

SYLVIA LOYD)	
(ADMINISTRATRIX of the)	
ESTATE of STEVE LOYD))	
)	
Claimant-Respondent)	
)	
v.)	
)	
RAM INDUSTRIES, INCORPORATED)	DATE ISSUED: <u>Aug. 7, 2001</u>
)	
and)	
)	
LOUISIANA WORKERS' COMPENSATION)	
CORPORATION)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Billy Wright Hilleren (Hilleren & Hilleren, L.L.P.), Mandeville, Louisiana, for claimant.

Ted Williams, Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (1998-LHC-0608) of Administrative Law Judge C. Richard Avery awarding benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Decedent, Steve Loyd,¹ sustained neck and back injuries, bruised ribs, and dental

injuries as a result of an accident which occurred while he was working for employer as an on-shore pipeline man on April 24, 1997. At the time of decedent's injury, employer was engaged in a dredging operation in the Bayou La Batre Ship Channel, a navigable waterway in southwest Alabama. Employer, serving on the project as a subcontractor to the United States Army Corps of Engineers (USACOE), operated the hydraulic dredge *Conway* in order to widen and deepen the channel. Under its contract, employer was responsible for removal, transportation, and appropriate disposal of the dredged soil and non-soil substances such as metal, steel cable, rope, cans, bottles, plastic and other materials. Specifically, the self-propelled dredge *Conway* pumped the dredged material through one continuous, connected pipeline from the vessel to a land-supported disposal pit, where the materials would be unloaded. A booster pump was attached to the discharge pipe about a quarter mile in-land from the channel to provide the additional pressure necessary to move the dredged material to the pit. As such, the *Conway*, discharge pipe, and booster pump operated as a unit in loading, transporting and unloading the dredged material.

Decedent's work involved the inspection and maintenance of the land portion of the pipeline, including the booster pump. In particular, decedent patrolled the pipeline to check for and repair any leaks. In addition, he would, when necessary, unclog debris from the booster pump and/or pipeline.² Decedent also used a bulldozer several times to move debris at the dumpsite, and to level out the road next to the dumpsite after it rained. During his employment, decedent boarded the dredge about ten times to retrieve tools, deliver messages and/or to pick up cans of diesel fuel for the bulldozer.

In his decision, the administrative law judge found that claimant satisfied the situs and status requirements and, thus, that decedent's injuries are covered under the Act. 33 U.S.C. §§902(3), 903(a). The administrative law judge awarded temporary total disability benefits from April 24, 1997, to October 5, 1999, the date of decedent's death.³

On appeal, employer challenges the administrative law judge's determinations that claimant satisfied the situs and status requirements under the Act. Claimant responds, urging affirmance. .

Employer argues that the administrative law judge erred as a matter of law in finding that decedent's injury was covered by the Act. Employer maintains that the administrative law judge's reliance on *Nelson v. American Dredging Co.*, 143 F.3d 789, 32 BRBS 115(CRT) (3^d Cir. 1998), to find that claimant satisfied both the situs and status requirements in this case, is misplaced, as there was no loading or unloading of cargo herein. Employer also contends that contrary to the administrative law judge's determination, decedent was not engaged in "maritime employment" at the time of his accident as his job duties were not essential to the unloading of any cargo.

For this claim to be covered by the Act, claimant must establish that decedent's injury

occurred upon the navigable waters of the United States, including any dry dock, or that his injury occurred on a landward area covered by Section 3(a) in order to meet the “situs” requirement and that his work is maritime in nature and is not specifically excluded in order to demonstrate “status” as a covered employee. 33 U.S.C. §§902(3), 903(a), (b); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Brooker v. Durocher Dock & Dredge*, 133 F.3d 1390, 1392, 31 BRBS 212, 213-214(CRT) (11th Cir.), *cert. granted*, 524 U.S. 982, *cert. dismissed*, 525 U.S. 957 (1998).

