finding of coverage under the Act, notwithstanding his erroneous finding that the entire facility is a covered situs. *Dryden v. The Dayton Power & Light Co.*, 43 BRBS 167 (2009).

In this case, involving a mixed-use facility at which raw bauxite is unloaded from ships, stored in sheds, and ultimately manufactured into aluminum oxide, the Board affirmed the administrative law judge's finding that, based on *Gavranovic*, 33 BRBS 1, employer's storage shed building, into which the off-loaded bauxite is delivered and underneath which claimant sustained his injury, is an "adjoining area" pursuant to Section 3(a). The Board observed that the building adjoins navigable waters, it is connected to the docks by conveyor belts, and it is used in furtherance of employer's unloading, rather than manufacturing, process. In particular, the Board noted that no manufacturing takes place in the building where claimant was injured. *Martin v. BPU Mgmt., Inc./Sherwin Alumina Co.*, 46 BRBS 11 (2012), *rev'd sub nom. BPU Mgmt., Inc./Sherwin Alumina Co. v. Director, OWCP*, 732 F.3d 457, 47 BRBS 39(CRT) (5th Cir. 2013).

The Fifth Circuit reversed the Board's affirmance of the finding that claimant satisfied the situs inquiry's functional prong, where claimant was injured in an underground cross-tunnel. The court emphasized that the site of the injury need be used for unloading a vessel only "customarily;" however, the fact that surface-level storage buildings are connected to the unloading process does not automatically render the cross-tunnels beneath the buildings a part of the unloading process. Citing *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 698 (1979), the court defined "vessel-unloading" as "includ[ing] the transfer of cargo from ship to shore only until it is surrendered for land transport," as this is the point where the longshoreman's duty to unload and move the cargo ceases. As applied to a mixed-use facility, the court held that the unloading process ends when the dock employees cease unloading cargo and deposit it for another "party" to retrieve, e.g., when the longshoremen no longer exercise control over the cargo. Therefore, because the bauxite claimant worked with had reached the cross-tunnel only after sitting in storage and the manufacturing process had begun, the site of injury was not used for "unloading." *BPU Mgmt., Inc./Sherwin Alumina Co. v. Director, OWCP [Martin]*, 732 F.3d 457, 47 BRBS 39(CRT) (5th Cir. 2013).

The Board rejected the employer's contention that its Gretna facility is not a covered situs because "manufacturing" also takes place there. The administrative law judge found that employer's facility does not contain separate manufacturing facilities and that no specific storage tanks or area of the facility is dedicated solely to blending and sparging liquid bulk product. Moreover, the administrative law judge credited evidence that 70 to 80 percent of the product stored at the terminal does not get blended or sparged in the storage tanks, but is shipped onto vessels from the tanks in the form in which it was received. *Victorian v. International-Matex Tank Terminals*, 52 BRBS 35 (2018), *aff'd sub nom. International-Matex Tank Terminals v. Director, OWCP*, 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019).

The Fifth Circuit affirmed the finding that the claimant was injured at a maritime terminal, an enumerated situs under Section 3(a). Employer's facility adjoins navigable waters of the Mississippi River; therefore, claimant's injury within the boundaries of the facility renders irrelevant its distance from navigable waters. The multi-functional facility also is

within the industry and regulatory definitions of "terminal" as well as the definition found "useful" by the Supreme Court in Caputo, 432 U.S. 249, 6 BRBS 150 (1977). Substantial evidence supports the administrative law judge's finding that the facility is customarily used for loading and unloading vessels; therefore, the manufacturing activity also conducted at the facility is an insufficient basis to hold the facility lacks a maritime purpose. *International-Matex Tank Terminals v. Director, OWCP [Victorian]*, 943 F.3d 278, 53 BRBS 79(CRT) (5th Cir. 2019).

Oil Platforms

Since there is nothing inherently maritime about a fixed oil drilling platform and since the particular platform where claimant was injured had no maritime connection or maritime function, the Board held that claimant's injury did not occur on a situs covered under the Act. *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 denied*, 8 F.3d 24 (5th Cir. 1994), *cert. denied*, 511 U.S. 1086 (1994). On reconsideration en banc, the Board affirmed its holding that the fixed wellhead platform upon which claimant was injured was not an "adjoining area" under Section 3(a). Since there is nothing inherently maritime about building and maintaining oil pipelines and platforms, and the only items claimant transported to and unloaded at the wellhead were tools and supplies used for the wellhead's maintenance, the situs element is not met due to a lack of a maritime nexus. *Munguia v. Chevron U.S.A., Inc.*, 25 BRBS 336 (1992), *aff'g on recon. en banc* 23 BRBS 180 (1990), *aff'd on other grounds*, 999 F.2d 808, 27 BRBS 103(CRT), *reh'g denied,* 8 F.3d 24 (5th Cir. 1993), *cert. denied*, 511 U.S. 1086 (1994). On appeal, the Fifth Circuit held claimant lacked status and did not address the situs finding.

The Fifth Circuit held that a parking lot constructed at a heliport used by employer to transport crewmen to fixed oil platforms is not a covered situs under Section 3(a) as it is not customarily used in loading, unloading, repairing or building a vessel. Following *Winchester,* the court acknowledged that absolute contiguity with navigable waters is not required for an "adjoining area" under Section 3(a), but held that the site lacked the requisite maritime nexus. *Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31 BRBS 199(CRT) (5th Cir. 1998).

The Board affirmed the administrative law judge's finding that claimant's injury occurred on a covered situs pursuant to Section 3(a), where employer's facility, used in building and repairing parts for offshore rigs, was on an island surrounded by navigable water, the site of the injury was four or five blocks from the water's edge, and the facility served a maritime function in that oil rig platforms were loaded and unloaded from barges and electrical hookups and repairs were performed on the barges. *Cooper v. Offshore Pipelines Int'l, Inc.*, 33 BRBS 46 (1999).

The Fifth Circuit affirmed the Board's holding that claimant, a pumper/gauger who worked on a fixed oil and gas production platform, was not injured on a covered situs. The court initially held that the platform, which was built on pilings over marsh and water and was inaccessible from land, does not constitute a "pier," applying a functional approach. The Supreme Court's decision in *Herb's Welding*, 470 U.S. 414, 17 BRBS 78(CRT), and the decision in *Munguia,* support the conclusion that fixed oil platforms are not maritime concerns. The court affirmed the holding that the site is not an "other adjoining area" under Section 3(a) as it is not used for maritime activity. *Thibodeaux v. Grasso Prod. Mgmt., Inc.*, 370 F.3d 486, 38 BRBS 13(CRT) (5th Cir. 2004).

The Board rejected employer's argument that *Thibodeaux*, 370 F.3d 486, 38 BRBS 13(CRT), applies to this case to preclude coverage because claimant was injured on a fixed platform. The Board held that, because the fixed platform had a docking facility used to load crude oil onto barges unlike in *Thibodeaux*, it was used for a maritime purpose and thus is an "adjoining area." Further, because the platform facility is a configuration of connecting pipelines with no distinct separation between the processing and the loading areas, the entire facility is covered, as in *Gavranovic*, 33 BRBS 1. Thus, the Board affirmed the administrative law judge's finding that claimant was injured on a covered situs even though he was not injured in the docking area. *Hudson v. Coastal Prod. Services, Inc.*, 40 BRBS 19 (2006), *aff'd*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009).

Affirming the Board's holding that claimant was injured on a covered situs, the Fifth Circuit observed that the fixed platform is directly and permanently connected to a docking facility used to load oil onto transport barges, and that the platform serves as a temporary holding station for the already produced oil until it is further transferred 30-40 feet to the loading facility where it is held until being shipped ashore by barge. The court discussed the "mixed use facilities" cases and stated that *Gavranovic*, 33 BRBS 1, supports the Board's decision that the platform and the oil storage barge are part of the same facility used in the overall loading process. The court distinguished the platform in this case from the drilling platform in *Thibodeaux*, 370 F.3d 486, 38 BRBS 13(CRT), as the latter platform involved no loading or unloading and, thus, did not qualify as an "other adjoining area." *Coastal Prod. Serv. Inc. v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009).

The Board reversed the administrative law judge's finding that claimant failed to satisfy the functional component of the situs inquiry and held, as a matter of law, that claimant was injured on an "adjoining area" under Section 3(a). Claimant was injured in the loading area of the Black Bay Central Facility, a fixed platform that supported the operations of satellite oil and gas production platforms. Supplies and equipment were shipped by vessel from the mainland to the Central Facility where they were unloaded and stored in the warehouse. When supplies were needed on the satellite platforms, they were loaded onto vessels at the Central Facility and shipped to the satellite platforms. The Board held that,

based on the plain language of Section 3(a), the Central Facility, which was customarily used by employer in loading and unloading vessels, qualifies as a covered situs. The Board distinguished the platform in this case from the production platform in *Thibodeaux*, 370 F.3d 486, 38 BRBS 13(CRT), which was not customarily used for loading and unloading vessels. Contrary to the administrative law judge's analysis, the fact that the cargo loaded and unloaded at the Central Facility consisted of supplies and equipment used for oil and gas drilling does not divest the platform of a maritime purpose. *Malta v. Wood Grp. Prod. Services*, 49 BRBS 31 (2015), *aff'd sub nom. Wood Grp. Prod. Services v. Director, OWCP*, 930 F.3d 733, 53 BRBS 35(CRT) (5th Cir. 2019).

The Fifth Circuit affirmed the Board's finding that claimant was injured on a covered situs. Although the Central Facility is a fixed platform whose purpose is to provide support services for oil and gas production platforms, it contains vessel docking facilities and cranes used to load and unload vessels. The court rejected the contention that the overall purpose of the facility overrides the fact that loading and unloading takes place where claimant was injured. The court further rejected employer's contention that claimant did not unload "cargo," stating the Act does not have a "maritime cargo" requirement; the nature of the items loaded and unloaded is not determinative. The court distinguished *Munguia*, noting claimant used a crane to unload vessels, and dicta in *Hudson*, *Thibodeaux*, and *Martin* as to any "cargo" requirement. *Wood Grp. Prod. Services v. Director, OWCP*, 930 F.3d 733 (5th Cir. 2019).

Seawalls, Bulkheads and Bridges

The Eleventh Circuit held that although the structure adjoins navigable waters and rests on vertical pilings anchored in a river bed, a seawall constructed to protect a generating plant from an encroaching river is not a pier or an "other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel" and, accordingly, does not meet the situs test for coverage under the Act. *Brooker v. Durocher Dock & Dredge*, 133 F.3d 1390, 31 BRBS 212(CRT) (11th Cir. 1998), *cert. granted*, 524 U.S. 982, *cert. dismissed*, 525 U.S. 957 (1998).

The Board held that in order to be an "adjoining area," a site must have a maritime nexus. In this case, where claimant was injured at a seawall which protected a public highway, at which no cargo was loaded or unloaded, and which had no navigational aids or boat hookups, the requisite nexus was lacking and the wall was not a covered situs. *Silva v. Hydro-Dredge Corp.*, 23 BRBS 123 (1989).

