

BRET TARVER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BO-MAC CONTRACTORS, INCORPORATED	)	DATE ISSUED: <u>Oct. 15, 2003</u>
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier- Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision on Employer/Carrier=s Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

John D. McElroy (Barton, Price & McElroy), Orange, Texas, for claimant.

John C. Elliott (Fitzhugh & Elliott, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and the Decision on Employer/Carrier=s Motion for Reconsideration (2002-LHC-270) of Administrative Law Judge C. Richard Avery rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers= Compensation Act, as amended, 33 U.S.C. '901 *et seq.* (the Act). We must affirm the administrative law judge=s findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. '921(b)(3).

Claimant worked as a welder for employer for five months. His work involved construction of barge slips on undeveloped land adjacent to the intracoastal waterway. At the time of claimant=s injury on July 14, 1998, the slip walls were in place and some water would enter into the excavated hole at high tide through a pipe in the wall. It is uncontested that the slips were not completed at the time of claimant=s injury. When the slips were completed, the wall of Aland@ between the excavated area and the waterway would be removed and water would fill the slip permanently. The slips would be used to house ocean-going barges so that pipe laying equipment could be loaded and unloaded. On July 14, 1998, claimant was injured on the land side of the excavation when an angle iron holding an 80-foot beam became loose, and the beam pinned claimant on the scaffolding. As a result of the accident, claimant is a paraplegic. Employer paid claimant benefits from July 15, 1998, to September 28, 2001.

The administrative law judge found that claimant=s injury occurred on a covered situs pursuant to Section 3(a) of the Act, 33 U.S.C. '903(a), because the site has a maritime purpose. Citing *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 12 BRBS 681 (5<sup>th</sup> Cir. 1980), the administrative law judge found that the site was covered even though it was incomplete. The administrative law judge also found that claimant satisfied the status test of Section 2(3) of the Act, 33 U.S.C. '902(3), as he was a harbor worker engaged in the construction of a facility akin to a pier, dock or wharf. Finally, the administrative law judge rejected employer=s contention that benefits are barred due to claimant=s alleged intoxication. The administrative law judge found that employer failed to demonstrate that claimant was intoxicated at the time of his injury and, more importantly, that intoxication was the sole cause of claimant=s accident.<sup>1</sup> See 33 U.S.C. '903(c), 920(c). The administrative law judge awarded claimant ongoing total disability benefits. Employer filed a motion for reconsideration, which the administrative law judge denied.

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<sup>1</sup> Employer does not raise on appeal any issues concerning the administrative law judge=s rejection of the intoxication defense.

On appeal, employer contends that the situs element of Section 3(a) is not satisfied, because the barge slip was not complete and therefore the site was not used for any maritime purpose at the time of claimant=s injury. Employer also contends that the status element of Section 2(3) is not satisfied because claimant=s work was not Adirectly connected@ to the maritime movement of cargo.<sup>2</sup> Claimant responds, urging affirmance of the administrative law judge=s findings on the coverage issues. Employer filed a reply brief, as well as a supplemental brief addressing the recent decision of the United States Court of Appeals for the Fifth Circuit in *Boomtown Belle Casino v. Bazor*, 313 F.3d 300, 36 BRBS 79(CRT) (5<sup>th</sup> Cir. 2002), *rev=g* 35 BRBS 121 (2001), *cert.denied*, \_\_\_ S.Ct. \_\_\_, 2003 WL 21180139, 71 U.S.L.W. 3725 (Oct. 6, 2003)(No. 02-1637).

In order to be covered by the Act, a claimant must satisfy both the status element of Section 2(3) of the Act and the situs element of Section 3(a) of the Act. 33 U.S.C. ' ' 902(3), 903(a); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Section 3(a) of the Act states that:

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). The administrative law judge found that claimant was injured on a covered situs because the barge slip, adjoining navigable waters, will have a maritime purpose upon completion. The administrative law judge acknowledged that the project was not complete at the time of claimant=s injury, but found this to be an insufficient basis on which to deny coverage in view of the Fifth Circuit=s decision in *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 12 BRBS 681 (5<sup>th</sup> Cir. 1980).<sup>3</sup> The claimant in *Trotti & Thompson* was involved in the construction of a pier within the Port of Beaumont. The pier extended into the Neches River and was to be used for loading and unloading vessels upon its completion. The employer argued that an uncompleted pier is not a covered situs. The Fifth Circuit stated that, Athere is a distinction between an area which before construction is a covered situs but is in the process of being put to some future use which will also qualify as a covered situs, and an area [such as that in the *Skipper* case of *Jacksonville Shipyards v. Perdue*, 539 F.2d 533, 4 BRBS 482 (5<sup>th</sup> Cir. 1976), *see infra*] which was once a covered situs, but is now abandoned . . . .@ *Trotti & Thompson*, 631 F.2d at 1218, 12 BRBS at 685. Citing *Travelers Ins. Co. v. McManigal*, 139 F.2d 949 (4<sup>th</sup> Cir. 1944), and *Brown & Root, Inc. v. Joyner*, 607 F.2d

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<sup>2</sup> Claimant=s claim under the Louisiana workers= compensation statute was dismissed without prejudice to his refiling a claim, once the coverage issue under the Longshore Act is decided. CX 31, 32.

<sup>3</sup> This case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit.

1087, 11 BRBS 86 (4<sup>th</sup> Cir. 1979), *cert. denied*, 446 U.S. 981 (1980), the Fifth Circuit held the site to be covered because the pier, like the dry docks in the two Fourth Circuit cases it cited, is carved out of an existing covered situs, *i.e.*, navigable water. *Trotti & Thompson*, 631 F.2d at 1219, 12 BRBS at 685-686. In finding the situs element satisfied in this case, the administrative law judge relied on the holding of the Fifth Circuit in *Trotti & Thompson* that an uncompleted pier is a covered situs. Decision and Order at 7. The administrative law judge found the factual differences between this case and *Trotti & Thompson* to be negligible. Decision and Order at 7.

Employer, however, contends that administrative law judge erred because he failed to acknowledge the critical distinction between this case and *Trotti & Thompson*, *i.e.*, the barge slip under construction was being carved out of an undeveloped piece of land and not out of an already covered situs. Employer avers that this land was not part of a port complex as in *Trotti & Thompson* and the slip was not being built by withdrawing navigable water from the site as in *McManigal* and *Joyner*, but by excavating dry land, which would later be filled with navigable water and used for barge moorings. Employer contends this future maritime use does not suffice to confer situs under *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 4 BRBS 482 (5<sup>th</sup> Cir. 1976); *Trotti & Thompson*, 631 F.2d 1214, 12 BRBS 681; *Nelson v. Guy F. Atkinson Constr. Co.*, 29 BRBS 39 (1995), *aff=d mem. sub nom. Nelson v. Director, OWCP*, 101 F.3d 706, 1996 WL 660878 (9<sup>th</sup> Cir. 1996); and, most recently, the Fifth Circuit's decision in *Boomtown Belle Casino v. Bazor*, 313 F.3d 300, 36 BRBS 79(CRT) (5<sup>th</sup> Cir. 2002), *cert. denied*, \_\_\_ S.Ct. \_\_\_, 2003 WL 21180139, 71 U.S.L.W. 3725 (Oct. 6, 2003) (No. 02-1637). Claimant responds that he was injured while engaged in the construction of an enumerated site, a wharf, and that therefore he is covered under *Trotti & Thompson*. For the reasons that follow, we must reverse the administrative law judge's finding that the situs element is satisfied.

Our resolution of this issue begins with a review of case law addressing the situs issue in terms of the construction of maritime facilities. In *Travelers Ins. Co. v. McManigal*, 139 F.2d 949 (4<sup>th</sup> Cir. 1944), a carpenter was killed during the construction of a dry dock at the Norfolk Navy Yard. The structure was 62 percent complete on the day of the accident. The dry dock was dredged from the bank of the river back into the Navy Yard. Originally, the space was filled with water from the navigable Elizabeth River. After the dredging was finished, the bottom of the excavated site was prepared for the concrete floor, which was poured underwater. The construction of the side walls was then begun, and when the work had reached a certain point, a cofferdam was erected at the river end of the dock and the water was pumped out to permit the completion of the structure. *Id.* at 950. The employer argued that because the dry dock was not completed, it was not a covered situs under Section 3(a), which at the time provided coverage for injuries occurring on navigable waters (including any dry dock). 33 U.S.C. § 903(a) (1970) (amended 1972 and 1984). The Fourth Circuit affirmed the deputy commissioner's award, stating, "It appears from the testimony that the site of the dock had always been covered with water until the cofferdam was built . . ." *Id.* at 952. The court stated that the temporary withdrawal of the water does not remove federal jurisdiction, nor was it material that the structure was not complete. *See also Ransom v. Coast Marine Constr. Co.*, 16 BRBS 69 (1984). As support for its decision, the Fourth Circuit quoted from *The Raithmoor*, 241 U.S. 166 (1916), an admiralty case involving a tort committed when a ship on the Delaware River

collided with a beacon that was being erected for the United States as an aid to navigation. The Supreme Court stated in *The Raithmoor*,

We regard the location and purpose of the structure as controlling from the time the structure was begun. *It was not being built on shore and awaiting the assumption of a maritime relation.* It was in course of construction in navigable waters, . . . This is not the case of a structure which at any time was identified with the shore, but, from the beginning of construction, locality and design gave it a distinctly maritime relation.

*McManigal*, 139 F.2d at 952, quoting *The Raithmoor*, 241 U.S. at 176 (emphasis added).

The Fourth Circuit followed *McManigal* in *Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4<sup>th</sup> Cir. 1979), *aff=g* 7 BRBS 356 and 7 BRBS 608 (1978), *cert. denied*, 446 U.S. 981 (1980). In *Joyner*, employer was hired by Newport News Shipbuilding to construct a shipyard on filled land in an area that was formerly a navigable part of the James River. Employer built a seawall to enclose part of the river, and then pumped sand into the area to create land for the new buildings. In addition, a new dry dock was excavated. The new yard was separated from the existing yard by a fence during the construction period. The Fourth Circuit affirmed the Board=s holding that the situs element was met with regard to the dry dock, as well as to the new shipyard. With regard to the former, the court relied on the fact that the site was previously navigable water, and it held that the temporary removal of water did not change this characteristic. With regard to the new shipyard adjacent to the dry dock, the court summarily stated that the 1972 version of Section 3(a), which expanded coverage to certain landward sites, covers this area. *Id.*, 607 F.2d at 1090, 11 BRBS at 92.

The Fifth Circuit discussed the situs element in *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 4 BRBS 482 (5<sup>th</sup> Cir. 1976), and specifically in the case of claimant Skipper who was one of five claimants before the court.<sup>4</sup> Before discussing the specifics of each case, the Fifth Circuit stated, in *dicta*,

We will require that a putative situs actually be used for loading, unloading, or

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<sup>4</sup> The *Perdue* case has an extensive history. See *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 4 BRBS 482 (5<sup>th</sup> Cir. 1976), *vacated and remanded in part sub nom. Director, OWCP v. Jacksonville Shipyards, Inc.*, 433 U.S. 904 (1977) (*Perdue*) and *P.C. Pfeiffer Co. v. Ford*, 433 U.S. 904 (1977) (*Ford and Bryant*), *cert. denied*, 433 U.S. 908 (1977), *remanded parts adhered to on remand*, 575 F.2d 79 (5<sup>th</sup> Cir. 1978), *reh=g denied in part*, 580 F.2d 1052 (1978) (*Perdue*), *cert. denied*, 440 U.S. 967 (1979) (*Perdue*), *aff=d sub nom. P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979) (*Ford and Bryant*). The *Skipper* case, however, ended with the first Fifth Circuit decision. The *Perdue* case was later overruled in part by the Fifth Circuit=s decision in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5<sup>th</sup> Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981).

one of the other functions specified in the Act. . . .[W]e . . . interpret the Act as requiring that the situs meet the statutory requirements as of the time of the injury. It will not suffice if the area was so used only in the past, or if such uses are merely contemplated for the future.

*Perdue*, 539 F.2d at 541, 4 BRBS at 488. With regard to Skipper's case, he was injured at an abandoned fabrication shop that adjoined the navigable St. John's River. The building was being dismantled to salvage steel for reuse in a non-maritime project. Although the shops were abandoned, the piers adjacent to them were still in use for ship tie-ups. The court held that the shop where claimant Skipper was injured was not a covered situs as it had been inactive for over a year and no loading, unloading, repairing or building of a vessel was taking place there. The court concluded that the abandoned shops lost their status as ship repair or shipbuilding facilities. *Id.*, 539 F.2d at 542-543, 4 BRBS at 489.

In *Trotti & Thompson*, 631 F.2d 1214, 12 BRBS 681, on which the administrative law judge relied in finding the situs element met in the instant case, the Fifth Circuit stated that, unlike *Skipper*, the case before it involved new construction of a pier within a port, intended for maritime use and built over a clearly covered situs, namely navigable waters. The Fifth Circuit stated that,

Notwithstanding some broad dictum concerning future use in *Perdue*, we feel that there is a distinction between an area which before construction is a covered situs but is in the process of being put to some future use which will also qualify as a covered situs, and an area which was once a covered situs but is now abandoned, with no plans for future use as a covered situs. *Perdue* involved only this latter type of area--the separate fabrication facility in which Skipper was injured. That separate, abandoned area is far different from the construction area of the pier or dry dock at an already covered situs on the navigable waters. The construction area of a pier or dry dock is after all simply being transformed from one defined maritime use to another.

*Trotti & Thompson*, 631 F.2d at 1218, 12 BRBS at 685. The court also relied on *McManigal* and *Joyner*, finding that a pier is an enumerated site under the 1972 Act, as a dry dock was before (and after) 1972, and therefore a pier construction site is a covered situs under Section 3(a). In this regard, the court stated that after 1972,

Congress now expressly prescribes that situs is satisfied for injuries occurring upon any pier adjoining navigable waters. And where pre-1972 injuries have been held covered, where occurring during the construction of a dry dock, a pier now being a covered situs the same rule should apply during its construction. Both are sites carved out of a clearly covered situs--the navigable water. . . . That a pier is now a part of the same parenthetical list in which prior to 1972 only a dry dock appeared, is further evidence that Congress expected an uncompleted pier to be treated like an uncompleted dry dock.

*Id.*, 631 F.2d at 1219, 12 BRBS at 686; *see also Hurston v. Director, OWCP*, 989 F.2d 1547, 26 BRBS 180(CRT) (9<sup>th</sup> Cir. 1993) (pier is a covered site regardless of its use). Here, however, the court placed a footnote stating, “Nor was the pier being built on shore and awaiting the assumption of a maritime relation.” *Trotti & Thompson*, 631 F.2d at 1219 n.13, 12 BRBS at 686 n.13, quoting *The Raithmoor*, 241 U.S. at 176.

The Board addressed a new construction case in *Nelson*, 29 BRBS 39. Claimant was engaged in a project to construct a lock on a dam project on the Columbia River. This construction involved the preparation and excavation of dry land; eventually, the navigable waters of the river would cover the area, but the land had never been part of the river before the project began. The Board first affirmed the administrative law judge’s finding that claimant was not injured on actual navigable waters. The Board distinguished the case from cases in which navigable water is removed from the site on a temporary basis, *see Joyner*, 607 F.2d 1087, 11 BRBS 86; *Ransom*, 16 BRBS 69, from the case before it on the ground that the site in question had never been a part of navigable water. *Nelson*, 29 BRBS at 40-41. The Board further held that the area was not an adjoining area under Section 3(a) as the area did not have a *current* maritime use, and because the situs test is not met merely because the injury occurred adjacent to water. *Id.* at 41.<sup>5</sup>

Recently, after the administrative law judge decided the instant case, the Fifth Circuit issued *Bazor*, 313 F.3d 300, 36 BRBS 79(CRT), in which the court reversed, *inter alia*, the Board’s holding that the situs test was satisfied; the court relied on the Board’s holding in *Nelson*. The site in question was adjacent to the navigable Harvey Canal and, upon the vessel’s completion, would be used to load and unload passengers from the casino vessel.<sup>6</sup> The Fifth Circuit held that a future maritime use is not sufficient to confer coverage on the site. At the time of claimant’s injury, the site had not yet been used for loading and unloading. The court noted the broad scope of the situs inquiry under *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5<sup>th</sup> Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981), but stated that *Winchester* considered the geographic dimension of the situs inquiry and not the atemporal dimension. *Bazor*, 313 F.3d at 304, 36 BRBS at 83(CRT).

The administrative law judge, citing *Winchester* and *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9<sup>th</sup> Cir. 1978) (concerning the adjoining area inquiry under Section 3(a)), found that the barge slip site was well-suited for maritime use, adjoined navigable waters, and was being constructed solely for the maritime purpose of allowing ships to tie-up so they could be loaded and unloaded. He stated that, like piers and wharves which are enumerated sites

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<sup>5</sup> The Ninth Circuit affirmed the Board’s decision in an unpublished opinion, stating that claimant identified no authority holding that dry land that has never been submerged can be navigable waters, and that the area is not an adjoining area because it was not customarily used for loading, unloading, *etc.* *Nelson*, 1996 WL 660878 at \*\*2.

