BRB No. 08-0287

D. S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 09/29/2008
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order and the Decision and Order-Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Stephen P. Moschetta (The Moschetta Law Firm, P.C.), Washington, Pennsylvania, for claimant.

Jean E. Novack (Strassburger McKenna Gutnick & Potter), Pittsburgh, Pennsylvania, for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order and the Decision and Order-Awarding Benefits (2005-LHC-01842) of Administrative Law Judge Daniel L. Leland 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).

Claimant injured his back during the course of his employment for employer on June 22, 1998, at its Robena Preparation Plant (Robena) located in Greensboro, Pennsylvania. Employer prepares and processes coal. Its facility, which is adjacent to the Monongahela River, a navigable body of water, receives coal from barges. The coal is moved by conveyor belts through the processing plant, and the finished coal is loaded

onto riverside barges. At the time of his injury, claimant was working as a mechanic repairing and servicing heavy equipment. Claimant underwent back surgery after his June 1998 work injury. He has not returned to work. Claimant received benefits under the Pennsylvania workers' compensation law. He filed a claim for benefits under the Act on May 26, 2004.

This claim was bifurcated at the request of the parties. After a formal hearing on March 30, 2006, the administrative law judge issued his decision addressing only coverage. In this decision, the administrative law judge found that claimant's job duties included servicing Terex machines, which are used to load processed coal onto barges. Therefore, the administrative law judge found that claimant's work as a mechanic is an integral part of the loading process and that claimant was engaged in maritime employment pursuant to Section 2(3) of the Act, 33 U.S.C. §902(3). The administrative law judge found that the garage in which claimant performed his job duties, and where he was working at the time of his back injury, is an adjoining area related to the loading and unloading process. Accordingly, the administrative law judge found that claimant established that his injury occurred on a covered situs, 33 U.S.C. §903(a), and, consequently, that claimant established coverage under the Act.

Employer appealed the administrative law judge's decision. BRB No. 06-0926. Claimant filed a motion to dismiss the appeal as interlocutory. By Order dated February 13, 2007, the Board granted claimant's motion, stating that the administrative law judge's decision was fully reviewable after issuance of a decision on the merits of the claim.

A second hearing was held on July 12, 2007, after which the administrative law judge issued his Decision and Order-Awarding Benefits. In this decision, the administrative law judge accepted the parties' stipulation that claimant is unable to return to his usual work as a mechanic. The administrative law judge found that employer failed to establish the availability of suitable alternate employment. Accordingly, the administrative law judge found claimant entitled to ongoing compensation for permanent total disability. 33 U.S.C. §908(a). Employer filed a timely appeal of the administrative law judge's Decision and Order-Awarding Benefits, challenging the coverage findings in the administrative law judge's initial Decision and Order.

On appeal, employer challenges the administrative law judge's findings that claimant was a maritime employee and that he was injured on a covered situs. Claimant responds, urging affirmance of the administrative law judge's finding of coverage under the Act.

Employer first contends that claimant's work as a mechanic was not integral to the loading and unloading process and that the administrative law judge's finding that this

process would cease but for claimant's repairs is unsupported by the evidence. Moreover, employer contends that the Terex machine claimant was repairing when he was injured is not essential to loading and the unloading coal as it is primarily used to haul coarse refuse from the processing plant to a disposal site located at the Robena facility. We reject employer's arguments and affirm the administrative law judge's conclusion that claimant engaged in maritime work sufficient to establish that he is a covered employee under Section 2(3) of the Act.

Section 2(3) provides that "the term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker. . . ." 33 U.S.C. §902(3) (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 Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989); *Sea-Land Serv., Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112(CRT) (3d Cir. 1992). To satisfy this requirement, he need only "spend at least some of [his] time in indisputably longshoring operations." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 273, 6 BRBS 150, 165 (1977); *Maher Terminals, Inc. v. Director, OWCP [Riggio]*, 330 F.3d 162, 37 BRBS 42(CRT) (3d Cir.), *cert. denied*, 540 U.S. 1088 (2003); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, addressed this aspect of the status test in *Riggio*, 330 F.3d 162, 37 BRBS 42(CRT), where claimant split his time evenly between work as a delivery clerk and as a checker for employer. He was employed as a delivery clerk on the day he was injured when he fell off a chair while working in an office. The court affirmed a finding of coverage pursuant to Section 2(3) because claimant spent half of his time in indisputably longshore employment as a checker. *Riggio*, 330 F.3d at 169-170, 37 BRBS at 47-48(CRT).