The Board affirmed the administrative law judge's decision granting employer's motion for summary decision. Claimant worked as a laborer on a beautification project to develop park lands along the Hudson River. One day he repaired a concrete bulkhead and the next he was assisting in the removal of landscape lumber away from the bulkhead area. He was injured when his knee was pinned between lumber and another contractor's construction trailer. As the injury did not occur on navigable waters, on an enumerated site, or on an "other adjoining area customarily used" for maritime activity, having occurred 85 to 90 feet away from the water in an area where no maritime activity occurred, claimant was not injured on a covered situs. The Board rejected

claimant's "walking in and out of coverage" argument, as it does not relate to the situs issue. The Board also rejected claimant's assertion that the bulkhead he worked on is similar to the covered pier-like bulkhead in *Fleischmann*, 137 F.3d 131, 32 BRBS 28(CRT) (*See* Enumerated Sites). The bulkhead here was made of concrete and granite blocks and did not extend over navigable water but, rather, rested along the land's edge. Thus, it was more akin to the seawall in *Silva*, 23 BRBS 123, which was not a covered situs. *R.V. [Villaverde] v. J. D'Annunzio & Sons*, 42 BRBS 63 (2008), *aff'd sub nom. Villaverde v. Director, OWCP*, 335 F. App'x 79 (2d Cir. 2009).

While the injury need not occur on a situs specifically enumerated in Section 3(a), the Act requires that a non-enumerated situs be used in the loading, unloading, building or repairing of a vessel. In this case, claimant was employed to paint an existing in-use bridge. The administrative law judge rationally found that claimant was not injured on actual navigable waters, and there is no evidence that the bridge was used for any of the above purposes. Thus, the situs test was not satisfied. *Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992).

The Board affirmed the administrative law judge's finding that claimant was not injured in an "adjoining area" as the bridge bulkhead area contained no facilities for mooring or loading boats, and no evidence was presented that the canal was used for commercial maritime activities. *Pulkoski v. Hendrickson Bros., Inc.*, 28 BRBS 298 (1994).

The Board rejected claimant's argument that the incomplete bridge on which he worked was really a "pier" and, consequently, an enumerated situs which need not possess a maritime nexus to be covered by the Act. As a bridge is not an enumerated situs, and as there is no evidence demonstrating that the bridge was used for maritime activities, the Board concluded that claimant failed the situs test as a matter of law. *Crapanzano v. Rice Mohawk, U. S. Constr. Co., Ltd.*, 30 BRBS 81, 83-84 (1996).

The Board affirmed the administrative law judge's finding that claimant's injury did not occur on a covered situs. Claimant was injured on a bridge over the Potomac River permanently affixed to land. Thus, his injury would not have been covered prior to the 1972 Amendments, pursuant to *Nacirema*, 396 U.S. 212, and is not covered post-1972 pursuant to *Perini*, as the injury did not occur on navigable waters. The Board also held that *LeMelle*, 674 F.2d 296, 14 BRBS 609, was distinguishable in this Fourth Circuit case. *LeMelle* addressed the status element as situs was agreed to, and the claimant was injured on a bridge piling in the middle of a river. In contrast, claimant herein was injured on a bridge deck permanently attached to and accessible by land. As a bridge is not an enumerated situs, it is not covered under the Act, pursuant to *Nacirema*. *F.S. [Smith] v. Wellington Power Co.*, 43 BRBS 111 (2009).

The plaintiff filed a FELA negligence action in district court for an injury sustained a railroad bridge over the Elizabeth River in Norfolk. The district court granted the employer's motion to dismiss on the ground that the Longshore Act was the plaintiff's exclusive remedy. On appeal, the Fourth Circuit reversed, holding that the injury did not occur on navigable waters or an enumerated situs. Moreover, the bridge was not a facility contiguous to navigable waters that is customarily used for the loading, unloading, building, repairing, or dismantling of a vessel. It is insufficient that the bridge had a lift span to permit vessels to pass underneath it. The decisions in

LeMelle and *Zapata* are distinguished. *Muhammad v. Norfolk S. Ry. Co.*, 925 F.3d 192, 53 BRBS 29(CRT) (4th Cir. 2019).

Claimant was injured while working from a "saddle," which was attached to a bridge pier anchored to the Hudson River riverbed. The bridge under construction, part of the Tappan Zee Bridge project, was not yet affixed to either shoreline at the time of claimant's injury. The Board affirmed the administrative law judge's finding that claimant was not injured on navigable waters, since the saddle, although "over" the river, was attached to the bridge pier, an extension of land. Claimant's injury therefore occurred on a fixed platform, not navigable waters. *Long v. Tappan Zee Constructors, LLC*, 53 BRBS 27 (2019).

Streets and Other Public Areas

The Board reversed an administrative law judge's holding that claimant was injured on a covered situs pursuant to Section 3(a) where he was injured at a restaurant in the course of his maritime employment. The site of injury was the front of a public restaurant on a public street in an area where general maritime activities co-exist with non-maritime activities. As the location of the restaurant was fortuitous and not based on maritime concerns, and because the surrounding area was not primarily used for or suited to maritime commerce, the Board reversed the finding that the area in front of the restaurant is an adjoining area for purposes of the Act. Further, Board noted that at the time of the injury, claimant was not exposed to the hazards uniquely inherent in maritime employment. *Humphries v. Cargill, Inc.*, 19 BRBS 187 (1986), *aff'd sub nom. Humphries v. Director, OWCP*, 834 F.2d 372, 20 BRBS 17(CRT) (4th Cir. 1987), *cert. denied*, 485 U.S. 1028 (1988). The Fourth Circuit rejected the approach in *Sea-Land*, 540 F.2d 629, 4 BRBS 289, which essentially read out the situs requirement, and discussed the *Winchester* and *Herron* tests. Without adopting a test, the court held that on the facts of this case, claimant was outside the Act's coverage. *Humphries v. Director, OWCP*, 834 F.2d 372, 20 BRBS 17(CRT) (4th Cir. 1987), *cert. denied*, 485 U.S. 1028 (1988).

Claimant injured on a public road outside employer's terminal but within the port complex was injured on a covered situs. In reversing the administrative law judge's decision, the Board stated that the facts relied on by the administrative law judge, *i.e.,* that the accident occurred on a public road, that claimant was on his way home at the time of the accident, and that his accident occurred on only one of several access routes to a terminal, are not dispositive. *Hagenzeiker v. Norton Lilly & Co.*, 22 BRBS 313 (1989).

The Board affirmed the administrative law judge's finding that a linesman injured in a car accident occurring on a public road between claimant's home and the harbor was not injured on a covered situs. The administrative law judge properly concluded that, in the absence of record evidence which could establish a nexus between the accident site and maritime commerce, the site of injury did not qualify as an "adjoining area." The Board held that the specific employment requirements concerning the location of claimant's residence and its use as his duty station, and the use of public roads between his home and the harbor do not automatically bring the location of his injury within the coverage of Section 3(a). *Beachler v. Nat'l Lines Bureau, Inc.*, 23 BRBS 438 (1990).

In this case, claimant was injured on a road on the property of employer's Steel Plant which was not used for any maritime activity, and which was two miles from the closest building of employer's shipyard. The Board held that the accident site lacks proximity to navigable waters and claimant was not exposed to maritime hazards, and thus affirmed the administrative law judge's finding that claimant was not injured on a covered situs. *McConnell v. Bethlehem Steel Corp.*, 25 BRBS 1 (1991).

In this Third Circuit case, the Board held that the administrative law judge erred in relying on that court's decisions in *Dravo Corp. v. Maxin*, 545 F.2d 374, 5 BRBS 268(CRT) (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977) and *Sea-Land*, 540 F.2d 629, 4 BRBS 289, to find that the claimant's injury at an auto repair shop 5 miles from the ship on which he was working and 3 miles from navigable water occurred on a covered situs. These decisions, although not specifically overruled, are no longer valid precedent in view of the Supreme Court's holding that both situs and status must be established, *see Caputo*, and more recent Third Circuit decisions acknowledging that the situs requirement must be met. *See Rock*, 953 F.2d 56, 25 BRBS 112(CRT). Thus, it is insufficient that claimant was injured in the course of his maritime employment. As there is no evidence that the general area around the auto shop is a maritime area, and it neither adjoins navigable water nor is used for a maritime purpose, the site is not a covered situs and claimant is not covered by the Act. *Cabaleiro v. Bay Refractory Co., Inc.*, 27 BRBS 72 (1993).

The Board affirmed the administrative law judge's denial of benefits inasmuch as claimant was injured in a car accident on a public road that is not a covered situs. The Board affirmed the administrative law judge's finding that employer was not somehow estopped from contesting Longshore coverage based on the state's denial of his state claim on the ground that his remedy was under the Longshore Act. The Board held that the action of the state cannot be imputed to employer as there is no identity of interest. *Mellin v. Marine World-Wide Services*, 32 BRBS 271 (1998), *aff'd*, 15 F. App'x 169 (4th Cir. 2001).

Fourth Circuit/Fifth Circuit—*Sidwell* and *Zepeda*

The Fourth Circuit declined to follow the opinions in *Winchester*, 632 F.2d 504, 12 BRBS 719, and *Herron*, 568 F.2d 137, 7 BRBS 409, and held that an "adjoining area" under Section 3(a) must actually "adjoin" navigable waters, not merely be in general geographic proximity of the waterfront in order to meet the situs test. An area is "adjoining" navigable waters only if it is contiguous with or otherwise touches navigable waters. To be included under the Act as an "other area" under the Act, the area must be a discrete shoreside structure or facility and it must be "customarily used by employer in loading, unloading, repairing, dismantling, or building a vessel." The court affirmed the finding that the situs test was not met, as claimant was injured eight-tenths of a mile from the ship terminal, and the facility does not adjoin navigable waters. *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 affirmed the finding that the situs test was not met, as claimants were injured at a container repair facility located approximately five miles away from a marine terminal. Applying the principles of its decision in *Sidwell*, 71 F.3d 1134, 29 BRBS 138(CRT), the court held that the repair facility does not "adjoin" navigable waters within the meaning of Section 3(a)

and is therefore not a maritime situs. The court noted that the facility neither is contiguous with navigable waters, nor touches such waters, nor is located within the boundaries of a marine terminal that is contiguous with such waters. The court rejected petitioners' arguments that the repair facility must be construed as an "other adjoining area" within the meaning of Section 3(a) because it was located at the closest feasible site for employer and because employees regularly traveled between the repair facility and employer's ship terminal facility. *Parker v. Director, OWCP*, 75 F.3d 929, 30 BRBS 10(CRT) (4th Cir. 1996), *cert. denied*, 519 U.S. 812 (1996).

The Board held that two employees of a power plant, which was located on Naval property adjacent to the Norfolk Naval Shipyard, were not injured on a covered situs under Section 3(a) of the Act. The Board observed that a railroad spur separates the shipyard from the power plant, and that a chain link fence surrounds the perimeters of each property, further separating the properties from one another. In addition, employer's personnel do not have immediate access to the shipyard, but must obtain a special pass from the shipyard. Based on these factors, the Board concluded that the power plant must be considered to be located on land separate and distinct from the shipyard. Following the Fourth Circuit's holding in *Sidwell*, 71 F.3d 1134, 29 BRBS 138(CRT), the Board held that since the power plant is not contiguous with navigable waters, it is not an "adjoining area" under Section 3(a). *Kerby v. Se. Pub. Serv. Auth.*, 31 BRBS 6 (1997), *aff'd mem.*, 135 F.3d 770 (4th Cir. 1998), *cert. denied*, 525 U.S. 816 (1998).

