BRB No. 10-0221

JUAN ZEPEDA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
NEW ORLEANS DEPOT SERVICES, INCORPORATED	)	
	)	
Self-Insured Employer-Petitioner	)	
	)	
NEW ORLEANS MARINE CONTRACTORS	)	DATE ISSUED: 12/03/2010
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Denying Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Anne Derbes Wittmann and Evan T. Caffrey (Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.), New Orleans, Louisiana, for New Orleans Depot Services, Incorporated.

Douglas P. Matthews (King, Krebs & Jurgens, P.L.L.C.), New Orleans, Louisiana, for New Orleans Marine Contractors and Signal Mutual Indemnity Association, Limited.

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

PER CURIAM:

New Orleans Depot Services (employer or NODSI) appeals the Decision and Order Awarding Benefits and the Order Denying Motion for Reconsideration (2008-LHC-01208) of Administrative Law Judge Clement J. Kennington 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 worked as a container repair mechanic for employer from 1996 to 2002. Prior to that, he repaired and maintained chassis and containers for New Orleans Marine Contractors (NOMC). During his employment for both companies, claimant was exposed to loud noises on a continuous basis and did not use hearing protection. The parties stipulated that claimant suffers from an 11.3 percent binaural hearing impairment. Decision and Order at 3. Thus, claimant sought permanent partial disability benefits under the Act. 33 U.S.C. §908(c)(13).

In his decision, the administrative law judge found that it is not contested that claimant was an employee covered under the Act while working for NOMC. However, NOMC contended that NODSI was claimant's last maritime employer. The administrative law judge found that NODSI's yard (the Chef Yard) where claimant performed the majority of his duties satisfies the Act's situs requirement and that claimant's duties as a marine container mechanic was maritime employment satisfying the Act's status requirement. 33 U.S.C. §§902(3), 903(a). Thus, the administrative law judge concluded that NODSI is the responsible employer and is liable for benefits for an 11.3 percent hearing loss. The administrative law judge rejected employer's motion for reconsideration.

On appeal, employer contends that the administrative law judge erred in finding employer's facility a covered situs because the Chef Yard is not used by any employer for loading, unloading, repairing, dismantling, or building any vessel and because no NODSI employee engages in loading, unloading, repairing or building a vessel. In addition, employer contends that claimant was not a maritime employee as he worked as a container repair mechanic, and did not load or unload a ship or build or repair a vessel. Thus, employer contends that the administrative law judge erred in finding that it is the responsible employer. NOMC responds, urging affirmance of the administrative law judge's findings that claimant's employment at NODSI was covered under the Act and that NODSI is the responsible employer. NODSI has filed a reply brief. Claimant has not responded to this appeal.

Pursuant to *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), the responsible employer in an occupational disease case, as in this hearing loss case, is the last covered employer to expose the employee to injurious stimuli prior to the date he becomes aware that he is suffering from an occupational disease arising out of his employment. *See Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13 (CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984); *Fishel v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 520 (1981), *aff'd*, 694 F.2d 327 (4th Cir. 1982). NODSI contends that it is not the responsible employer as it is not an employer covered under the Act. *See generally J.T. [Tracy] v. Global Int'l Offshore, Ltd.*, 43 BRBS 92 (2009)(subsequent employer cannot be held liable for benefits under the Act where claimant did not work on a covered situs). For a claim to be covered by the Act, a claimant must establish that the 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 the employee is a maritime employee under Section 2(3) and is not specifically excluded by 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).

We first address employer's contention that the Chef Yard is not a covered situs pursuant to Section 3(a).[1] In this case, employer's facility is not an enumerated site such as a pier or wharf. Thus, to be considered a covered situs the Chef Yard must be an "other adjoining area." An area may 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. *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 determining whether a site is within an "adjoining area" under Section 3(a), the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held that the perimeter of an area is defined by function rather than labels or fence

[1] 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).

lines; thus, a covered area encompasses sites customarily used for maritime activity by any statutory employer. Moreover, an area can be "adjoining" if it is "close to or in the vicinity of navigable waters, or in a neighboring area." *Winchester*, 632 F.2d at 514, 12 BRBS at 727; *see also Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31 BRBS 199(CRT) (5th Cir. 1998). Thus, the geographic proximity to navigable waters and the functional relationship of the site to those waters are critical in determining whether a location is a covered situs. *See Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001)(*en banc*).