In *Schwalb*, the Supreme Court upheld coverage for three employees, two of whom worked at a loading terminal performing housekeeping and janitorial services and one who maintained and repaired loading equipment. The two employees engaged in housekeeping and janitorial services were responsible for ordinary janitorial services as well as cleaning spilled coal from loading equipment in order to prevent equipment malfunctions. Holding all three employees covered, the Court reasoned that employees "who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act." *Schwalb*, 493 U.S. at 47, 23 BRBS at 99(CRT). The Court stated that coverage "is not limited to employees who are denominated 'longshoremen' or who physically handle the cargo," *id.*, and held that "it has been clearly decided that, aside from the specified occupations [in Section 2(3)], land-based activity . . . will be deemed maritime only if it is an integral or essential part

of loading or unloading a vessel." *Id.*, 493 U.S. at 45, 23 BRBS at 98(CRT); *see P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 82, 11 BRBS 320, 328 (1979); *Caputo*, 432 U.S. at 272-274, 6 BRBS at 165. In addressing the maintenance and repair work performed, the Court further stated that "[s]omeone who repairs or maintains a piece of loading equipment is just as vital to and an integral part of the loading process as an operator of that equipment. … It is irrelevant that an employee's contribution to the loading process is not continuous or that repair and maintenance is not always needed. Employees are surely covered when they are injured while performing a task integral to loading a ship." *Schwalb*, 493 U.S. at 48, 23 BRBS at 99(CRT).

Subsequently, in *Rock*, 953 F.2d 56, 25 BRBS 112(CRT), the Third Circuit addressed whether a courtesy van driver who transported passengers primarily within employer's maritime terminal was engaged in maritime employment. Citing *Schwalb*, the court concluded that land-based activity, other than those activities explicitly listed in Section 2(3), should be deemed maritime only if it is an integral or essential part of the chain of events leading up to the loading, unloading, or building of a vessel. That the claimant may have occasionally transported longshoremen was not determinative as his job description did not include such services, separate buses existed to transport longshoremen, and his job was not indispensable to the loading process itself. *Id.*, 953 F.2d at 67, 25 BRBS at 121(CRT). Thus, the court held that the claimant was not engaged in maritime employment.

In cases involving mechanics and repairmen, the Board has considered whether, consistent with the Supreme Court's holding in *Schwalb*, the employee's functions were integral to the loading and unloading process. In *Jones v. Aluminum Co. of America*, 31 BRBS 130 (1997), the Board held that the decedent, whose job involved maintaining and repairing conveyor belts used to unload bauxite from ships and transport it to employer's storage facility, worked in maritime employment. The bauxite moved from a ship to a state-owned conveyor belt, to employer's first conveyer belt, and then by employer's second conveyer belt to its storage facility. The Board held that the administrative law judge erred in establishing a boundary between the state's conveyor belt and employer's belts because the unloading process is not complete until the bauxite is delivered to employer's storage facility. Therefore, the Board held that the decedent's maintenance and repair work on employer's conveyor belts furthered the unloading process. The Board held that because this work constituted a regular non-discretionary portion of the claimant's job, it met the *Caputo* requirement of "some … time in indisputably longshoring operations" and confers coverage under the Act.

In *Fergusen v. Southern States Cooperative*, 27 BRBS 16 (1993), the Board held that decedent's employment, *inter alia*, repairing front end loaders used to load potash from the warehouse to a railroad or truck and in repairing the bucket elevator used to

move potash within the facility was covered employment as it involved the maintenance of machinery essential to the unloading process. The Board held that, although decedent's longshore activities made up approximately two percent of his overall work duties, these tasks were not too episodic or irregular under *Caputo* to deny status under the Act. Specifically, decedent was instrumental to the unloading of the six ships that actually unloaded at employer's facility between November 1984 when employer purchased the waterside facility and the date of decedent's death on May 31, 1986. *See also Simonds v. Pittman Mechanical Contractors, Inc.*, 27 BRBS 120 (1993), *aff'd sub nom. Pittman Mechanical Contractors, Inc., v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994).