The Fourth Circuit, following *Sidwell*, reiterated its holding that an "adjoining area" under Section 3(a) must not only "adjoin" navigable waters, but the property must also be a discrete structure or facility, the very *raison d'être* of which is its use in connection with navigable waters. In the instant case, employer's steel fabrication facility, one-third of which was dedicated to maritime related projects, was located 1000 feet from the water's edge, and employer's property itself extended to the water's edge. Nevertheless, the court reversed the Board's holding that the situs test was met, as it was not customary for employer's workers to move between land and the water in any regular way; rather, they remained in the plant fabricating maritime and non-maritime components, just as they would have done if the plant were located at any inland site. The court acknowledged that employer's facility was contiguous with navigable water, and that components were, on rare occasions, shipped by barge from the facility, but found these facts to be fortuitous and not meaningful. *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 85(CRT) (4th Cir. 1998), *cert. denied*, 525 U.S. 1040 (1998).

The Board affirmed the administrative law judge's finding that claimant, who was injured while working on a "float bridge" at a railroad facility which abuts the Chesapeake Bay, was injured on a covered situs under the controlling authority of the Fourth Circuit. The Board held that the "float bridge" satisfies the situs criteria using either the administrative law judge's analogy with a pier or by identifying it as an "other adjoining area," as the float bridge is used only to load and unload railcars from barges. Regarding the analogy with a pier, the Board, in a footnote, rejected employer's assertion that enumerated areas must also be "customarily used" in the loading process. *Turk v. E. Shore R.R., Inc.*, 34 BRBS 27 (2000).

In a case arising in the Fourth Circuit, the Board affirmed the administrative law judge's finding that claimant's injury did not occur on a covered situs, pursuant to the Fourth Circuit's decision in *Brickhouse*, 142 F.3d 217, 32 BRBS 86(CRT). Employer's facility in this case adjoined navigable

waters, but ship repair work did not take place at this facility. The components had to be shipped elsewhere to be installed on vessels, and thus the *"raison d'être"* of the repair facility is not its use in connection with navigable waters. The mere fact of a geographical nexus is not sufficient; there must also be a functional nexus with navigable waters. The fact that a "small portion" of the components is shipped by barge is insufficient to confer coverage pursuant to *Brickhouse. Sowers v. Metro Mach. Corp.*, 35 BRBS 154 (2001) (Hall, C.J., dissenting), *aff'd on recon. en banc*, 35 BRBS 181 (2002) (Hall, J., dissenting).

In a case arising in the Fourth Circuit, the Board held that claimant's injury, which occurred in employer's parking located outside employer's fenced off facility, did not occur on a covered situs under Section 3(a) of the Act. The Board concluded that the parking lot was a separate and distinct property, since it was physically separated from employer's shipyard by a public road and a security fence. As the parking lot was not contiguous with navigable waters, pursuant to the Fourth Circuit's holding in *Sidwell*, 71 F.3d 1134, 29 BRBS 138(CRT), the Board held that it was not an "adjoining area" under Section 3(a) of the Act. *Griffin v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 87 (1998).

Following G*riffin*, 32 BRBS 87 (1998), the Board affirmed the administrative law judge's determination that employer's Building 511, the location of claimant's injury, is not a situs under Section 3(a) under the holding in *Sidwell,* as the building is separated from the shipyard by public roads and does not adjoin navigable water. *McCormick v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 207 (1998).

The Board reversed the administrative law judge's determination that the North Yard Parking Lot, the location of claimant's injury, is not a covered situs under Section 3(a). The Board held that the North Yard Parking Lot constitutes an "adjoining area," even though it is separated from employer's production area by a fence and a security gate, because it is located within an overall shipyard area contiguous to water. The Board distinguished the facts of this case from those in *McCormick*, 32 BRBS 207 (1998), *Griffin*, 32 BRBS 87 (1998), and *Kerby*, 31 BRBS 6 (1997), stating that, "[t]he fence, unlike a public road, privately-owned railroad tracks, or other thoroughfare or divider, does not sever the contiguity between the North Yard Parking Lot and the rest of employer's shipyard which adjoins navigable waters." *Williams v. Northrop Grumman Shipbuilding*, 45 BRBS 57 (2011).

The Fifth Circuit overruled *Winchester*, and adopted the reasoning of *Sidwell*, 71 F.3d 1134, 29 BRBS 138(CRT) (4th Cir. 1995). The Fifth Circuit thus held that "adjoining" means "to border on" or "be contiguous with," stating that this definition is more faithful to the plain language of the statute. As the claimant's injury occurred in a small industrial park that was not contiguous with navigable waters, the court held that the situs element was not met. *New Orleans Depot Services, Inc. v. Director, OWCP [Zepeda]*, 718 F.3d 384, 47 BRBS 5(CRT) (5th Cir. 2013) (en banc), *rev'g Zepeda v. New Orleans Depot Services, Inc.*, 44 BRBS 103 (2010).

The Fifth Circuit stated that employer's facility satisfied the geographic component of the situs test as the entire alumina processing facility adjoins navigable water. However, the court reversed the Board's holding that employer's facility satisfied the functional relationship component of Section 3(a). *BPU Mgmt., Inc./Sherwin Alumina Co. v. Director, OWCP [Martin]*, 732 F.3d 457,

47 BRBS 39(CRT) (5th Cir. 2013), *rev'g Martin v. BPU Mgmt., Inc./Sherwin Alumina Co.*, 46 BRBS 1 (2012) (*see* digest, *supra*).

The Board reversed the administrative law judge's finding that the parking lot where claimant was injured, within employer's shipyard, is not a covered situs. The Board held that the shipyard is an "other adjoining area," as it is contiguous with navigable water and its function is to build ships, and it is covered in its entirety. The parking lot within the shipyard's boundaries is also covered, and it is unnecessary to address the parking lot's function separately merely because it is separated from the production areas by a fence. The Board held that *Williams*, 45 BRBS 57, provides guidance because situs law in the Fourth and Fifth Circuits is now congruent. The Board distinguished those situations where injuries occurred off-property or on the grounds of mixed-use facilities. *Church v. Huntington Ingalls, Inc., Pascagoula Operations*, 53 BRBS 1 (2019).

The Board affirmed the administrative law judge's finding that the chassis yard where claimant was injured is a part of the terminal. The Board agreed that the following facts regarding the functional and geographic relationship between the chassis yard and the terminal were significant in concluding that "the chassis yard is part of the terminal" and that the terminal "includes the chassis yard:" trains loaded with cargo pass through the chassis yard into the terminal daily and then depart the facility; Gate 22, located on the eastern fence line of the chassis yard, is routinely used to move equipment essential to the handling of intermodal cargo containers into and out of the terminal; the port authority police, though not responsible for guarding the main entrance to the chassis yard on Lee Avenue, is responsible for opening the gates which provide access for trains to move through the chassis yard to the terminal and for opening Gate 22 to enable heavy equipment to move between the chassis yard and the terminal; and employer's movement of the fence line separating the chassis yard and terminal to create an express lane for outbound trucks establishes the "fluidity" of the area and that the chassis yard "is not a discrete parcel, independent from the remainder of the terminal." Consequently, because the terminal is an enumerated site, the Board affirmed the administrative law judge's conclusion that claimant's injury at the chassis yard occurred on a covered situs under Section 3(a) of the Act. *Harris v. Virginia Int'l Terminals, LLC*, 53 BRBS 23 (2019).

After delivering cargo from the Port of Houston Barbours Cut Container Terminal to the Gulf Winds Warehouse, claimant slipped and fell while walking in the Gulf Winds parking lot. The sole issue is whether the site where claimant's injury occurred satisfies the geographic component of the "other adjoining area" situs test under Fifth Circuit law, which requires showing the site borders on navigable water. The administrative law judge found claimant's injury did not occur on a covered situs because the parking lot is separated from navigable water by the Terminal's property fence, a public road, and the Gulfwinds' property fence, so it does not satisfy the geographic component. After addressing the Fifth Circuit law and rejecting the notion that the entire area is a contiguous enumerated maritime area, the Board affirmed the administrative law judge's decision granting employer's motion for summary decision. *Hall v Ceres Gulf, Inc.*, 53 BRBS 31 (2020) (Buzzard, J., dissenting).

Section 3(b)

Section 3(b) provides

> No compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof, or of any State or foreign government, or any subdivision thereof.

33 U.S.C. §903(b).

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The Board held that the weight of the evidence supports the administrative law judge's finding that the University of Guam is a subdivision of the government of Guam, and thus, that claimant may not receive benefits, pursuant to Section 3(b) of the Act. The Board reviewed federal law to determine whether an entity created under state law is a "political subdivision" of the state, and noted that the vast majority of state universities enjoy sovereign immunity under the 11th Amendment to the Constitution. *Tyndzik v. Univ. of Guam*, 27 BRBS 57 (1993)(Smith, J., dissenting), *rev'd in pert. part sub nom. Tyndzik v. Director, OWCP*, 53 F.3d 1050, 29 BRBS 83(CRT) (9th Cir. 1995). Reversing this decision, the Ninth Circuit held that claimant was not excluded by Section 3(b). The territorial statute creating the University set up a "non-membership, non-profit corporation" whose Board of Regents were not employees of the government. The university also cannot perform basic governmental functions. Claimant, an employee of the University, therefore may pursue his claim under the Act. *Tyndzik v. Director, OWCP*, 53 F.3d 1050, 29 BRBS 83(CRT) (9th Cir. 1995).

The Board affirmed the administrative law judges' determinations that employer, the City of Titusville, is a governmental subdivision of the State of Florida as defined by Section 3(b) of the Act, as the city can, *inter alia*, tax its citizens and enact laws. Moreover, the city is authorized by state law to construct marinas for use by the general populace. Thus, the marina is not akin to a private facility. Consequently, the Board affirmed the administrative law judges' conclusions that claimants, employees of the city marina, are excluded from coverage under the Act by operation of Section 3(b). *Keating v. City of Titusville*, 31 BRBS 187 (1997).

The Board affirmed the administrative law judge's finding that employer, the Golden Gate Bridge, Highway & Transit District, is a subdivision of the State of California, and his consequent conclusion that claimant's claim is barred pursuant to Section 3(b) of the Act. The Board rejected claimant's assertions that the doctrine of sovereign immunity is co-extensive with Section 3(b), that Section 3(b) was not intended to cover municipalities, and that there is no "clear-cut interpretative test" for determining whether a lesser public entity, like employer, may be treated as a "subdivision" of a state government under Section 3(b).

With regard to this latter contention, the Board held that the decisions in *Tyndzik,* 53 F.3d 1050, 29 BRBS 83(CRT), and *Keating,* 31 BRBS 187, state that in order for Section 3(b) to apply, the employer in question must perform some "basic governmental functions on its own." In this case, the administrative law judge found that employer performed independent, government functions with the primary purpose of serving the general public, and had the right to take property by eminent domain and to enact ordinances, including traffic regulations, for travel on its facilities, which are enforceable in state courts. Moreover, while it does not have taxing power, it does have the power to issue bonds and a legislatively-derived reliance on local municipalities for some of its financing. *Wheaton v. Golden Gate Bridge, Highway & Transp. Dist.*, 41 BRBS 51 (2007), *aff'd*, 559 F.3d 979, 43 BRBS 17(CRT) (9th Cir. 2009).