In *Winchester*, the court held that the claimant's injury in a gear room located five blocks from the nearest dock occurred on a covered site as it occurred within an area customarily used by employers for loading and unloading. Not only was the gear room in a general area adjoining navigable waters where other gear rooms were located and which was thus customarily used for loading activities, but the gear room itself also had a sufficient nexus to the waterfront to be a covered site. *Winchester*, 632 F.2d at 515, 12 BRBS at 727. More recently, in *Coastal Prod. Serv., Inc., v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009), the Fifth Circuit addressed a case in which the claimant was injured on an oil platform used as a "consolidation point" for the transport of oil. The court held that although the platform itself was not actually used for loading and unloading the oil, the platform, which was in navigable waters, had a functional relationship to the loading process because oil was loaded onto transport barges from the sunken barge that was directly and permanently connected to the platform. In addition, the court held that *Winchester* teaches that "simply because a vessel cannot dock for loading and unloading at a particular area does not mean that the area is not a covered situs,… [and that] if a particular area is associated with items used as part of the loading process, the area need not itself be directly involved in loading or unloading a vessel or physically connected to the point of loading and unloading." *Id*., 555 F.3d at 434, 42 BRBS at 73(CRT); *Cf. Tarver v. Bo-Mac Contractors, Inc.*, 384 F.3d 180, 38 BRBS 71(CRT) (5th Cir. 2004); *Boomtown Belle Casino v. Bazor*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003) (future maritime use is not sufficient to confer situs).

After considering the evidence regarding employer's yard in view of the Fifth Circuit's decisions in *Winchester* and *Hudson*, the administrative law judge found that employer's yard satisfies the situs requirement of the Act. He found that the Chef Yard, where claimant primarily performed his duties, is approximately 300 yards from the Industrial Canal, which is a navigable waterway. He noted that it does not directly adjoin the waterfront but that the waterfront is accessible by road. Thus, he found that the site has a geographic nexus with navigable waters. The administrative law judge also found that the Chef Yard satisfies the functional nexus requirement as the site was used to repair and store containers, some of which were used in marine transportation. Pursuant to *Hudson*, the administrative law judge found that the lack of loading and unloading at

the yard itself is not dispositive, as the yard is used for the repair of items used in those processes. Decision and Order at 22; Order on Recon. at 4-7. The administrative law judge also addressed employer's contention that the Board's decisions in *Arjona v. Interport Maintenance Co.*, 34 BRBS 15 (2000) and *Bennett v. Matson Terminals, Inc.*, 14 BRBS 526 (1981), *aff'd sub nom. Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982), require a finding that the container repair facility is not a covered site and concluded that these cases were decided using the more restrictive decision in *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978), which is not controlling precedent in this case.[2]

We reject employer's contentions of error and affirm the administrative law judge's finding that claimant was injured on a covered situs as it is rational, supported by substantial evidence and in accordance with law. In *Stratton*, 35 BRBS 1, part of employer's business was to repair pumps, valves, gauges and other devices used on vessels. The Board thus affirmed the finding that the maritime function criterion of *Winchester* was met. The Board also affirmed the finding that a geographic nexus was present as employer's facility was adjacent to a canal which directly led to the navigable waters of the St. John's River. As the employer's facility was "within the vicinity" of the St. John's River, a navigable body of water, and as it was used to repair and fabricate instruments used to operate vessels, the *Winchester* situs formulation was satisfied. *Id.* at 4-5. Similarly, in this case, employer's container repair yard is located within 300 yards of navigable waters, the Industrial Canal, and employer's business involved the repair