In this case, the administrative law judge found the evidence established that claimant was responsible for servicing mobile equipment, including Terex machines, which were used, at times, to load processed coal into the de-stock hopper from which the coal goes into the river tipple and directly onto barges. Decision and Order at 6; *see* Tr. at 21, 28, 65-66. Moreover, the administrative law judge found that cessation of barge loading at the Robena facility would occur if a mechanic did not service the heavy equipment used in the loading process at the facility. Therefore, the administrative law judge found that claimant's work is integral to the chain of events ensuring that the loading process proceeds as employer's business requires. The administrative law judge found that it is not determinative that the Terex machines claimant repaired were not exclusively dedicated to loading and unloading and that claimant performed this type of repair work intermittently, as claimant's duties as a whole are pertinent to the status inquiry.

Employer does not challenge the administrative law judge's findings that Terex machines were used, at times, to load processed coal that ultimately was deposited onto barges, or that claimant repaired Terex machines. Claimant and Darrell Smith, employer's Robena plant foreman at the date of claimant's injury, testified that some processed coal was not immediately loaded onto barges, but was stockpiled at the facility. The Terex machine is used to load the stockpiled coal into the de-stock hopper, which transferred the coal to a conveyor belt, and the belt transferred the coal to a barge on the river. Tr. at 18-21, 64-66. Darrell Smith testified that the primary function of the Terex is to haul coarse refuse after processing to the refuse disposal site at Robena. Tr. at 65; *see also* Tr. at 20. Employer contends that claimant lacks status because the Terex is not used primarily to load coal, and claimant repairs other equipment as well. However, these facts are not dispositive, as, pursuant to *Schwalb*, claimant's contribution to the loading process need not be constant. *Schwalb*, 493 U.S. at 48, 23 BRBS at 99(CRT). Moreover, the possibility that the loading process might not immediately come to a halt if the Terex is out of service is also irrelevant because the lack of a functioning Terex would eventually halt the loading process of stockpiled coal. *See Ruffin v. Newport News*

Shipbuilding & Dry Dock Co., 36 BRBS 52 (2002); *see also Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981). Therefore, the administrative law judge rationally found that interruption of barge loading at the Robena facility would occur if a mechanic did not service the heavy equipment used at the facility in the loading process. *See Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002). Accordingly, the administrative law judge properly concluded that claimant's work repairing the Terex machine is integral to the loading process. Moreover, substantial evidence supports his finding that claimant spent "at least some of his time" in indisputably maritime work as this repair work was a regular non-discretionary part of claimant's job. *Riggio*, 330 F.3d 162, 37 BRBS 42(CRT). Therefore, we affirm the administrative law judge's finding that claimant was a maritime employee pursuant to Section 2(3).

We next address employer's contention that claimant's injury did not occur on a maritime situs. 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). Coverage under Section 3(a) of the Act 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 197 (1992). In *Nelson v. American Dredging Co.*, 143 F.3d 789, 32 BRBS 115(CRT) (3rd Cir. 1998), the Third Circuit addressed the scope of an "adjoining area" under Section 3(a). At the time of the claimant's injury in that case, the employer was engaged in a beach renourishment project on Fenwick Island, Delaware. 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 on the beach approximately 50 feet from the water's edge. The administrative law judge concluded, in part, that the situs requirement of Section 3(a), 33 U.S.C. §903(a), was not satisfied and the Board affirmed that determination. *Nelson v. American Dredging Co*, 30 BRBS 205 (1999).

In reversing the Board's decision, the Third Circuit held that the dispositive question regarding situs is whether at least one employer customarily used the beach for loading and/or unloading, and it concluded employer did so on the facts presented.