Affirming the Board's decision in *Wheaton,* the Ninth Circuit stated that municipalities and agencies of municipalities are commonly understood to fall within the meaning of "subdivision" of a state. The court rejected the contention that the word "government" modifies "State" such that only subdivisions of a state government are excluded. The court held that the Board properly addressed the factors of *Tyndzik,* 53 F.3d 1050, 29 BRBS 83(CRT), in determining that the employee was employed by a "subdivision." The District was created by state law and an election in a six-county area. The directors are appointed by local elected officials. Its meetings are open to the public and its contracts must be bid competitively pursuant to state law. The District's board can enact ordinances and traffic regulations, and pass resolutions; it has the power of eminent domain. The District engages in the governmental functions of managing a bridge and public transportation by bus and ferry. Although it does not have taxing power, the District can set tolls. *Wheaton v. Golden Gate Bridge, Highway & Transp. Dist.,* 559 F.3d 979, 43 BRBS 17(CRT) (9th Cir. 2009).

The Board rejected employer's contention that claimant is excluded from coverage pursuant to Section 3(b) as it offered no factual or legal support for its contention that claimant was an employee of the United States or any agency thereof merely because he was employed by a company to enforce federal regulations on board vessels. *K.L. [Labit] v. Blue Marine Sec., LLC*, 43 BRBS 45 (2009).

Claimant, who worked for Georgia Ports Authority (GPA), was injured during his assignment to work for SSA. The Board rejected SSA's contention that Section 3(b) of the Act prevents liability from being shifted from a governmental subdivision to a statutory employer, as the determination as to whether claimant is excluded from coverage under Section 3(b) is dependent on whether the administrative law judge properly determined that SSA was claimant's borrowing employer at the time of injury. In this regard, the Board affirmed the administrative law judge's determination that SSA was claimant's borrowing employer at the time of injury as the administrative law judge conducted a thorough analysis under the nine-factor *Ruiz-Gaudet* test, and his findings were supported by substantial evidence and in accordance with law. *Fitzgerald v. Stevedoring Services of Am.*, 34 BRBS 202 (2001).

Section 3(c)

Section 3(c), 33 U.S.C. §903(c)(formerly 33 U.S.C. §903(b)(1982) (amended 1984), provides that "no compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another."

This provision is applied in conjunction with subsections (c) and (d) of Section 20 of the Act, 33 U.S.C. §920(c),(d), which presumes, in the absence of substantial evidence to the contrary, that the injury was not due solely to intoxication or due to the willful intent of the employee to injure or kill himself or another.

Section 3(c) provides the sole exception to Section 4(b), which provides that compensation is payable without regard to fault as a cause of injury. *Newport News Shipbuilding & Dry Dock Co. v. Hall*, 674 F.2d 248, 14 BRBS 641 (4th Cir. 1982).

Solely Due to Intoxication

Where claimant is injured in the course of employment, Section 3(c) nonetheless bars compensation if the injury was due solely to the intoxication of the employee. *Oliver v. Murry's Steaks*, 17 BRBS 105 (1985). *See G.S. [Schwirse] v.. Marine Terminals Corp.*, 42 BRBS 100 (2008), *modified in part on recon.*, 43 BRBS 108 (2009) (rule against drinking on the job does not take claimant out of the course of employment; his intoxication must be addressed in the context of Section 3(c)). Section 20(c) provides a presumption that, in the absence of substantial evidence to the contrary, claimant's injury was not occasioned solely by his intoxication. 33 U.S.C. §920(c). The Section 20(c) presumption must be rebutted with substantial evidence in order for Section 3(c) to bar benefits to the employee. *Schwirse v. Director, OWCP*, 736 F.3d 1165, 47 BRBS 31(CRT) (9th Cir. 2013).

The Board has held that the Section 20(c) presumption can be overcome only by substantial evidence that claimant was intoxicated and that the injury was caused solely by the intoxication. *Walker v. Universal Terminal & Stevedoring Corp.*, 7 BRBS 1019 (1978), *rev'd,* 645 F.2d 170, 13 BRBS 257 (3d Cir. 1981); *Shelton v. Pac. Architects & Engineers, Inc.*, 1 BRBS 306 (1975). In *Sheridon v. Petro-Drive, Inc.*, 18 BRBS 57 (1986), the Board held an administrative law judge erred in finding Section 20(c) rebutted by proof of intoxication alone. Employer must also show the injury was due to intoxication and, while every hypothetical cause need not be negated, it must present evidence that permits no other rational conclusion than that intoxication was the sole cause. The Board thus vacated the administrative law judge's decision and remanded for proper application of Section 20(c).

In *Walker*, 7 BRBS 1019, where an intoxicated claimant asphyxiated in his own vomit, the Board reversed an administrative law judge's conclusion that the injury was solely due to intoxication and held the Section 20(c) presumption was unrebutted. The Board reasoned that employer had not ruled out other possible causes where a jump or fall to the ship's deck could have triggered the vomiting. The Third Circuit reversed the Board, holding that the administrative law judge correctly found the presumption rebutted and his decision was supported by substantial evidence. The court held that employer need not refute every imaginable theory of death. *Walker v. Universal Terminal & Stevedoring Corp.*, 645 F.2d 170, 13 BRBS 257 (3d Cir. 1981).

In *Birdwell v. W. Tug & Barge*, 16 BRBS 321 (1984), the Board affirmed an administrative law judge's conclusion that the claim was not barred by Section 3(c). The administrative law judge noted that a medical opinion that intoxication was the primary cause of death did not establish intoxication as the sole cause of death. Moreover, claimant's death occurred when he drowned after attempting to walk a mooring line to a vessel, which the administrative law judge noted is risky in any condition. The administrative law judge thus found the evidence insufficient to rebut Section 20(c). *See also Shelton*, 1 BRBS 306 (1975) (where no direct proof that claimant's intoxication caused him to fall from his third floor hotel window and sustain severe injuries was presented, hypothetical on how intoxication may have logically caused accident was insufficient to rebut Section 20(c)); *Phoenix Assurance Co. of New York v. Britton*, 289 F.2d 784 (D.C. Cir. 1961) (where an intoxicated employee driving a company truck was killed on a road, numerous factors entering into the cause of the accident prevented Section 3(c) from barring compensation); *Maryland Cas. Co. v. Cardillo*, 107 F.2d 959 (D.C. Cir. 1939) (where an intoxicated insurance collector was robbed and killed, Section 3(c) did not bar compensation because employer did not show that the decedent's injuries were not occasioned by the murderous assault).

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The Board affirmed the administrative law judge's finding that claimant's breaking of a company rule against drinking on the job did not take him out of the course of his employment. Claimant's injury occurred within the time and space boundaries of his employment. Claimant's violation of the rule implicates fault, which is irrelevant under the Act unless Section 3(c) applies. However, Section 3(c) bars recovery if claimant's injury was due solely to his intoxication. The Board reversed the administrative law judge's finding that employer failed to rebut the Section 20(c) presumption. In this case, employer provided the opinions of medical experts that claimant's fall was due solely to his intoxication. These opinions are not speculative, as the administrative law judge found, but are based on hospital records, site reports and claimant's own testimony that he was too intoxicated to recall the event. The case was remanded to the administrative law judge to weigh the evidence as a whole on the issue of whether intoxication was the sole cause of claimant's injury. The Board stated that the administrative law judge inappropriately

speculated, without a basis in the record, that the fall was caused by claimant's distraction or carelessness. *G.S. [Schwirse] v. Marine Terminals Corp.,* 42 BRBS 100 (2008), *modified in part on recon.*, 43 BRBS 108 (2009).

Because Section 3(c) is an affirmative defense to the claim, the burden of proof is on employer to establish, based on the record as a whole, that the injury was occasioned solely by the intoxication of the employee. This burden of proof, after employer establishes rebuttal of the Section 20(c) presumption, does not require that employer "rule out" all other possible causes of injury other than intoxication. Rather, employer bears the burden of persuading the administrative law judge, under the preponderance of the evidence standard, that its evidence is the more convincing. In this case, the Board affirmed the administrative law judge's finding on remand that employer established by a preponderance of the evidence that claimant's injury was occasioned solely by his intoxication and that claimant's compensation is barred pursuant to Section 3(c). Two doctors stated that intoxication was the sole cause of the fall that caused claimant's injuries and employer's manager testified to the absence of slippery conditions. *Schwirse v. Marine Terminals Corp.*, 45 BRBS 53 (2011), *aff'd sub nom. Schwirse v. Director, OWCP*, 736 F.3d 1165, 47 BRBS 31(CRT) (9th Cir. 2013).

The Ninth Circuit affirmed the Board's affirmance of the denial of benefits under Section 3(c). The court held that Section 3(c) requires a "but for" analysis; "occasioned solely by" means that the legal or proximate cause of the injury was intoxication, regardless of the material on which the employee landed when he fell. The court held that the administrative law judge and the Board properly applied the substantial evidence standard in determining that the Section 20(c) presumption was rebutted; employer need not "rule out" all other possible causes of injury and here employer produced substantial evidence that intoxication caused the fall and that there were no tripping hazards. When the Section 20(c) presumption is rebutted, claimant bears the burden of establishing his entitlement to benefits, which here he failed to do on the record as a whole. *Schwirse v. Director, OWCP*, 736 F.3d 1165, 47 BRBS 31(CRT) (9th Cir. 2013).

Although employer's cross-appeal was not timely filed, the Board nonetheless affirmed the administrative law judge's finding that although the decedent was under the influence of a drug at the time of his death, employer did not produce substantial evidence that decedent's death was due solely to the intoxication in view of decedent's pre-existing heart condition. *Urso v. MVM, Inc.*, 44 BRBS 53 (2010).

Willful Intention

Section 3(c) also bars compensation if the injury was occasioned by the "willful intention of the employee to injure or kill himself or another." Section 20(d) presumes that the injury was not occasioned by such a willful intent. *See Green v. Atl. & Gulf Stevedores, Inc.*, 18 BRBS 116 (1986) (under Section 3(c), word "solely" applies only to intoxication clause).

The Supreme Court addressed the Section 20(d) presumption in a case involving suicide in *Del Vecchio v. Bowers*, 296 U.S. 280 (1935), the seminal case for application of the "bursting bubble" theory of presumptions to Section 20 of the Act. Decedent in *Del Vecchio* shot himself at work; the Court stated that the fact that the wound was self-inflicted permits but one of two conclusions: either the shooting was an accident or it was a suicide. The evidence regarding the site and circumstances of death could support either conclusion. Claimant presented evidence that the decedent was in good health, good disposition, good financial condition and had written a cheerful letter to his mother the night before his death saying he would write again soon, while employer presented evidence that decedent had recently undergone a mastoid operation, complained of increasing ear and head pain and had been advised that another surgery might be necessary. The deputy commission denied benefits, finding a suicide, but the Court of Appeals reversed, stating that since the evidence was as consistent with accident as with suicide, the presumption required a finding in favor of claimant. Reversing that decision, the Court stated that once the employer "carried his burden by offering testimony sufficient to justify a finding of suicide, the presumption falls out of the case. It never had and cannot acquire the attribute of evidence in claimant's favor." *Id.* at 286. Thus, the Court of Appeals erred in holding that as the evidence on the issue of accident versus suicide was evenly balanced, the presumption controlled the outcome. As the deputy commissioner's finding of suicide was supported by substantial evidence, it should not have been set aside.