[2] In *Arjona*, 34 BRBS 15, the employer's facility was about ¼ mile from Newark Bay, a navigable waterway, and about ½ to 1 mile north of the Port Newark-Port Elizabeth Terminal. Employer's property occupied approximately 70 acres of land within the Conrail yard, and was bounded on the north, south, and east sides by Conrail railroad tracks. To the west, the facility was bounded by an interstate highway; there was no exit from this highway leading to or from employer's yard. Moreover, there was no water access to the property. Applying *Herron*, the Board affirmed the finding that the property was not a covered site as it was "clear that employer's property does not have a sufficient functional nexus to maritime activity to warrant a finding of coverage under the Act." *Arjona*, 24 BRBS at 18. In *Bennett*, 14 BRBS 526, the employer's container refurbishment site was 12 miles from the Oakland terminal, 750 feet from a waterway and ½ mile from a deep water port. The Board held there was a functional nexus between the Oakland terminal and the refurbishment site, but that the site was not particularly suited for maritime purposes, the site was chosen due to economic factors, and the adjoining businesses were not primarily maritime. Moreover, the Board held that the proximity to the deep water port was merely fortuitous, as employer had no relationship with that facility. The Ninth Circuit summarily affirmed the Board's decision as consistent with *Herron*.

and storage of containers used in maritime shipping. Although an aerial view photograph of the surrounding area reveals that there are non-maritime businesses in the surrounding area, the Fifth Circuit has stated this fact does not conclusively establish that a site is not an "adjoining area." *Winchester*, 632 F.2d at 513, 12 BRBS at 726.

Moreover, pursuant to *Hudson*, the adjoining area "need not itself be directly involved in loading or unloading a vessel or physically connected to the point of loading and unloading" in order for the site to be covered by the Act. *Id*., 555 F.3d at 434, 42 BRBS at 73(CRT); *see also D.S. [Smith] v. Consolidation Coal Co.*, 42 BRBS 80 (2008) (garage used to repair heavy equipment used in the loading/unloading process has a functional nexus with the loading process on a navigable river sufficient to bring it within the scope of Section 3(a)). It is sufficient that the area is associated with items used in the loading and unloading process, in this case the repair of containers.[3] *Hudson*, 555 F.3d at 434, 42 BRBS at 73(CRT); *Stratton*, 35 BRBS at 9. Therefore, we affirm the administrative law judge's finding that employer's Chef Yard is a covered situs pursuant to Section 3(a) of the Act. *Hudson*, 555 F.3d 426, 42 BRBS 68(CRT); *Winchester*, 632 F.2d 504, 12 BRBS 719.

Employer also contends that the administrative law judge erred in finding that claimant was a covered employee while working at NODSI. The administrative law judge found that claimant's work as a marine container mechanic was maritime employment pursuant to Section 2(3) of the Act, 33 U.S.C. §902(3).[4] Repair and maintenance of equipment used in the loading and unloading process are integral to that process and such work is, therefore, covered employment. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989); *Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990). Specifically, container repair is covered employment because it is essential to the containers' continued use in maritime commerce. *Coleman*, 904 F.2d at 611, 23 BRBS at 101(CRT); *Insinna v. Sea-Land Service, Inc.*, 12 BRBS 772 (1980). As claimant repaired intermodal containers, some of which were used for maritime purposes, we affirm the administrative law judge's

[3] We reject employer's reliance on *Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002), and similar cases as they are inapposite. Such cases relate to facilities which are divisible into separate manufacturing and shipping areas.

[4] Section 2(3) states, in relevant part,

> 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, ...

finding that claimant satisfies the Act's status requirement. *Arjona v. Interport Maintenance Co., Inc.*, 31 BRBS 86 (1997). Therefore, as the situs and status elements are satisfied, and as employer does not raise any other issues concerning its designation as the responsible employer, we affirm the administrative law judge's finding that NODSI is liable for claimant's permanent partial disability benefits as his last maritime employer. *See Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and the Order Denying Motion for Reconsideration 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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BETTY JEAN HALL
Administrative Appeals Judge