<sup>6</sup> The vessel was under construction at a shipyard and was not moored at the site.

and which are inherently maritime, a barge slip is inherently maritime and should be considered an adjoining area under Section 3(a). The administrative law judge noted the distinction between this case and *Trotti & Thompson*, as, unlike in the latter case, the site was not previously navigable waters. He stated that this difference should not bar recovery, as such a holding would foil the purpose of the expanded situs definition in Section 3(a).<sup>7</sup>

Although the barge slip under construction was being built solely for maritime purposes, we are constrained by the foregoing case law to hold that this site is not covered pursuant to Section 3(a) of the Act. Contrary to the administrative law judge's finding that the differences between this case and *Trotti & Thompson* are negligible, we find that the determinative facts do indeed concern the nature of the site prior to its completion. Unlike the dry docks and piers in *McManigal*, *Joyner* and *Trotti & Thompson*, the site in question here had never been navigable waters or any another enumerated site. Rather, the site and surrounding land areas were unoccupied. One of employer's supervisors testified that the project was undertaken from the land side of the water. The property had to be cleared and holes were dug in the land, with the excavated dirt being dumped behind the holes to build up the land. Tr. 188-189. The pictures in evidence bear this out. EX 23. Only after the excavation was complete and the slip walls were in place would navigable water fill the slip. Tr. at 50-51, 190. Moreover, although the site is suitable for maritime uses, at the time of claimant's injury neither the site nor any immediately surrounding areas were used for a maritime purpose. Tr. at 192. The Fifth Circuit's decisions in *Perdue*, *Trotti & Thompson*, and, most recently, *Bazor*, together contemplate either that, at the time of claimant's injury, the location have a current maritime use, or that the site of the project under construction had been navigable waters or another covered site previously. Neither condition is present in this case. It is undisputed that the barge slip site had no maritime use at the time of claimant's injury and, moreover, it is evident that the barge slip was not being constructed by the temporary removal of navigable waters, but by the excavation of vacant land.

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<sup>7</sup> The administrative law judge also stated that at the time of claimant's injury, the barge slip was adjusted daily to the ebb and flow of the tides. Decision and Order at 7-8. On employer's motion for reconsideration, the administrative law judge stated he did not rest his decision on the ebb and flow of the tides. The administrative law judge stated that his finding of situs hinged on the fact that the site adjoined navigable waters and was being constructed for a maritime purpose. Decision on Recon. at 1. Thus, we need not address any factual error the administrative law judge may have committed with regard to the tidal influences on the site.

The instant case is most analogous to *Nelson*, 29 BRBS 39, which the administrative law judge did not discuss, and which was cited with approval in *Bazor*, 313 F.3d at 304, 36 BRBS at 83(CRT). In both cases, the project under construction was an inherently maritime structure, which would, upon completion, be used for maritime commerce. Nonetheless, the focus is on the nature of the site *at the time of injury*, see *Nelson*, 29 BRBS at 41, and, absent in both cases was any maritime use at the time of the claimant=s injuries. Tr. at 192-193; *Nelson*, 29 BRBS 41-42; see *Bazor*, 313 F.3d at 304, 36 BRBS at 83(CRT). Nor are we persuaded by claimant=s argument that because the site herein could be deemed a wharf, @ *i.e.*, an enumerated situs, the administrative law judge=s finding must be affirmed. In *Trotti & Thompson*, the Fifth Circuit recognized, albeit in a footnote, the limitation on its holding that new pier construction constitutes a covered situs. The court stated, ANor was the pier >being built on shore and awaiting the assumption of a maritime relation.=@ *Trotti & Thompson*, 631 F.2d at 1219 n.13, 12 BRBS at 686 n.13, quoting *The Raithmoor*, 241 U.S. at 176. That is exactly the scenario presented by this case: a barge slip being built on shore, excavated from land, and awaiting completion so it could be used for maritime purposes. As the site had no maritime use at the time of claimant=s injury and as the project was not located on a site that was an already-covered situs, we hold that claimant=s injury did not occur on a covered situs pursuant to Section 3(a). *Bazor*, 313 F.3d at 304, 36 BRBS at 83(CRT).<sup>8</sup> Therefore, we reverse the administrative law judge=s award of benefits under the Act.

Accordingly, the Decision and Order and the Decision on Employer/Carrier=s Motion for Reconsideration awarding benefits are reversed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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<sup>8</sup> Given this disposition, we need not address employer=s appeal with regard to the administrative law judge=s finding that the status element of Section 2(3) was satisfied.