Following *Del Vecchio*, the Ninth Circuit held that where one of the permissible inferences was that the employee committed suicide, the presumption fell from the case. Under such circumstances, the deputy commissioner's finding that decedent fell from the scow and drowned was conclusive, and the award of benefits was affirmed. *Salmon Bay Sand & Gravel Co., Inc. v. Marshall*, 93 F.2d 1 (9th Cir. 1937). *See also O'Leary v. Dielschneider*, 204 F.2d 810 (9th Cir. 1953).

In cases where the facts establish that the employee committed suicide, the issue is whether the employer had the "willful intention" to do so. Where decedent's death is caused by an irresistible suicidal impulse resulting from an employment-related condition, the Board has held that Section 3(c) does not bar compensation. *Cooper v. Cooper Associates, Inc.*, 7 BRBS 853 (1978), *rev'd on other grounds sub nom. Director, OWCP v. Cooper Associates, Inc.*, 607 F.2d 1385, 10 BRBS 1058 (D.C. Cir. 1979)(death due to suicidal impulse related to stress of work). *See Voris v. Texas Employers Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951) (following work injury, employee developed manic-depressive illness and shot himself;

court affirmed award, holding that the deputy commissioner could reasonably find that the accident and injury caused the manic-depressive insanity; that mental condition caused the deceased to take his own life; and that his reasoning faculties were so far impaired that his act of self-destruction was not voluntary and willful); *Terminal Shipping Co. v. Traynor*, 243 F. Supp. 915 (D. Md. 1965) (decedent who sustained a cerebral hemorrhage at work subsequently suffered from physical difficulties and depression until he took his own life; court affirmed the deputy commissioner's award, holding that where a work injury causes a mental disease or defect which in turn was responsible for decedent's impulse to take his own life and so far impaired his ability to resist that impulse that he was in fact unable to control it, his suicide was not willful). *See generally Brannon v. Potomac Elec. Power Co.*, 6 BRBS 527 (1977), *aff'd sub nom. Director, OWCP v. Potomac Elec. Power Co.*, 607 F.2d 1378, 10 BRBS 1048 (D.C. Cir. 1979) (Section 8(f) case where initial electrical injury at work was aggravated by working conditions, culminating in worsening mental condition and compensable suicide).

The cases involving the employee's willful intent to injure another turn on their specific facts. The Board remanded a case for further findings where the administrative law judge mistakenly focused on an assailant's intent to injure two employees rather than the employee's intent. *Williams v. Healy-Ball-Greenfield*, 15 BRBS 489 (1983) (two claimants shot by a third employee while at work), *decision after remand*, 22 BRBS 234 (1989) (Brown, J., dissenting), *infra*.

In *Arrar v. St. Louis Shipbuilding Co.*, 780 F.2d 19, 18 BRBS 37(CRT) (8th Cir. 1985), *rev'g* BRB No. 83-1996 (1985), the court reversed a Board opinion affirming an administrative law judge's finding that an injury was caused by claimant's willful intention to injure another. In that case two co-workers, Batts and Bozovich, got into a fight. There was a controversy over what happened thereafter, with Batts testifying claimant hit or grabbed him and claimant contending he was an innocent bystander attacked by Mr. Batts. The court held the administrative law judge erred in finding Batts's testimony that Mr. Arrar "hit" or "grabbed" him sufficient to rebut Section 20(d), as it supports a conclusion that claimant was attempting to stop the fight as readily as a conclusion that he intended to injure Batts. As the testimony sheds no light on claimant's intent, it is not substantial evidence that Arrar's injury arose through his willful intent to injure Batts. Thus, Section 3(c) did not bar compensation. *See also Kielczewski v. The Washington Post Co.*, 8 BRBS 428 (1978)(harassment alone insufficient to show willful intent rebutting Section 20(d)); *Rogers v. Dalton Steamship Corp.*, 7 BRBS 207 (1977) (reversing administrative law judge and holding evidence insufficient where it established only that claimant was engaged in a verbal altercation). *Compare Green*, 18 BRBS 116 (claimant, who sustained an eye injury, engaged in a fist fight with Mr. Adger; after this fight ended, both participants retired from the field, until claimant returned with a pocket knife and charged Adger, who hit him with a 2x4 near his eye during this altercation. Board affirmed the administrative law judge's finding that claimant's eye injury was caused during the second fight and thus was barred by Section 3(c)); *O'Connor v. Triple A Mach. Shop*, 13 BRBS 473 (1981) (affirming

administrative law judge's decision that claim was barred by Section 3(c) where claimant was the initial aggressor physically and verbally; Board also rejected argument that claimant was too drunk to form necessary intent, noting claimant's "circular" argument was premised on the notion that he was too intoxicated to form intent but not so intoxicated that his injury was barred by intoxication).

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In this case, the injured employees, Bobby and Charles Williams, repeatedly harassed a third employee, Obregon, over the course of several months. On the date of injury, the three men were involved in an altercation, after which Obregon left the work site, returning about 40 minutes later with a gun. Obregon shot and killed Bobby Williams, and Charles Williams was injured when he fell while attempting to escape the shooting. The Board affirmed the administrative law judge's finding that Section 3(c) did not bar the claims of Bobby Williams's widow and Charles Williams because the credited evidence established that after Obregon's return to work neither man did anything to provoke him. As the Williams cousins did not willfully intend to injure or kill Obregon at the time of their injuries, the claim was not barred. The Board further stated that any harassment or abuse the employees directed at Obregon prior to his return to work was irrelevant as those incidents had ended before the shooting, at which time Obregon became the aggressor. *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J., dissenting).

Where an employee's death does not stem from a "willful intent" to commit suicide, but is instead caused by an irresistible suicidal impulse resulting from an employment-related condition, Section 3(c) does not bar compensation. The Board affirmed the administrative law judge's finding that the claim was not barred by Section 3(c) as a doctor's opinion that decedent's work injury and its effects prevented him from forming a rational and willful intent to commit suicide provides substantial evidence for that finding. *Maddon v. W. Asbestos Co.*, 23 BRBS 55 (1989).

The Board rejected employer's argument that the administrative law judge erred in failing to conclude that claimant's death benefits claim is barred under Section 3(c). Where, as here, it is uncontested that the employee's death was a suicide, the Section 20(d) presumption that the injury was not occasioned by the willful intention of the employee to kill himself applies, but is rebutted. The Board held that there is substantial evidence to support the administrative law judge's finding that decedent's death was not due to a "willful intent" to commit suicide but rather was due to an irresistible suicidal impulse resulting from severe depression related to the work injury. *Konno v. Young Bros., Ltd.*, 28 BRBS 57 (1994).

In this DBA case where the employee was found dead due to asphyxiation by hanging inside his villa in Saudi Arabia, the First Circuit held that evidence supporting the realistic possibility of suicide is sufficient to rebut the Section 20(d) presumption. Citing *Del*

Vecchio, 296 U.S. 280, the court stated that once countered by a reasonable possibility of suicide, the presumption fell from the case. The court stated that although some of the evidence of record weighs against suicide, there is no record evidence of a cause of death that would be covered under the Act. Thus, the court concluded that the failure of the claim depends not on proof of suicide but, rather, on claimant's failure to establish a likely cause of death that would be covered under the Act. *Truczinskas v. Director, OWCP*, 699 F.3d 672, 46 BRBS 85(CRT) (1st Cir. 2012).

The Ninth Circuit rejected the "irresistible impulse test" as having no bearing on whether a work-related injury caused the attempted suicide, and it held that a suicide or injuries from a suicide attempt are compensable under the Act when there is "a direct and unbroken chain of causation" between a compensable work-related injury and the suicide attempt. This test better comports with modern psychiatry and the no-fault aspect of the Longshore Act. If the suicide or attempted suicide is the product of the work-related injury, it is not "willful." Thus, the fact that claimant planned his suicide attempt does not necessarily preclude compensation. The case is remanded for application of this test. *Kealoha v. Director, OWCP*, 713 F.3d 521, 47 BRBS 1(CRT) (9th Cir. 2013).

In this case where decedent worked in Iraq, returned home on multiple visits, and killed himself after he returned home for the last time in June/July 2006, the Board vacated the administrative law judge's award of death benefits to claimant (decedent's widow). The Board held that, in light of the Ninth Circuit's recent decision in *Kealoha,* 713 F.3d 521, 47 BRBS 1(CRT) (9th Cir. 2013), the administrative law judge applied incorrect law in determining whether decedent's suicide was compensable. The Ninth Circuit held that, in a suicide case, the appropriate test is the "chain of causation," which requires an unbroken chain of causation from the work to the suicide, and not the previously-used "irresistible impulse" test. On remand, as Section 20(a) has been invoked and rebutted, the administrative law judge must weigh the evidence as a whole to determine whether claimant established that decedent's suicide was the direct result of a work injury or whether the suicide was caused by events and information decedent experienced and learned once he returned home. *Dill v. Serv. Employees Int'l, Inc.*, 48 BRBS 31 (2014), *aff'd sub nom. Serv. Employees Int'l, Inc. v. Director, OWCP*, 793 F. App'x 655, 54 BRBS 47(CRT) (9th Cir. 2020).

The "arising out of employment" requirement of Section 2(2) is a separate issue from the Section 3(c) "willful intention to injure" inquiry. Thus, even if an injury has arisen out of and in the course of employment, it is not compensable if the injury was occasioned by the willful intention of the employee to injure himself. In order to rebut the Section 20(d) presumption, employer must present substantial countervailing evidence that claimant willfully intended to injure himself; willful intent to injure oneself requires a strict standard of proof. A claimant's disregard of medical advice does not establish the willful intent to injure oneself. Thus, the Board reversed the administrative law judge's finding that Section 20(d) presumption was rebutted by evidence that claimant, who had pre-existing epilepsy, willfully

engaged in driving, contrary to medical evidence, which led to the motor vehicle accident in which he was injured. The Board noted that the intervening cause case law relied upon by the administrative law judge has no relevance to the inquiry as there is no duty of due care with regard to the initial work injury. *See* Section 4(b). *Jackson v. Strachan Shipping Co.*, 32 BRBS 71 (1998) (R. Smith, J., concurring & dissenting).

Claimant alleged he was injured in a collision between the truck he was driving and another truck. The Board reversed the administrative law judge's finding that employer rebutted the Section 20(d) presumption that claimant did not intentionally injure himself. The Board held that there is no direct evidence that claimant intended to injure himself and the evidence relied upon by the administrative law judge to find claimant's "intent" cannot support the inferences he drew. The evidence of record indicates both drivers were found to be at fault. Moreover, if claimant's negligent conduct precipitated the collision, such does not preclude recovery under Section 3(c). The Act, 33 U.S.C. §904(b), applies irrespective of fault or negligence unless a specific exclusion applies. *Jarrett v. CP & O, LLC*, 51 BRBS 41 (2017), *vacated on recon.*, 52 BRBS 27 (2018).

On reconsideration, the Board re-addressed claimant's appeal, taking employer's contentions into account. Claimant alleged he was injured in a collision between the truck he was driving and another truck. The Board reversed the administrative law judge's findings that employer rebutted the Section 20(d) presumption that claimant did not intentionally injure himself and that the claim is barred by Section 3(c) . The Board held that there is no direct evidence that claimant intended to injure himself and the evidence relied upon by the administrative law judge to find claimant's "intent" cannot support the inferences he drew. The evidence of record indicates both drivers were found to be at fault. Moreover, if claimant's negligent conduct precipitated the collision, such does not preclude recovery under Section 3(c). The Act, 33 U.S.C. §904(b), applies irrespective of fault or negligence unless a specific exclusion applies. *Jarrett v. CP & O, LLC*, 52 BRBS 27 (2018), *vacating on recon.* 51 BRBS 41 (2017).