Section 3(a) states:

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a)(1994). Coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998); *Melerine v. Harbor Constr. Co.*, 26 BRBS 97 (1992). To be considered a covered situs, a site must have a maritime nexus, but it need not be used exclusively or primarily for maritime purposes. *See Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981); *Melerine*, 26 BRBS 97. An area can be considered an “adjoining area” within the meaning of the Act if it is in the vicinity of navigable waters, or in a neighboring area, and it is customarily used for maritime activity. *Winchester*, 632 F.2d 504, 12 BRBS 719; *see also Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). Under *Winchester*,⁴ the definition of “adjoining area” is a broad one. It includes areas in the vicinity of navigable waters which are used for maritime activity, *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729, and actual contiguity with navigable waters is not required. *See Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31 BRBS 199(CRT)(5th Cir. 1998).

Generally, a claimant satisfies the “status” requirement if he is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See* 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). To satisfy this requirement, he need only “spend at least some of [his] time in indisputably longshoring operations.” *Caputo*, 432 U.S. at 273, 6 BRBS at 165; *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981).

In *Nelson*, 143 F.3d 789, 32 BRBS 115(CRT), employer, at the time of injury, was engaged in a beach renourishment project on Fenwick Island, Delaware. The project consisted of widening the beach by pumping sand from ten miles offshore onto the beach. Specifically, the sand was obtained from the ocean floor by a hopper dredge and deposited in the hold of that vessel. The dredge then transported the sand to a mooring buoy located several hundred yards from the beach, and the sand, in a slurry form, was unloaded from the vessel and deposited on the beach by pumping it through a pipeline. The flow of the sand through the pipeline and its distribution on the beach were controlled by moving the pipeline along the beach, by adding sections thereto, and by a system of valves on the pipeline. The final distribution and grading of the sand were done with a bulldozer. Claimant, a bulldozer operator and assistant foreman, injured his back when he fell while dismounting from his bulldozer; at the time of this incident, claimant's bulldozer was approximately fifty feet from the water's edge. The administrative law judge determined that claimant's work was not covered by the Act. He concluded that the "situs" requirement of Section 3(a), 33 U.S.C. §903(a), was not satisfied and that claimant's job was not maritime employment within the "status" requirement of Section 2(3) of the Act, 33 U.S.C. §902(3).. The Board affirmed the administrative law judge's determinations, but its holdings with regard to both situs and status were reversed by the United States Court of Appeals for the Third Circuit. *Nelson v. American Dredging Co.*, 30 BRBS 205 (1996), *rev'd in part*, 143 F.3d 789, 32 BRBS 115(CRT)(3^d Cir. 1998).

The Third Circuit, after noting that the Board too narrowly defined the word "customarily" in Section 3(a),⁵ held that the dispositive question regarding situs in *Nelson* was whether employer customarily used the beach for loading and/or unloading. *Nelson*, 143 F.3d at 797, 32 BRBS at 122(CRT). Based on the particular facts of *Nelson*, the Third Circuit held that 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*, 143 F.3d at 797, 32 BRBS at 123(CRT). The Third Circuit also held that claimant's job moving sand and pipes with a bulldozer as part of the process of rebuilding the beach, qualified as maritime employment as he was a vital part of the process of unloading sand from employer's vessel onto the beach. *Nelson*, 143 F.3d at 799, 32 BRBS at 123(CRT). The court held that as the sand was loaded into the hold of the self-propelled vessel which then transported the load a distance of nine miles on the Atlantic Ocean to the employer's pipeline, the ship was in maritime commerce. *Nelson*, 143 F.3d at 798, 32 BRBS at 123(CRT). Thus, when pumped through the pipeline, the sand was literally "unloaded" as much as it would have been had it been bagged and removed from the vessel by a crane and cargo nets. *Id.* Moreover, the court held that claimant's duties were a vital part of the unloading process. *Id.* Specifically, the court noted that with the aid of his bulldozer claimant moved the pipeline up and down the beach in order to strategically deposit, *i.e.*, unload, the sand; he waded knee deep into the ocean waters to adjust valves and add sections to the pipeline; and finally he moved the sand from where it was pumped in those waters adjacent to the beach to the shore and then graded the sand on the beach with his bulldozer. *Id.* The court further stated that even if it were to assume that the final grading was not an

integral part of the unloading process, but instead was part of the process of rebuilding the beach, it is abundantly clear that in all other respects claimant was directly and intimately involved in unloading the hopper vessel. *Id.*