Nelson, 143 F.3d at 797, 32 BRBS at 122(CRT). Considering the meaning of the term "area," the court rejected a construction requiring a discrete structure or facility, in favor of the plain meaning of the term, including an open piece of land and a distinct piece of ground set aside for a specific use. Thus, an unimproved beach could be an "adjoining area." Based on the facts of the case, the Third Circuit thus 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 797-798, 32 BRBS at 123(CRT).

The Third Circuit has not addressed whether a mixed-use situs such as employer's garage at the Robena facility where employer maintains and repairs heavy equipment used in both its loading/unloading and its plant operations, such as the Terex and bulldozers, and equipment used solely in its plant operations, such as a forklift and backhoe, is an "adjoining area" under Section 3(a). *See* Tr. at 21, 46-47, 64, 66-67. It is well established, however, that manufacturing facilities can be apportioned into covered and non-covered areas. In *Maraney v. Consolidation Coal Co.*, 37 BRBS 97 (2003), the Board addressed whether an injury occurring at employer's Robena facility arose on a covered situs. The Board held that the entire Robena facility is not a covered situs since it contains distinct areas for loading and unloading of coal, and for non-maritime coal processing. Claimant Maraney was a mobile equipment operator who was injured during the course of constructing a coal impoundment or depository for coal slurry, which is a by-product of the coal cleaning process. The impoundment site represented the end of the cleaning process, and it was not intended to store products destined for vessels; thus, the Board held that it had no functional relationship with the navigable water where employer's unloading/loading operations occurred. Moreover, the site was located approximately .8 of a mile inland from the processing plant, to which it was connected by a roadway. In light of these facts, the Board affirmed the administrative law judge's finding that the impoundment site is not "an adjoining area" under Section 3(a) as it is separate from employer's unloading/loading area and it is not used for a maritime purpose. *Maraney*, 37 BRBS at 101-102. *See also Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001).

In *Gavranovic v. Mobil Mining & Minerals*, 33 BRBS 1 (1999), the claimants worked as operators for a fertilizer manufacturer. Both claimants were injured while working in a building used to store fertilizer. From this particular building, which was adjacent to navigable water and in proximity to the docks, fertilizer was either transferred to another building, from which it was transported by conveyor belt to barges at the dock, or it was loaded onto trucks or railcars. The administrative law judge found that the building and the dock were not separate areas, and he concluded the building was an adjoining area. The Board affirmed the administrative law judge's determination that the building was a covered situs, holding that the building wherein Gavranovic was injured

was distinctly maritime and not separate from the loading areas. *Gavranovic*, 33 BRBS at 2, 4-5.

In this case, the administrative law judge stated that the relevant inquiry is whether employer's garage where claimant's injury occurred is an area adjoining the loading/unloading portion of employer's facility, which is indisputably maritime, or is part of the facility devoted to coal processing and waste storage. Decision and Order at 10. The administrative law judge found that the garage is approximately 100 yards from navigable water. Tr. at 37. The administrative law judge found that the operations of the garage are related in part to the loading process since repairs are undertaken there of equipment essential to the loading and unloading of coal. The administrative law judge also found that the garage is located within and around essential elements of the loading process, thereby allowing it to service aspects of the process and ensure the smooth operation of the maritime component of the Robena facility. Specifically, the garage is located next to the stockpiled coal and approximately 150 feet from the de-stock hopper. CX 7. Furthermore, the Terex machine on which claimant was working when he was injured was brought in for repair after breaking down while loading coal onto the de-stock hopper belt. Tr. at 37-38. The administrative law judge found that the garage is situated next to four Quonset huts where steel cables used as barge running lines are stored. The administrative law judge found that a maritime nexus is not severed merely because the garage also services non-maritime equipment. Thus, the administrative law judge concluded that claimant was injured in an "adjoining area" and, therefore, that he was injured on a covered situs under Section 3(a).

Employer contends that the garage facility is not an "adjoining area" under Section 3(a) because its repair and maintenance function is not directly used for "loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. §903(a). Specifically, employer argues that the word "in" preceding "loading, unloading, repairing, dismantling, or building a vessel" in Section 3(a) should be construed to require a direct, immediate connection between the site and the enumerated functions defining an adjoining area.

We reject this contention. There is no indication from the statutory language that an adjoining area must be exclusively and directly used for "loading, unloading, repairing, dismantling, or building a vessel." In *Nelson*, the Third Circuit held that the Board too narrowly defined the word "customarily" in Section 3(a), by construing it to mean that the customary use of the beach had to be for some maritime purpose. *Nelson*, 143 F.3d at 796, 32 BRBS at 121(CRT). Moreover, the court rejected the construction of adjoining area given by the Fourth Circuit in *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 1139, 29 BRBS 138, 143(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996), that the situs must be a discrete structure or facility whose *raison d'etre* is its use in connection with navigable waters. The Third Circuit held that this definition is not

indicated by the plain meaning of "adjoining area" and that such a construction would be inconsistent with the remedial purpose of the 1972 amendments of the Act, and the liberal construction that the Supreme Court has repeatedly emphasized they are to be given. *Nelson*, 143 F.3d at 795, 797-798, 32 BRBS at 120, 122(CRT). Moreover, other circuit courts and the Board have held that a facility used for the repair and maintenance of equipment employed in the loading/unloading process may be an "adjoining area." *See, e.g., Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981) (gear room used to store gear used in the loading process located five blocks from nearest dock a covered situs); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978) (claimant responsible for maintaining and repairing equipment used in loading and in loading vessels injured at gear locker located 2,600 feet from a river and 2,050 feet from a port); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (claimant, a marine mechanic, injured at employer's "clean shed" next to its repair shop facility). Pursuant to *Nelson*, which held that "adjoining area" in Section 3(a) should be broadly construed, and the case law holding that a site where loading and unloading equipment is repaired and maintained is an "adjoining area," we reject employer's contention that Section 3(a) mandates that the site of an injury must be specifically used for loading, unloading, repairing, dismantling, or building a vessel to constitute an adjoining area.

Alternatively, employer argues that its garage is not an adjoining area because the facility does not repair and service heavy equipment that is exclusively used in loading and unloading coal; rather, the garage also is used to repair equipment that does not have a maritime purpose. In *Nelson*, the Third Circuit specifically construed "adjoining area" as including the beach on Fenwick Island, Delaware, since the employer customarily unloaded sand from its vessels onto the beach and, as such, it constituted a covered maritime situs under the Act. That this beach is customarily used for recreation was not pertinent to the court's conclusion. Similarly, other circuits have held that the situs need not be exclusively used for maritime purposes but must customarily be used for some maritime activity. *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 39, 12 BRBS 808, 818 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981); *Winchester*, 632 F.2d at 516, 12 BRBS at 727. Accordingly, we reject employer's contention that the non-maritime repair and maintenance work performed at its garage renders the facility an uncovered site as the garage is used to repair heavy equipment used in the unloading/loading process. The garage has a functional nexus with the loading process on the river sufficient to bring it within the scope of Section 3(a). *Pearson v. Jered Brown Bros.*, 39 BRBS 59 (2005), *aff'd on recon en banc*, 40 BRBS 2 (2006).

Moreover, the facts of this case are clearly distinguishable from *Maraney*, 37 BRBS 97. In *Maraney*, claimant was injured approximately .8 of a mile inland from the processing plant at the Robena facility, to which it was connected only by a roadway. The coal

impoundment site where the claimant was injured represented the end of the coal cleaning process, the site was not intended to store products destined for vessels, and it had no functional relationship with navigable water where employer's unloading/loading operations occurred. In this case, however, 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 located next to Quonset huts that store steel cable used in the unloading/loading process. Thus, the site has a geographic nexus to the loading site on the river. Based on these facts, we affirm the administrative law judge's finding that employer's garage is an "adjoining area" under Section 3(a), as it is in accordance with law. *Stratton*, 35 BRBS 1. Therefore, we affirm the administrative law judge's finding that claimant's injury occurred on a covered situs. *Id*. As employer does not challenge any other aspect of the administrative law judge's two decisions, we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order and the Decision and Order-Awarding Benefits are affirmed.

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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REGINA C. McGRANERY
Administrative Appeals Judge