Misrepresentation Regarding Prior Injuries

Section 3(c) contains the only provision under the Act for barring benefits due to an employee's misconduct. Misrepresentation in an employment application relating to a prior injury is not one of the bases for barring benefits described in Section 3(c). Such misrepresentation on an employment application will not justify denial of compensation benefits. *Newport News Shipbuilding v. Hall*, 674 F.2d 248, 14 BRBS 641 (4th Cir. 1982), *aff'g* 13 BRBS 873 (1981) (S. Smith, dissenting); *Hallford v. lngalls Shipbuilding Div., Litton Sys., Inc.*, 15 BRBS 112 (1982) (Ramsey, dissenting). *See* 33 U.S.C. §931, which provides a fine and/or imprisonment for misrepresentation by a claimant for the purpose of obtaining benefits.

There is thus no statutory basis for applying the test adopted in some state workers' compensation cases, *see* 3 *Larsen's Workers' Compensation Law*, §66.04 (2008) (formerly 1C A.Larsen, *The Law of Workmen's Compensation*, §47.53 (1980)), under which benefits may be denied where claimant misrepresented his medical history on his employment application, employer relied on the misrepresentation, and claimant's subsequent injury was causally related to the concealed medical history. "To engraft such an exception into the LHWCA would be to 'amend a statute under the guise of statutory interpretation' a task we are not at liberty to perform." *Hall*, 674 F.2d at 251, 14 BRBS at 646-647.

Section 3(d)

Section 3(d), 33 U.S.C. §903(d), excludes employees at facilities engaged in work involving small vessels unless injured in certain specified areas.

It provides:

> (d)(1) No compensation shall be payable to an employee employed at a facility of an employer if, as certified by the Secretary, the facility is engaged in the business of building, repairing, or dismantling exclusively small vessels (as defined in paragraph (3) of this subsection), unless the injury occurs while upon the navigable waters of the United States or while upon any adjoining pier, wharf, dock, facility over land for launching vessels, or facility over land for hauling, lifting, or drydocking vessels.
>
> (2) Notwithstanding paragraph (1), compensation shall be payable to an employee-
>
> > (A) who is employed at a facility which is used in the business of building, repairing, or dismantling small vessels if such facility receives Federal maritime subsidies; or
> >
> > (B) if the employee is not subject to coverage under a State workers' compensation law.
>
> (3) For purposes of this subsection, a small vessel means —
>
> > (A) a commercial barge which is under 900 lightship displacement tons; or
> >
> > (B) a commercial tugboat, towboat, crew boat, supply boat, fishing vessel, or other work vessel which is under 1,600 tons gross as measured under section 14502 of title 46, or an alternate tonnage measured under section 14302 of that title as prescribed by the Secretary under section 14104 of that title.

33 U.S.C. §903(d).

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The Board affirmed the administrative law judge's finding that the location within employer's facility where claimant was injured is exempt from coverage pursuant to the small vessel exemption of Section 3(d)(1) of the Act, and that therefore claimant's claim is not covered by the Act. Employer presented a "Certificate of Exemption From Coverage" issued by the DOL which documents employer's facility's exemption from coverage, and claimant did not contend that the location of his injury was not covered by the certificate. *Koepp v. Trinity Indus., Inc.*, 46 BRBS 7 (2012).

Section 3(e)

Section 3(e), 33 U.S.C. §903(e), provides a statutory credit for state workers' compensation benefits or Jones Act benefits "paid to an employee for the same injury, disability, or death for which benefits are claimed under this Act."

This provision is consistent with prior cases holding employers are entitled to a credit under the Act for payments made pursuant to a state award. *Sun Ship, Inc. v. Pennsylvania,* 447 U.S 715, 12 BRBS 890 (1980); *Calbeck v. Travelers Ins. Co.*, 370 U.S. 114 (1962); *See Le v. Sioux City & New Orleans Terminal Corp.,* 18 BRBS 175 (1986). In *Landry v. Carlson Mooring Service*, 643 F.2d 1080, 13 BRBS 301 (5th Cir.), *cert. denied*, 454 U.S. 1123 (1981), the Fifth Circuit upheld concurrent rights to recover under Texas law and the Act, but stated that in order to avoid double recovery, claimant would be required to credit his Texas award against any Longshore recovery. The court rejected the argument that the total amount should be credited, holding that attorney's fees are not included in the credit as only state compensation the claimant actually receives is subject to a credit.

The Act also contains other credit provisions. Section 14(j) provides for reimbursement of advance payments of compensation out of any installments which are due, and Section 33(f) allows employer a credit for amounts recovered in a third party suit. These provisions are discussed in Sections 14 and 33 of the deskbook. In addition, where a claimant awarded benefits for a scheduled disability sustains a second, aggravating injury to the same body part, employer may credit the amount paid for the prior injury against its liability for the second injury. *See Strachan Shipping Co. v. Nash*, 782 F.2d 513, 18 BRBS 45(CRT) (5th Cir. 1986) (en banc). Cases addressing this "credit doctrine" are discussed in Section 8.

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The Board rejected claimant's contention that the administrative law judge erred in awarding employer a credit for a state workers' compensation settlement with several employers for his asbestosis. Under recently enacted Section 3(e), employer is entitled to a credit for state benefits paid to an employee for the same injury or disability, and thus the credit applies irrespective of whether the state compensation was paid by an employer covered under the Longshore Act. The administrative law judge properly limited employer's credit to claimant's net recovery under the state act. *Hoey v. Gen. Dynamics Corp.*, 17 BRBS 229 (1985).

The Board held that employer is not entitled to a credit, pursuant to Section 3(e), for unemployment benefits claimant received during his period of temporary total disability as such benefits are not other workers' compensation benefits. *Marvin v. Marinette Marine Corp.*, 19 BRBS 60 (1986).

Veterans' disability benefits are not included within the scope of the credit doctrine as codified in Section 3(e), since such benefits are not claimed or paid pursuant to the Longshore Act, the Jones Act, or any other workers' compensation law. *Todd Shipyards Corp. v. Director, OWCP*, 848 F.2d 125, 21 BRBS 114(CRT) (9th Cir. 1988), *aff'g Clark v. Todd Shipyards Corp.*, 20 BRBS 30 (1987).

The Board rejected the claimant/widow's contention that the administrative law judge erred in failing to reduce employer's credit to reflect the son's interest in the settlement of the state claim. As part of the state settlement, claimant agreed to have her son dismissed as a party. The Board affirmed the administrative law judge's decision to credit the entire amount of the state settlement against employer's liability under the Longshore Act as there was no evidence establishing the portion of the state settlement representing the son's interest. The Board held that a $15,500 medical lien paid to a third party on claimant's behalf as part of the state settlement was properly included in employer's Section 3(e) credit, stating it would not apply the Section 3(e) "amounts paid to an employee" language literally where this interpretation would result in employer's receiving less of a credit than it would have been entitled to receive prior to the enactment of Section 3(e). Finally, the Board held that attorney's fees paid at state level of compensation proceedings are not included in employer's Section 3(e) credit. *Lustig v. Todd Shipyards Corp.,* 20 BRBS 207 (1988), *aff'd in part and rev'd in part sub nom. Lustig v. U.S. Dep't of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989).

On appeal, the Ninth Circuit affirmed the Board's determination that employer is entitled to a Section 3(e) credit for the full amount of the state settlement, stating that the evidence did not establish that the son received or was granted any portion of the state award. The court also affirmed the disallowance of a credit for attorney's fees paid in connection with the state settlement. The court, however, reversed the Board's determination that employer is entitled to a credit for a medical lien paid directly to a third party on claimant's behalf. As the amount of the lien was paid directly to the third party, it was not an "amount paid to an employee." The court stated it was unclear that allowing the credit would result in a double recovery to claimant, and absent evidence of double recovery, the plain language of the statute controlled. *Lustig v. U.S. Dep't of Labor,* 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989).

The Fifth Circuit denied a credit against employer's liability, pursuant to the aggravation rule, for permanent total disability where a prior employer settled a claim for unscheduled permanent partial disability for $20,000. The court held Section 3(e) did not apply to allow employer a credit for the $20,000 settlement as that payment was made pursuant to the Act rather than a state act or the Jones Act. The court also held ITO was not entitled to a credit under the credit doctrine. *ITO Corp. v. Director, OWCP [Aples],* 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir.1989).

The Board modified the administrative law judge's award of a Section 3(e) credit, holding that employer is not entitled to a credit for amounts specifically awarded under state law for decedent's lifetime claim against amounts due under the Act to decedent's widow for her survivor's claim. *Lustig* is distinguished as the state settlement apportioned the amount between the lifetime claim and the death claim. *Pigott v. Gen. Dynamics Corp.*, 23 BRBS 30 (1989).

The administrative law judge's disallowance of a credit for state payments received by claimant against his scheduled awards under Section 8(c)(2) and (22) on the basis that the disability being compensated is not the same was held in error, as the payments were for the same injuries. The administrative law judge had stated that Section 3(e) was inapplicable because there were no schedule awards under the state act. This finding is reversed, and the case is remanded to the administrative law judge for a determination of the amount of benefits paid under the state act for each of claimant's injuries. The Board noted that employer may not credit any excess state payments for one injury against its federal liability for a different injury. The Board did not address claimant's argument that vocational rehabilitation benefits should not be credited against disability benefits as this issue was raised in a response brief rather than a cross-appeal. *Garcia v. Nat'l Steel & Shipbuilding Co.,* 21 BRBS 314 (1989).

Where it was impossible to apportion claimant's state settlement among his various medical conditions, the Board reversed the administrative law judge's denial of a Section 3(e) credit and allowed employer to offset the entire net amount of the settlement against its federal liability since some of that settlement covers the same injury or disability for which federal benefits are sought. The Board rejected employer's request for a credit for black lung benefits in this case involving a back injury, since those benefits are neither for the same injury nor the same disability for which claimant received benefits under the Act. *Vanover v. Found. Constructors,* 22 BRBS 453 (1989), *aff'd sub nom. Found. Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). Affirming the Board, the Ninth Circuit stated that pneumoconiosis and a back injury are not the "same injury or disability," for which claimant received benefits under the Act and thus the Board did not err in failing to give employer a Section 3(e) credit for claimant's receipt of black lung benefits. *Found. Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991).

The Board held that employer is not entitled to credit the $20,000 it paid to the parents of decedent under Louisiana law against its liability under Section 44(c)(1), which requires that employer pay $5,000 to the Special Fund where an injured worker dies without statutory survivors under the Act. Section 3(e) allows a credit for state payments to a claimant against benefits due claimant under the Act, and Congress did not provide a credit for payments made to the Special Fund under Section 44(c)(1). *Wong v. Help Unlimited of Tampa, Inc.*, 19 BRBS 255 (1987).

Where state law does not cover workers entitled to Longshore benefits, the Board rejected employer's argument that it is entitled to a Section 3(e) credit for its liability under the state act. The Board concluded that employer's preemption argument was without merit because Section 3(e) was not intended to apply where concurrent state and federal jurisdiction does not exist and there is no danger of double recovery because under state law the state is entitled to reimbursement for any state benefits paid to claimant. The Board held that the administrative law judge erred in concluding that, in general, medical expenses are not properly the subject of a Section 3(e) credit, but found the error harmless because the administrative law judge correctly recognized that the state's right to reimbursement for claimant's medical expenses is contingent upon claimant's obtaining an award of medical benefits under the Longshore Act. *McDougall v. E.P. Paup Co.*, 21 BRBS 204 (1988), *aff'd in part and modified in part sub nom. E.P. Paup Co. v. Director, OWCP*, 994 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

Affirming the Board's decision in *McDougall,* awarding claimant benefits and directing reimbursement to the state for benefits previously paid to claimant under the state act, the Ninth Circuit rejected employer's argument that the Board's reimbursement order violated Section 3(e). The court reasoned that Section 3(e) does not apply to the instant case because state law excludes coverage for workers covered under maritime law. The court held that Federal preemption may occur only when Congress has expressly precluded state law, an expression of such intent can be inferred from the structure and purpose of the federal statute, or when state law conflicts with federal law or stands as an obstacle to achieving federal objectives. The court noted that while the plain language of Section 3(e) supports the argument that state law is preempted, a closer review satisfied it that Congress did not intend to expressly preempt the state's reimbursement statute. Finally, the court stated that Section 3(e) applies only if there is concurrent state and federal coverage, and that there is nothing in the Act indicating that a state cannot exclude from its jurisdiction injuries covered by federal law. The court therefore affirmed the Board's conclusion that employer is not entitled to an offset under Section 3(e). *E.P. Paup Co. v. Director, OWCP*, 999 F.2d 1341, 27 BRBS 41(CRT) (9th Cir. 1993).

The Fifth Circuit held, under "the highly unusual fact pattern" of this case, Claimant's Louisiana state-tort claim was not preempted by the Longshore Act. In reversing the district court's dismissal with prejudice of Claimant's state-tort claim, the court held that although typically a claimant cannot receive both Longshore Act compensation and make a claim in tort under state law, Claimant, in this instance under Louisiana law, eschewed any Longshore Act claim and therefore had the option to bring a state claim in tort. The court reasoned because Claimant alleged his significant exposure to asbestos first occurred in 1969, his state remedy for his mesothelioma fell outside the scope of the Louisiana Workers' Compensation Act (WCA) in effect at that time (mesothelioma was not covered by the WCA until it was amended in 1975). As such, concurrent jurisdiction existed enabling Claimant to seek relief under either the Longshore Act or state tort law. Emphasizing "that the category of claims we address here is small," the court stated its

holding is limited to: 1) maritime workers; 2) injured in the "twilight zone" of coverage; 3) in Louisiana; 4) who neither seek nor obtain Longshore Act compensation; and 5) whose injuries are not covered by the relevant version of the WCA. *Barosse v. Huntington Ingalls, Inc.*, 70 F.4th 315, 57 BRBS 1(CRT) (5th Cir. 2023).

The Board held that the administrative law judge erred in allowing employer a Section 3(e) credit for full amount of a state settlement covering benefits for decedent, his widow and his children which had been apportioned between the parties pursuant to contractual agreements approved by a judge of the California Workers' Compensation Appeals Board. The Board held that the administrative law judge was bound to honor the contractual agreements regarding apportionment and that his failure to do so violated the Full Faith and Credit Clause of the Constitution. As to the children's interest in the settlement, while the administrative law judge correctly found that none of decedent's children would be eligible for death benefits under California law, that fact is immaterial in view of the specific apportionment of proceeds to them. Moreover, because the children were not claiming death benefits under the Longshore Act, and as non-dependent adults would not be entitled to such, their portion of the state recovery is not included in employer's credit as these payments are not for benefits claimed under the Act; thus, there is no danger of double recovery. Regarding the decedent's and widow's claims, the Board held that decedent's disability benefits paid under the state agreement may only be offset against his disability benefits due under the Longshore Act and claimant's death benefits under the California settlement may only be offset against her survivor's benefits. Where the record is unclear as to how a specific settlement amount is apportioned, employer is entitled to offset the disputed amount under Section 3(e) against its liability under the Longshore Act. Accordingly, the Board held that the administrative law judge properly included the $1750 in state settlement proceeds which was not apportioned in employer's Section 3(e) credit. The Board rejected employer's argument that it is entitled to an additional credit for money it was required to pay as a penalty for its delay in paying state benefits because such penalties are treated as "compensation" under California law, as this payment was not paid to compensate claimant for the claimed injury, disability or death. *Ponder v. Peter Kiewit Sons' Co.*, 24 BRBS 46 (1990).

The court held that the administrative law judge correctly did not credit employer with an $8,700 settlement in a claim for penalties under the state act. In doing so, the court deferred to the Director's position that the penalty payments were not for the same injury because they were strictly for employer's failure to perform its obligations on time and not for the employee's death as it was supported by the clear language and intent of Section 3(e) providing credit to employers for any amounts paid to an employee for the same injury. The court noted that the Director's interpretation was supported by the Board's decision in *Ponder*, 24 BRBS 46, and by the Fifth Circuit decision in *Landry*, 643 F.2d 1080, 13 BRBS 301. *Transbay Container Terminal v. U.S. Dep't of Labor*, 141 F.3d 907, 32 BRBS 35(CRT) (9th Cir. 1998).

The Board held that employer is entitled to a credit for the amount claimant received, less attorney's fees, from a state award for the scar resulting from surgery for her work-related elbow injury because both the state award for the scar and the disability award for loss of use of the arm under Section 8(c)(1) of the Act resulted from the same work injury. *Shafer v. Gen. Dynamics Corp.*, 23 BRBS 212 (1990).

After reversing the administrative law judge's finding that decedent's daughter was not entitled to benefits based on dependency, the Board rejected claimant's argument that the amount of the settlement apportioned to her should not be included in employer's section 3(e) credit. The Board noted that, had it affirmed the administrative law judge's denial of benefits to the decedent's daughter, employer would not have been entitled to the credit under Section 3(e) for amounts specifically apportioned to the daughter. In addition, the Board rejected claimant's argument that a separate settlement was not subject to a Section 3(e) credit since it contained no apportionment. *Lucero v. Kaiser Aluminum & Chem. Corp.*, 23 BRBS 261 (1990), *aff'd mem. sub nom. Kaiser Aluminum & Chem. Corp. v. Director, OWCP*, 951 F.2d 360 (9th Cir. 1991).

The Third Circuit set forth the legislative and case law history regarding the applicability of concurrent federal and state compensation awards, concluding with the Supreme Court's decision in *Sun Ship* that a land based longshoreman could receive both a state award and an award under the Longshore Act with the prior state award credited against the longshore award and the 1984 Amendment addition of Section 3(e). Thus, as claimant was injured on land, the Virgin Islands could provide a workers' compensation remedy; however, due to Section 5(a) and the Supremacy Clause, claimant cannot recover in tort under state law. (Note that Section 3(e) of the Act is mis-cited on page 950 of the court's decision). *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, *reh'g denied,* 910 F.2d 1179 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991).

The Board held that, pursuant to the plain language of Section 3(e) and its legislative history, when employer is paying compensation under a state award, and it is entitled to Section 8(f) relief for its liability under the Act, Section 3(e) allows the Special Fund to credit employer's state payments against the liability of the Special Fund pursuant to Section 8(f). *Stewart v. Bath Iron Works Corp.*, 25 BRBS 151 (1991).

The Board reaffirmed its holding in *Stewart*, 25 BRBS 151, that when an employer has paid claimant compensation under a state act, and it is entitled to Section 8(f) relief for its liability under the Act, Section 3(e) allows the Special Fund to credit the employer's state payments against the liability of the Special Fund pursuant to Section 8(f). The Board reiterated that this holding accurately reflects the plain language of the statute, as well as its legislative history. The Board also rejected employer's contention that the First Circuit's decision in *Reich*, 42 F.3d 74, 29 BRBS 11(CRT), undermines the Board's

holding in *Stewart*, as Reich does not involve any specific interpretation of Section 3(e). *Roush v. Bath Iron Works*, 49 BRBS 5 (2015).

There must be an actual Longshore Act award in effect before Section 3(e) is applicable. Merely because Section 3(e) would apply to offset the longshore award, and claimant so concedes, does not mean than an award should not therefore be entered. *Kinnes v. Gen. Dynamics Corp.*, 25 BRBS 311 (1992).

The Board rejected employer's assertion that the administrative law judge erred in failing to allow him to credit the state payments made to decedent's child from his first marriage under Virginia law against its federal liability to decedent's widow and her two children under Section 3(e). The Board found no error in the administrative law judge's decision despite that employer's overall liability under both the Virginia and Longshore Acts exceeds the 66 2/3 percent maximum imposed by Section 9(b). Decedent's eldest son elected to receive the more generous amount of benefits allowed by Virginia law, and as this amount exceeds the amount this child is entitled to under the Longshore Act, employer's liability is offset for that child with no danger of double recovery. Allowing employer to credit the state payments made to the elder son from decedent's first marriage against its liability to the widow and her children under the Longshore Act would deprive them of a portion of the benefits which the Longshore Act was intended to provide. *Ferguson v. S. States Coop.*, 27 BRBS 16 (1993).

Where claimant received a smaller compensation award under Connecticut law than under the Longshore Act, the Second Circuit held that the Board properly credited her entire state award minus attorney's fees against the Longshore award pursuant to Section 3(e). Although the Connecticut State Commissioner's order approving the state settlement appeared to indicate that claimant is entitled to the state award in addition to the Longshore award, and Connecticut law arguably allowed for the federal award to be credited against the state award, the court held that allowing employer a Section 3(e) credit was mandated by the plain language of the statute and, pursuant to the Supremacy Clause, the Longshore Act could not be superseded by state law. *Bouchard v. Gen. Dynamics Corp.*, 963 F.2d 541, 25 BRBS 152(CRT) (2d Cir. 1992).

Where claimant properly withdrew his Longshore claim to exclusively pursue a claim under state law, the Board held that employer is entitled to a hearing on its request for Section 8(f) relief regardless of whether claimant has withdrawn his claim for benefits under the Act. The Board noted, however, that a finding that employer is entitled to Section 8(f) relief will not affect employer's obligations under the state statute. The Board deferred to the Director's position that, notwithstanding that any liability of the Special Fund would be completely offset pursuant to Section 3(e) by the state benefits paid by employer, a finding of Special Fund liability would benefit employer with respect to the calculation of employer's assessment under Section 44. *Langley v. Kellers' Peoria Harbor Fleeting*, 27 BRBS 140 (1993) (Brown, J., dissenting).

The First Circuit affirmed the Board's determination that employer is entitled to a Section 3(e) credit for the full amount of the state consent decree. Claimant had argued that employer should not receive the credit for amounts paid under the state consent decree because the respective awards were not for the same "injury" or "disability." The court, however, stated that although the benefits claimant received under the consent decree may have been awarded to compensate him for one or more effects of, or disabilities arising from that injury, while the benefits he received under the Act may have been awarded to compensate him for others, the physical injury upon which all of those benefits were ultimately based was the same. *D'Errico v. Gen. Dynamics Corp.*, 996 F.2d 503, 27 BRBS 24(CRT) (1st Cir. 1993).