The administrative law judge herein determined that claimant satisfied the situs requirement as decedent's injury, much like the claimant's injury in *Nelson*, occurred in an area adjoining navigable waters which was customarily used by employer to unload dredged material. Specifically, the administrative law judge found that employer's primary purpose, according to documents from the USACOE, was dredging Bayou La Batre, a navigable waterway. Claimant's Exhibit 23. The administrative law judge found that employer's duty of dredging included the removal, transportation, and satisfactory disposal of the dredged soil and non-soil substances from Bayou La Batre. With regard to the particular site of injury, the administrative law judge found that the scaffolding was less than a quarter mile from the shoreline, and that employer's entire work site was, according to the contract, used exclusively by employer for the unloading of dredged materials and was customarily used for such purposes as employer had been performing these functions for at least two months prior to decedent's injury.

With regard to status, the administrative law judge determined that decedent was a "maritime employee" as his duties were essential to the unloading of the dredged material. Specifically, he found that decedent's primary function during his work for employer was to ensure that the soil and non-soil material dredged from Bayou La Batre traveled through the pipeline without difficulty and into the dump pit. In particular, the administrative law judge found that decedent was responsible for ensuring proper flow of the pipeline as well as patching any holes which developed in the pipeline during the unloading process. As such, the administrative law judge concluded that the dredged material could not have been unloaded satisfactorily without decedent's performing his employment duties. Thus, the administrative law judge determined that like the claimant in *Nelson*, decedent's function herein was essential for unloading the dredged material onto the shore and into the dump pit.

Contrary to employer's contention, we hold that the administrative law judge's application of *Nelson* in the instant case is appropriate. As the administrative law judge found, the factual situation herein is analogous to that presented in *Nelson*. Specifically, both cases involved the loading, transportation, and unloading of dredged material from navigable water, and the injured employees' job duties were an essential part of that process. The present case actually presents even more compelling facts in favor of coverage, as decedent's duties assisting with employer's dredging operation furthered maritime commerce in that the project improved the navigability of the La Batre Ship Channel. With regard specifically to situs, as in *Nelson*, employer's entire work site was customarily used for its dredging operation, and thus was used in the loading and unloading of the dredged material. Accordingly, decedent's work herein was performed at a covered situs. *See* 33 U.S.C. §903(a).

Similarly, as in *Nelson*, decedent's duties in the case at hand were an integral part of the unloading process as he worked directly to ensure that the dredged material properly flowed from the *Conway* through the pipeline to the dump site. Contrary to employer's contention, the fact that in the instant case the *Conway* did not store the dredged material does not distinguish this case from *Nelson*. The facts demonstrate that the *Conway*, in conjunction with the pipeline, was involved in the collection, transportation and "unloading" of "cargo," *i.e.*, in this case the dredged debris. The *Conway*, while moving along the Bayou La Batre Ship Channel, actually acquired and possessed the silt and debris from the channel, albeit for only a brief period of time, by sucking it into the dredge mechanism, and then pumped it from that mechanism through the discharge pipeline in the unloading process. It therefore performed an unloading function similar in all material aspects to the ship in *Nelson*. In addition, decedent's work was integral to improving the navigability of the shipping channel, and work on such a project involving navigation and commerce on navigable waters is maritime activity.⁶ See *Odom Constr. Co. v. U.S. Dept. of Labor*, 622 F.2d 110, 12 BRBS 396 (5th Cir. 1980). Consequently, decedent's duties with employer were sufficient to establish status under Section 2(3) of the Act. See 33 U.S.C. §902(3).

The administrative law judge's findings of fact are supported by substantial evidence, and his analysis is consistent with law. Consequently, the administrative law judge's conclusion that claimant established both the situs and status requirements and thus, that decedent's injuries are covered under the Act, is affirmed.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge