BRB No. 07-0982

R.V.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
J. D'ANNUNZIO AND SONS	)	DATE ISSUED: 07/17/2008
	)	
and	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Order Granting Employer's Motion for Summary Decision of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Alan C. Rassner (Rassner, Rassner & Olman), Roslyn, New York, for claimant.

Robert N. Dengler (Flicker, Garelick & Associates, L.L.P.), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Order Granting Employer's Motion for Summary Decision (2006-LHC-1686) of Administrative Law Judge Ralph A. Romano 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 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).

Employer was hired by Hudson River Park Trust to construct a portion of a larger beautification project to develop a park with recreational, educational, and community facilities along the Hudson River in New York. Employer's contractual area was bound by West 26th Street on the south, West 29th Street on the north, the Hudson River on the west, and Route 9A in Manhattan on the east. The project involved tree transplantation, demolition, excavation, bulkhead repair and restoration, lighting installation, and paving. Emp. Ex. 1.

Claimant had worked as a laborer for employer for four weeks.[1] The day before his injury, he was transferred to work on the Hudson River project, and he was assigned to repair a bulkhead.[2] Claimant spent three hours chipping excess concrete off the bulkhead wall and five hours pouring new concrete onto it. Emp. Ex. 1 at Exh. B. According to claimant, when he chipped away concrete from the outer side of the bulkhead, he was on a scaffold suspended over the river. Order at 2; Cl's Dep. at 20-24. The next day, claimant was assigned to assist in the removal of landscape lumber away from the bulkhead work area. Claimant had worked approximately one hour guiding a payloader carrying a sling of the lumber when his knee was pinned between some lumber and another contractor's construction trailer. Order at 4; Selover Dep. at 20-21. This injury occurred approximately 85 or 90 feet away from the bulkhead on which he had worked the day before. Order at 4-5; Cl's Dep. at 30-33; Selover Dep. at 20-21. Claimant is receiving benefits under the New York workers' compensation law. Emp. Brief at 6. Claimant also filed this claim for benefits under the Act.

Employer moved for summary decision, arguing that claimant does not satisfy the Act's situs requirement, 33 U.S.C. §903(a). ALJ Ex. 4. Claimant responded, filing a cross-motion for summary decision and arguing that he is a covered "harbor worker" because he was working on a bulkhead. He contended it did not matter where his injury occurred, as, once he is designated a "harbor worker," he cannot walk in and out of coverage. ALJ Ex. 5.

The administrative law judge granted employer's motion for summary decision. He found that there is no genuine issue of material fact regarding the situs of claimant's

[1]Claimant installed train tracks and built roads on a project on Staten Island. Order at 2; Cl's Dep. at 16-19.

[2]Employer's area of the project involved two existing piers which extended off the bulkhead. Claimant did not have any responsibilities related to the piers, and claimant's supervisor testified that the only work employer was contracted to perform on the piers was installing lighting, shade structures, and benches. Order at 3-4; Cl's Dep. at 40-42; Selover Dep. at 21-23, 26.

injury. Specifically, the administrative law judge found that claimant was not injured on navigable waters but was injured between 85 and 90 feet landward of the bulkhead in an area that contained no facilities for loading, unloading, mooring, building, repairing or dismantling vessels. Thus, the administrative law judge found that the area where claimant was injured was not an enumerated area, had no nexus to maritime activity, and, thus, was not a covered situs pursuant to Section 3(a). Order at 6. The administrative law judge also addressed the Act's status requirement, 33 U.S.C. §902(3). He stated that claimant had no history of maritime work, that he worked only one day on the bulkhead, and that claimant's work on the bulkhead had nothing to do with loading, unloading, mooring, building, or repairing vessels, but, rather, was to prevent erosion of the earth into the water. Moreover, the administrative law judge found that employer's work on the piers, which involved installation of lighting, shade structures, and benches, did not establish a sufficient connection to ships or to any loading and unloading process. Accordingly, he found that claimant also did not satisfy the status requirement, and he concluded that employer is entitled to summary judgment as a matter of law. The administrative law judge denied claimant's motion for summary decision and dismissed the claim. Order at 7.

Claimant appeals the administrative law judge's decision. He argues that his work on the bulkhead gave him "harbor worker" status because the bulkhead is a "pier" and that he cannot be denied benefits by "moving in and out of situs" on employer's work site adjacent to the river. Employer responds, urging affirmance and arguing that claimant does not satisfy either the status or the situs requirement, and, as a matter of law, the administrative law judge properly granted summary decision.

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §§18.40(c), 18.41(a). As the facts of this case pertaining to claimant's employment and the site of his injury are undisputed, there is no genuine issue of fact. Therefore, the question before the Board is whether the administrative law judge properly applied the law to the established facts.

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or that it occurred on a landward area covered by Section 3(a), and that his work is maritime in

nature pursuant to Section 2(3) and is not specifically excluded by any provision in the Act. 33 U.S.C. §§902(3), 3(a); *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). Thus, in order to demonstrate that coverage exists, a claimant must separately satisfy both the "situs" and the "status" requirements of the Act. *Id.*; *see also Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied*, 525 U.S. 981 (1998); *Crapanzano v. Rice Mohawk, U.S. Constr. Co., Ltd.*, 30 BRBS 81 (1996).

Claimant contends he is covered by the Act whether his injury occurred on or away from the bulkhead because he was on employer's job site adjacent to the water performing employer's work in connection with bulkhead repair and construction. Claimant relies *Fleischmann*, 137 F.3d 131, 32 BRBS 28(CRT), for the proposition that the entire area around the bulkhead is a covered situs. Claimant attempts to analogize the bulkhead area in this case to a "pier" or "wharf," citing language in *Fleichmann* that Congress's failure to define these term indicates that the geographic area encompassed in coverage is not to be limited to the water's edge. Claimant asserts that he would have been covered if injured on scaffolding attached to the bulkhead during his work in the previous day and his injury on land is thus also covered, thereby preventing him from "walking in and out of coverage."[3] Employer argues that claimant is not covered because he was injured in an area that has no connection to loading, unloading, mooring, constructing, repairing or dismantling vessels.

[3]Contrary to claimant's argument, because his injury did not occur on navigable water, he must establish both the status and situs elements separately. The issue of "walking in and out of coverage" applies to status generally and is typically resolved by considering any work to which an employee could be assigned. *See Ford*, 444 U.S. 69, 11 BRBS 320; *Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002); *McGray Constr. Co. v. Hurston*, 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999); *W.B. v. Sea-Logix, L.L.C.*, 41 BRBS 89 (2007). Specifically, in an employee's current employment, if he may be assigned to regularly perform both maritime and non-maritime duties, then he cannot "walk in and out of coverage," and he would satisfy the status requirement even if he were injured while performing the non-maritime work. Therefore, to satisfy the status requirement under the Act, an employee need not be performing maritime work at the time of his injury so long as he regularly performs such work some of the time. *Caputo*, 432 U.S. 249, 6 BRBS 150. However, claimant must also satisfy the situs element, and Section 3(a) provides coverage only where the injury occurs on a maritime situs. *Bianco*, 304 F.3d 1053, 36 BRBS 57(CRT); *Fleischmann*, 137 F.3d at 139, 32 BRBS at 34(CRT). Thus, a maritime employee who leaves a maritime site during the course of his employment and is injured in a non-covered area is not covered by the Act. *See Humphries v. Director, OWCP*, 834 F.2d 372, 20 BRBS 17(CRT) (4th cir. 1987), *cert. denied*, 484 U.S. 1028 (1988).

Section 3(a) of the Act 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). To be considered a covered situs, a site must have a maritime nexus, but it need not be used exclusively or primarily for maritime purposes. *See Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981). In this case, claimant was not injured upon navigable waters or on an enumerated site such as a pier or wharf.[4] The issue is whether claimant's injury occurred on an "other adjoining area," and claimant contends the bulkhead is a covered adjoining area.

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. *Triguero v. Consolidated Rail Corp.*, 932 F.2d 95 (2d Cir. 1991); *see also Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978).[5] Although claimant formulates his argument around the bulkhead, the facts here

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[4]Although claimant relies on *Fleischmann* to equate the bulkhead herein to a pier, *Fleischmann* is distinguishable in this regard: unlike claimant in *Fleischmann*, claimant here was not working on the bulkhead on the day when he was injured. He was removing landscaping timbers in the park area 85-90 feet east of the bulkhead. Moreover, in *Fleischmann*, the court adopted the structural definition of the term "pier," utilized by the Ninth Circuit in *Hurston v. Director, OWCP*, 989 F.2d 1547, 1553, 26 BRBS 180, 190(CRT) (9th Cir. 1993), under which a pier is a "structure built on pilings extending from land to navigable waters." *Fleischmann*, 137 F.3d at 138, 32 BRBS at 34(CRT). The bulkhead at issue in *Fleischmann* met this test. The bulkhead in the present case does not, as it is not built on pilings extending into navigable water but rather sits along the land's edge, resting on granite blocks topped by concrete. The bulkhead project involved removing the existing portion that was deteriorating and replacing it with new concrete.

[5]The United States Court of Appeals for the Ninth Circuit concluded that an "adjoining area" must have a functional relationship with navigable waters but need not depend on physical contiguity with those waters. The United States Court of Appeals for

establish that he was not injured while working on the bulkhead. To satisfy the situs element, the Act requires that the employee be injured on a covered situs. *Bianco*, 304 F.3d 1053, 36 BRBS 57(CRT); *Fleischmann*, 137 F.3d at 139, 32 BRBS at 34(CRT). At the time of his injury, claimant was moving landscaping timbers in an area 85 to 90 feet landward of the bulkhead, next to another contractor's construction trailer which backed to a fence separating the construction site from a bike path and the highway. While the overall site was bounded by and thus adjacent to the Hudson River, the administrative law judge concluded, based on undisputed facts, that no loading, unloading, building, repairing, or dismantling of vessels occurred at the site where claimant was working for employer. Absent customary maritime activity, an area cannot be a covered "adjoining area" within the meaning of Section 3(a). 33 U.S.C. §903(a); *Silva v. Hydro-Dredge Corp.*, 23 BRBS 123 (1989).

In an analogous case, *Silva*, the claimant, who was a usually a pile driver, was hired to repair a seawall and was injured thereon. The seawall adjoined a public roadway and served to protect the roadway from the water. It contained no vessel hook-ups and was not used for maritime purposes. The Board held that the seawall's placement next to the water did not automatically make it an adjoining area within the meaning of the Act. Consequently, because it was not customarily used for maritime activity, the seawall was not a covered situs. *Silva*, 23 BRBS at 126; *see also Pulkoski v. Hendrickson Brothers, Inc.*, 28 BRBS 298 (1994) (employee injured 1 to 2 feet landward of a bridge bulkhead – not covered). Similarly, in the present case, the fact that the area is adjacent to the Hudson River cannot convert a park under construction into a maritime situs.

As the administrative law judge rationally found that the area where claimant was injured in this case was not "customarily used for maritime activity," we affirm his conclusion that claimant was not injured on a covered situs. The site was to be used as a park, and claimant's work was in preparation for that use. The administrative law judge properly applied the law to the facts in this case to conclude that the area where the injury occurred has no nexus to maritime activity. Consequently, claimant has not satisfied the

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the Second Circuit, within whose jurisdiction this case arises, stated in *Triguero*, 932 F.2d at 100-101, that it would apply the factors listed in the Ninth Circuit's decision in *Herron*, 568 F.2d at 141, 7 BRBS at 411, which are:

> 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.

situs requirement, and employer is, as a matter of law, entitled to summary decision.[6] We affirm the administrative law judge's dismissal of this claim.

Accordingly, the administrative law judge's Order Granting Employer's Motion for Summary Decision is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[6]In light of our decision, we need not address whether claimant satisfied the Section 2(3) status requirement.