BRB Nos. 09-0833
and 09-0833A

ALFRED F. WAKELEY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
KNUTSON TOWBOAT COMPANY	)	DATE ISSUED: 07/22/2010
	)	
and	)	
	)	
SAIF CORPORATION	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Denying Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Norman Cole (Sather, Byerly & Holloway, L.L.P.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Denying Benefits (2007-LHC-1749) of Administrative Law Judge Jennifer Gee 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 was hired by employer in 2002 as a carpenter. After spending approximately nine months as a member of the paint shop in employer's downtown facility where he was assigned to clean up and paint the Georgia Pacific lumber mill, claimant split his time between employer's downtown and Millington facilities. He repaired and remodeled the buildings at those sites. Tr. at 105-106, 119, 248-249, 263, 386-387, 398. Claimant alleges he injured his back on July 11, 2006, when he jerked/twisted it while using a man-lift to repair the roof of the Millington shop. He finished working the rest of that week and then went to the emergency room on the weekend. He has not worked for employer since. The parties agree that claimant is entitled to temporary total disability benefits from July 15, 2006, through October 1, 2006, if his injury is found to be compensable under the Act.

The administrative law judge found that employer's truck shop, or Millington shop, is a maritime situs, in light of its being situated in an enclosed, contiguous, property adjacent to a navigable body of water. 33 U.S.C. §903(a). She found that indisputably maritime activities occurred on the property, as the parties stipulated that log barges were unloaded nine times during the year claimant was injured. The administrative law judge also found that maritime operations occurred in the shop, as she concluded it is most likely the shop contained tools used to repair maritime equipment. Decision and Order at 15. However, the administrative law judge found that claimant was not a maritime employee under 33 U.S.C. §902(3), as his work repairing the Millington building does not constitute maritime work. She questioned claimant's credibility as it pertained to his descriptions of other alleged maritime work and found that any maritime work with which claimant was involved was merely incidental to his regular work as a carpenter. Decision and Order at 17-18. Thus, the administrative law judge denied benefits. Both parties appeal the decision. Claimant contends the administrative law judge erred in finding that he was not a maritime employee pursuant to Section 2(3), 33 U.S.C. §902(3). BRB No. 09-0833. Employer cross-appeals, contending the administrative law judge erred in finding its Millington facility is a maritime situs under Section 3(a), 33 U.S.C. §903(a). BRB No. 09-0833A.

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), 903(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. *Hurston v. Director, OWCP*, 989 F.2d 1547, 26 BRBS 180(CRT) (9th Cir. 1993).

Employer operates two main facilities in Coos Bay, Oregon. The Front Street facility is on the harbor in downtown Coos Bay and the Millington facility is a 40-acre parcel situated a few miles south on the Isthmus Slough. At the time of claimant's injury in 2006, logs would arrive at the Millington property via truck or barge and would be stored on the property until they were ready to be trucked to the purchaser. The logs which arrived by barge were corralled by small boats called "log broncs" and were then removed from the water and placed on trucks for transport by a LeTourneau machine. The log broncs and LeTourneau machine were repaired in the field or at the east end of the Millington building which sits approximately 100 yards from the water. Tr. at 224, 237-238, 246. The Isthmus Slough is navigable near employer's property. Tr. at 105, 267.

Situs

Employer contends on cross-appeal that the administrative law judge erred in finding that the Millington shop is a covered situs. Specifically, employer argues that the Millington building was not used to repair maritime equipment or store tools used to repair the LeTourneau machine and the log broncs. *See* Emp. Ex. 68 at 6-7, 15-16, 22; Tr. at 218, 223-224, 243, 373-375, 385. Employer also asserts that the administrative law judge erred in not applying the "adjoining area" test set forth in *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978).

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. *Herron*, 568 F.2d 137, 7 BRBS 409; *see also Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981). Claimant was not injured upon navigable waters or on an enumerated site; thus, the issue is whether claimant's injury occurred on an "other 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. *See Herron*, 568 F.2d 137, 7 BRBS 409; *see also Triguero v. Consolidated Rail Corp.*, 932 F.2d 95 (2d Cir. 1991). The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, concluded that an "adjoining area" must have a functional relationship and geographical relationship with navigable waters but need not depend on physical contiguity with those waters. *Herron*, 568 F.2d at 141, 7 BRBS at 411.[1]

The administrative law judge acknowledged the *Herron* factors but stated that the facts of *Herron*, which involved an injury in a gear locker 2,600 feet from a river and 2,050 feet outside the port entrance, were distinguishable from the facts here. Decision and Order at 13-15. Therefore, she did not apply the factors. Contrary to employer's argument, the administrative law judge correctly determined that the *Herron* factors specifically need not be analyzed in this case, as the evidence supports the conclusion that at the time of claimant's injury, the site had a geographic and functional relationship with navigable water. As the administrative law judge found, the Millington shop sits in an enclosed facility that is part of one contiguous property adjacent to the navigable slough on which barges were unloaded during claimant's employment. The building is

[1]In *Herron*, 568 F.2d at 141, 7 BRBS at 411, the Ninth Circuit stated that consideration should be given to the following factors, among others, in determining if a site is an "adjoining area:"

> 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.

Employer argues that it is now a multi-faceted company and the storage and truck-transport of logs is its primary business at Millington; accordingly, it doest not satisfy the *Herron* situs test. Specifically, it argues that its site is a desirable piece of property because it is flat, not because it is near water. Additionally, employer argues that the adjoining properties are not devoted to maritime commerce, as there is a concrete plant, lumber yard, undeveloped mud flats, and private residences neighboring the Millington property. Employer does not dispute the proximity to water; however, it argues that the proximity is a detriment to its business instead of a benefit, because of environmental hazards/concerns. As discussed, *infra*, however, it is not the current use of the property but its use at the time of claimant's injury which is determinative.

not separated from the slough by fence or other barrier and does not involve distinct manufacturing or other processing functions. An aerial view of the property shows that the Millington shop is the only building on the property. Emp. Ex. 83. Accordingly, the administrative law judge stated: "there is insufficient evidence to show why the machine shop should be considered functionally separate from the rest of the shipyard."[2] Decision and Order at 15.

The administrative law judge's finding that the entire Millington property is a covered situs is supported by substantial evidence and in accordance with law. There is no question but that the property is adjacent to navigable water and the building sits approximately 100 yards from the water within the confines of the property. The administrative law judge properly found that the entire property had a maritime function at the time of claimant's injury as nine barges brought shipments of logs to the facility in 2006. Further, there is no dispute that, when the log broncs and LeTourneau needed repairs, those repairs generally occurred on the property. In light of the testimony that the repairs sometimes occurred just outside the shop and there was conflicting testimony as to whether the tools needed for these repairs were stored inside the shop, the administrative law judge reasonably inferred that "it seems unlikely that [the building] is not used to maintain any tools or equipment for the LeTourneau or log broncs[,]" and she concluded that "workers used the machine shop in carrying out the yard's maritime operations."[3] Decision and Order at 15; Tr. at 107-108, 122-123. Claimant's credited

[2]Although this is not a "shipyard," it also is not a "multi-purpose facility" or manufacturing site which would require considering covered versus non-covered areas. *See Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002) (entire property need not be covered in mixed-use facilities); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998); *Melerine v. Harbor Constr. Co.*, 26 BRBS 97 (1992). Rather, it is more like a terminal loading operation where the entire facility is covered. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *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).

[3]We reject employer's contentions that the administrative law judge improperly placed on it the burden of demonstrating that the Millington facility is not a covered situs. The administrative law judge stated: "there is not enough evidence in the record to refute the Claimant's assertions regarding maritime tools and equipment being stored in the machine shop or to show that the building played no role in the Employer's maritime operations at the Millington shop." Decision and Order at 15. Employer interprets this statement as placing the burden on it to establish this was not a maritime situs. Rather, there was conflicting testimony regarding whether tools used in the repair of maritime equipment were stored in the Millington building, and the administrative law judge could

testimony constitutes substantial evidence supporting the administrative law judge's reasonable inference and conclusion regarding the use of the building. As the property is adjacent to a navigable body of water and the administrative law judge found that at the time of injury, maritime activities occurred on the property and in the building in conjunction with the use of the navigable slough, the administrative law judge properly found that the entire property is a covered situs.[4] *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 1140 n.11, 29 BRBS 138, 144 n.11(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996) (entire area covered if parcel of land, not particular square foot where injury occurred, adjoins navigable waters); *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Waugh v. Matt's Enterprises, Inc.*, 33 BRBS 9 (1999) (scrap field 500 feet from water's edge in employer's waterfront facility is covered situs); *Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998) (fabrication yard adjacent to navigable water covered); *Wood v. Universal Dredging Corp.*, 11 BRBS 210 (1979) (storage area where injury occurred, within the Navy Yard, was covered area). Accordingly, we affirm the administrative law judge's finding that claimant's injury occurred on a covered situs.[5] 33 U.S.C. §903(a).

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properly rely on claimant's testimony rather than that of employer's witnesses in this regard. Thus, there is substantial evidence to support the administrative law judge's finding.

[4]Although employer's witnesses testified that barges no longer bring logs to the property, Tr. at 376-377, and that the maritime equipment is no longer used or repaired, the issue is not the current state of the property, but, rather, the state of the facility at the time of claimant's injury. *See, e.g., Tarver v. Bo-Mac Contractors, Inc.*, 384 F.3d 180, 38 BRBS 71(CRT) (5th Cir. 2004) (future maritime use insufficient to confer coverage); *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) (past commercial use of waterway was irrelevant to determining navigability at the time of the claimant's injury).

[5]In light of our decision, claimant's assertion that the administrative law judge erred in excluding the testimony of Mr. Moore, a former employee who retired eight years before claimant began working for employer, is moot. In any event, the administrative law judge rationally excluded this testimony because employer presented evidence demonstrating that operations had changed since Mr. Moore's departure, and claimant provided some of the same testimony, making Mr. Moore's testimony duplicative. *See generally McCurley v. Kiewest Co.*, 22 BRBS 115 (1989).

Status

Claimant contends the administrative law judge erred in finding he did not satisfy the status requirement. Specifically, claimant argues that his primary job maintaining, remodeling, and repairing the Millington building, which the administrative law judge found is used to store tools for repairing the unloading equipment, was covered employment. Alternatively, claimant asserts that his periodic maritime work confers coverage.

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). Generally, a claimant satisfies the "status" requirement if he is an employee engaged in work which is integral to loading, unloading, constructing, or repairing 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. The Act covers those workers injured while maintaining or repairing buildings and machinery essential to the shipbuilding and the loading/unloading processes. *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT); *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981); *Price v. Norfolk & Western Ry. Co.*, 618 F.2d 1059 (4th Cir. 1980).

In this case, claimant testified that he did not load or unload logs to or from barges, fabricate tools or equipment used on tugs or barges, or operate or repair the equipment used to remove logs from barges. Decision and Order at 5; Tr. at 170-171. Rather, he worked on various construction projects on the Millington building, including building an addition on the structure, remodeling tool rooms, parts rooms, and offices, replacing fiberglass and PVC panels to allow light into the building, running wires, and constructing a ramp to the building. Decision and Order at 6; Tr. at 105-106. The administrative law judge found there was insufficient evidence to support a finding that claimant's construction and maintenance on the Millington building was maritime employment. Decision and Order at 17. Although the administrative law judge found that the building is a covered situs because it is on a property that is adjacent to navigable water and housed tools used by workers to repair the log broncs and LeTourneau, she

found that claimant's construction work on the building was not related to the unloading of the log barges.[6]

We reverse the administrative law judge's denial of coverage. Contrary to the administrative law judge's conclusion, employees who maintain structures involved in maritime activities are covered employees; the administrative law judge's distinction of such work from the direct repair of longshore equipment has no basis in law. In *Graziano*, 663 F.2d 340, 14 BRBS 52, a mason-laborer, who repaired masonry in shipyard buildings, dug ditches, poured cement, repaired boilers and manholes, cleaned acid tanks, and removed asbestos from pipes, was found to be a covered employee based on his masonry duties.[7] The court also held that his other duties maintaining shipbuilding equipment conferred coverage because they were a regular portion of his overall employment. In *Price*, 618 F.2d 1059, the Fourth Circuit held that work painting a support tower, which housed part of a conveyor belt system for moving grain between ship and land, was covered work. The court declined to distinguish between repairing the machinery and repairing the structure that housed the machinery. In *Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006), the Ninth Circuit held that the term "harbor worker" includes those directly involved in the construction of maritime facilities even if their specific duties are not uniquely maritime. Thus, a utility-line trench-digger was covered, as his work was part of a wharf replacement project. In *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993),

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[6]She stated, Decision and Order at 17:

> Although I find there is insufficient evidence to show that the Millington building should qualify as functionally distinct from the rest of the property, the shop is tangentially related to the loading and unloading of tugboats and barges. I agree that tools used to repair maritime equipment may have been stored in the building, but the Claimant's work on the shop is far different than creating a structure that workers stand on so they can repair longshoring equipment. There is insufficient evidence to show how the Claimant's remodeling and light construction work on the building assisted workers in loading or unloading logs from the slough. Thus, I find the Claimant's work at the Millington shop does not meet the maritime status test.

[7]The United States Court of Appeals for the First Circuit stated: "[t]he maintenance of the structures housing shipyard machinery and in which shipbuilding operations are carried on is no less essential to shipbuilding than is the repair of the machinery itself." *Graziano*, 663 F.2d at 342-343, 14 BRBS at 56.

the Board held that the decedent's work removing and constructing bulkheads and cutting holes in the warehouse roof to accommodate the masts of self-unloading ships also was covered work. Similarly, in *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982), the Fifth Circuit held that the claimant, a carpenter engaged in erecting scaffolding beneath a pier over navigable water, was engaged in maritime work at the time of his injury. The court rejected the argument that the claimant's non-maritime carpentry skills should exclude him from coverage, as his work was to assist others in doing their maritime work. The Fifth Circuit stated it is "clear that the maintenance and repair of tools, equipment, and facilities used in indisputably maritime activities lies within the scope of 'maritime employment[.]'" *Hullinghorst*, 650 F.2d at 755, 14 BRBS at 376.

Claimant's primary job was to perform construction/carpentry projects at both the downtown and the Millington facilities. The administrative law judge found, and we have affirmed, that the entire Millington property, including the shop, is a covered situs. It is also undisputed that the majority of claimant's time at the Millington property was spent maintaining, repairing, or remodeling the Millington building. Further, the administrative law judge found that the Millington building was used to carry out maritime operations because it housed tools for the repair of maritime equipment. As claimant spent at least some of his time in the repair of a structure used for a maritime purpose, his work constitutes covered employment. *Healy Tibbitts Builders*, 444 F.3d 1095, 40 BRBS 13(CRT); *Graziano*, 663 F.2d 340, 14 BRBS 52; *Price*, 618 F.2d 1059. Therefore, we reverse the administrative law judge's finding that claimant was not a "maritime employee" pursuant to Section 2(3). As claimant has satisfied both the situs and status tests, his injury is covered by the Act. Therefore, we vacate the denial of benefits, and we remand the case to the administrative law judge for consideration of any remaining issues on the merits.[8] As claimant's work maintaining the Millington building constitutes covered employment, we need not address whether his alleged periodic work performing other activities, such as cleaning tugs and barges or replacing dock planks, conveys coverage.

[8]Although the parties stipulated that claimant would be entitled to temporary total disability benefits from July 15 through October 1, 2006, it appears there are unresolved issues concerning disability after October 1, 2006. In any event, an appropriate final order must be issued.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded to the administrative law judge for consideration of any remaining issues.

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