The Board affirmed the administrative law judge's finding that Section 3(e) is not applicable in this case. Employer paid claimant temporary total disability benefits under the Act, and accepted the compensability of the concurrent claim under the Virginia statute. The Virginia Workers' Compensation Commission awarded claimant benefits, subject to a credit for the benefits paid under the Longshore Act, and ordered claimant to pay her attorney $500. Claimant sought to have employer reimburse her for the $500 fee on the ground that, pursuant to Section 3(e), employer may not receive a credit for state attorney's fees. Although this is a valid statement of law, in this case Section 3(e) does not apply because no amounts were paid to claimant under the state workers' compensation law. The Board thus affirmed the administrative law judge's grant of employer's motion for summary decision. *Hunter v. Huntington Ingalls, Inc.*, 48 BRBS 55 (2014).

Employer is entitled to a Section 3(e) credit for amounts claimant received as a result of a settlement of third-party suits that included a Jones Act suit. Where, as here, the record is unclear as to how the settlement amount is apportioned among the various claims being settled, employer is entitled to offset the entire net amount against its liability under the Longshore Act. *Bundens v. J.E. Brenneman Co.*, 28 BRBS 20 (1994), *aff'd and modified*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995). On appeal, the Third Circuit held that employer is entitled to a credit for the entire net proceeds of settlements of third-party suits, including a Jones Act suit, by virtue of the combination of Sections 3(e) and 33(f), and not by either alone, as the Board held, as the settlements are not apportioned by type of claim. *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3d Cir. 1995).

The First Circuit held that the Secretary's interpretation of Section 44 in dual liability cases is entitled to deference. When employer is liable for the same amount under both the Maine Act and the Longshore Act, employer's payment of compensation under the state act, which is credited against employer's federal liability under Section 3(e), is considered to be payment under the Longshore Act for purposes of employer's assessment under Section 44. *Reich v. Bath Iron Works Corp.*, 42 F.3d 74, 29 BRBS 11(CRT) (1st Cir. 1994).

The Board held that the net proceeds of a third-party settlement under the Federal Employer's Liability Act (FELA), 45 U.S.C. §51, may provide the basis for a credit against an employer's compensation liability. The Board noted that while the FELA settlement recovery does not fall within the enumerated provisions of the Act which pertain to third-party settlements and advance payments of compensation, a credit from the net amount of the FELA recovery is based on an independent credit doctrine which exists in case law to provide employers with an offset to prevent double recovery. Applying the credit in this case consistently with that obtained pursuant to Sections 3(e) and 33(f) of the Act, the Board also ruled that employer was entitled to a credit only in the net amount of the FELA settlement, which figure was reached after subtracting claimant's obligation to pay contingent attorneys' fees to counsel in the FELA action. *Jenkins v. Norfolk & W. Ry. Co.*, 30 BRBS 109 (1996).

For the reasons stated in *Jenkins*, 30 BRBS 109 (1996), the Board affirmed the administrative law judge's granting of an offset for the net amount claimant received in a prior FELA settlement, a figure reached after subtracting claimant's attorney's fee in the FELA action. The Board rejected employer's contention that it is entitled to a credit for payments claimant received from the Railroad Retirement Board. The Board held that these payments are retirement benefits, not workers' compensation benefits, and thus are not subject to a credit under Section 3(e) of the Act. *Wilson v. Norfolk & W. Ry. Co.*, 32 BRBS 57 (1998), *rev'd*, 7 F. App'x 156 (4th Cir. 2001) (holding doctrine of election of remedies barred Longshore claim after FELA settlement).

Holding that claimant may not pursue a remedy under the Longshore Act after settling a claim under FELA, the Fourth Circuit stated in *dicta* that employer is not entitled to a credit under Section 3(e) of the Act for the FELA settlement in this case as that award is not being paid under a workers' compensation law. *Artis v. Norfolk & W. Ry. Co.*, 204 F.3d 141, 34 BRBS 6(CRT) (4th Cir. 2000).

The Board reversed the administrative law judge's finding that employer is entitled to a credit pursuant to Section 3(e) for state short-term disability benefits (EDD) paid to claimant and then repaid to the state agency by employer once the injury was accepted as compensable under the Act. The Board found that the administrative law judge's premise for this conclusion, i.e., because "when the employer made a payment to the EDD, it was in effect indirectly making a payment to the claimant pursuant to the workers' compensation laws of the State of California," is not supported by the facts because there was no evidence that claimant filed any claim for state workers' compensation benefits. Moreover, the Board stated that employer did not show that the EDD payments themselves were made pursuant to a workers' compensation law. Consequently, employer did not satisfy its burden of showing that the EDD payments to claimant and employer's reimbursement of those payments to the EDD constituted an amount paid "pursuant to a workers' compensation law" as required for Section 3(e) to apply. *Cutietta v. Nat'l Steel & Shipbuilding Co.*, 49 BRBS 37 (2015).

Where claimant filed a state claim against his nominal employer, a temporary employment agency, and a claim under the Act against his borrowing longshore employer, and then settled his state claim without the prior approval of the borrowing employer, the Board held that the administrative law judge erred in considering the nominal employer to be a "third-party" and in applying the Section 33(g) bar to deny longshore benefits. As there was neither a third-party nor a suit for civil tort damages involved in this case, the Board held that Section 33 is not applicable. Rather, employer, as the parties agree, is entitled to a Section 3(e) credit against the state settlement. Consequently, the Board held that the administrative law judge erred in applying Section 33(g) instead of Section 3(e), and it remanded the case for resolution of this and any remaining issues. *Redmond v. Sea Ray Boats*, 32 BRBS 1 (1998), *vacated in part on other grounds on recon.*, 32 BRBS 195 (1998).

The district court held that Section 3(e) of the Act is incorporated into the Defense Base Act, and that the Saudi Social Insurance Law is a "workers' compensation law" within the meaning of Section 3(e) as it more closely resembles a workers' compensation law than a public social insurance program based on a weighing of the relevant factors. Employer therefore is entitled to a Section 3(e) credit for payments claimant received pursuant to the Saudi Social Insurance Law. *Lee v. Boeing Co., Inc.*, 7 F. Supp. 2d 617 (D.Md. 1998). Payments made by a carrier, Chubb, under Pennsylvania law pursuant to its Voluntary Foreign Workers' Compensation policy with employer are to be credited against employer's liability under the Act pursuant to Section 3(e). As Chubb remains liable to claimant for benefits under Pennsylvania law, Chubb is not entitled to credit or reimbursement from either employer or the Special Fund for benefits it incorrectly paid under the Act. *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001).

The Second Circuit reversed the Board's holding that the entire net proceeds of an unapportioned state workers' compensation settlement covering both disability and death benefits may be credited against an award of death benefits under the Longshore Act. The basis for the Board's holding was that both the state and Longshore Act cases were related to the same injury--decedent's asbestosis that resulted in disability and death; the Board stated that the state settlement had resolved all claims for disability and future claims for death and that decedent had previously claimed and been awarded disability benefits and that his widow was currently claiming death benefits under the Longshore Act. The court rejected the Board's reasoning, and interpreted Section 3(e) to limit the allowable credit to amounts paid for the same injury, death or disability *currently* being claimed under the Longshore Act. The court further held that, consistent with Section 7(c) of the APA, the party claiming a Section 3(e) credit bears the burden of proof on allocation of the state settlement. The case was remanded for a determination of the amounts paid to settle the state disability claim and the future death claim, with employer bearing the burden of proof

on the allocation of the state settlement. *Barscz v. Director, OWCP*, 486 F.3d 744, 41 BRBS 17(CRT) (2d Cir. 2007).

Employer's unilateral suspension of benefits due under the terms of a compensation order as a result of its assertion of a Section 3(e) credit presents a mixed question of law and fact under Section 22 concerning the amount of benefits due claimant. The Board held that there is no statutory or regulatory impediment to employer's raising entitlement to a Section 3(e) credit on modification, so long as the Section 22 time limits are satisfied. The Board vacated the administrative law judge's finding that employer's stipulations in 2003 regarding claimant's alleged neck, back, shoulder, knee, and hand conditions precludes employer's raising in 2008 its entitlement to a Section 3(e) credit arising from employer's earlier payments under a state compensation scheme for a back injury occurring in 1987. The case was remanded to the administrative law judge to address factors relevant to employer's entitlement to modification of the prior award and to a Section 3(e) credit. *M.R. [Rusich] v. Elec. Boat Corp.*, 43 BRBS 35 (2009).

The Ninth Circuit reversed the Board's holding that the credit doctrine supports the last responsible employer's entitlement to a credit for the Section 8(i) settlement payments made by other potentially liable longshore employers in claimant's occupational disease claim. The court deferred to the Director's interpretation that Section 3(e) does not apply to this situation; economically, it does not make sense for the injured employee to settle claims to the benefit of the responsible employer. Thus, application of Section 3(e) would discourage settlements. *Alexander v. Director, OWCP,* 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002), *rev'g in pert. part Alexander v. Triple A Mach. Shop*, 32 BRBS 40 (1999) and 34 BRBS 34 (2000).

Citing *Alexander*, 32 BRBS 40 (1998), the Board affirmed the administrative law judge's finding that employer is entitled to a credit for payments made by other potentially liable longshore employers in settlement of claimant's occupational disease claim. The Board distinguished *Aples*, 883 F.2d 422, 22 BRBS 126(CRT) (5th Cir. 1989), in which the employer was denied a credit for the previous employer's settlement payment, on the basis that *Aples* involved multiple traumatic injuries with successive employers as opposed to the instant case in which employer was held solely liable for the entire disability caused by decedent's occupational disease. *Ibos v. New Orleans Stevedores*, 35 BRBS 50 (2001), *rev'd in pert. part and aff'd on other grounds*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S.1141 (2004). Reversing this decision, the Fifth Circuit deferred to the Director's position that the amounts received from the settling employers are irrelevant to the amount owed by the responsible employer and should not reduce its liability, rejecting the Board's application of the *Nash* extra-statutory credit doctrine to a case involving alternative liability for a single occupational injury. *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003) (Jones, J., dissenting on the basis that there is no reason not to apply the *Nash* credit doctrine, applicable in "aggravation rule" cases, to cases involving a single occupational injury).

The party claiming a credit for the claimant's proceeds from a British tort suit, AG Jersey here, has the burden of proving the allocation of the settlement proceeds to show that it is deserving of a credit for benefits due under the Act. In this case, AG Jersey has not established the applicability of any of the Act's credit doctrines as: it did not show there were payments made under another workers' compensation act or the Jones Act (Section 3(e)); it did not show there was a reduction of benefits due to a modification of a prior award (Section 22); it did not show there was a third-party payment (Section 33(f)); and it did not show there was an injury under the schedule for which prior payments had been made (*Nash*). AG Jersey also did not show that the settlement payment was an advanced payment of compensation (Section 14(j)), as the details of the settlement have not been divulged. The Board also rejected the suggestion that it create another extra-statutory credit provision; double recoveries are not absolutely prohibited under *Yates*, 519 U.S. 248, 31 BRBS 5(CRT). The Board also rejected AG Jersey's argument that allowing double recovery would give non-U.S. citizens greater rights, stating that the rights of U.S. citizens and foreign nationals are not always equal under the Act. Therefore, the Board held that AG Jersey is not entitled to a credit for payments made to claimant pursuant to the tort settlement. *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015).