BRB No. 11-0502

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| DAVID MARTIN | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| BPU MANAGEMENT, INCORPORATED/ SHERWIN ALUMINA COMPANY | ) | DATE ISSUED: 04/04/2012 |
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| and | ) | |
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| LIBERTY MUTUAL INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier-Petitioners | ) | DECISION and ORDER |

Appeal of the Decision and Order and Modified Decision and Order Awarding Benefits on Reconsideration of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Daniel F. Horne (Stone and Horne, L.L.P.), Corpus Christi, Texas, for claimant.

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

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and Modified Decision and Order Awarding Benefits on Reconsideration (2010-LHC-00230) of Administrative Law Judge Lee J. Romero, Jr., 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 sustained a lower back injury on February 15, 2006, while shoveling raw bauxite onto an underground cross-tunnel conveyor belt at employer's Sherwin Alumina facility, which is located on the Texas Gulf Coast. The primary purpose of employer's facility is to extract aluminum oxide (alumina) from bauxite ore. The raw bauxite is unloaded from vessels at Dock 5 of employer's deep water port to the storage building by means of an overhead conveyor system. The overhead conveyor system carries the raw material over a street and fence separating the dock area from the alumina processing facility and dumps it into discreet piles according to grade in Building 15. Once a particular grade of raw bauxite is selected for the extraction process, it falls through one or more of 60 trap doors into an underground area referred to as the reclaim system. Once in the reclaim system, the raw bauxite passes through a screw feeder which sifts the rocks and bigger clumps of bauxite into a fine powder and then drops it onto the reclaim conveyor belt, which then, in turn, transports and drops the material onto the cross-tunnel conveyor. The cross-tunnel conveyor belt, which is approximately 25-30 feet underground, transfers the pre-sifted, pre-blended bauxite to the rod mill, where the material is further pulverized as part of the manufacturing process. Often, some bauxite spills off the cross-tunnel conveyor onto the floor of the cross-tunnel area, thereby requiring workers, like claimant, to intermittently shovel the spilled bauxite back onto the cross-tunnel conveyor belt. It is in the course of this particular assignment underneath Building 15 that claimant sustained his injury. Once at the rod mill, the bauxite proceeds through the remaining steps in the manufacturing process whereby the alumina is extracted. The finished product is stored and eventually loaded and delivered from the facility either by rail car or ship (Dock 90).

On the day of his injury, claimant stated that while performing the cleanup work in the cross-tunnel, he felt something pop in his lower back. He went to employer's medical clinic and thereafter sought treatment from Dr. Walker, a chiropractor. On February 17, 2006, Dr. Walker released claimant to return to work with restrictions and claimant performed light-duty work for employer until March 31, 2006.[1] Claimant did not work again until he obtained a position as a warehouse safety coordinator at Wendland Air Conditioning and Heating (WACH) in Portland, Texas, on May 22, 2009, a position he continued to hold as of the date of the hearing.

[1]Dr. Masciale diagnosed claimant, on April 25, 2006, with internal disc derangement with a posterior annular tear, recommended lumbar epidural steroid injections, and released claimant to work light duty. Dr. Masciale subsequently performed an L4 laminectomy, radical discectomy and fusion on March 5, 2007.

Claimant subsequently filed a claim seeking benefits under the Act.[2] In his decision, the administrative law judge found that claimant's injury occurred on a covered situs. 33 U.S.C. §903(a). On the merits, the administrative law judge found that claimant was unable to return to his usual employment until May 6, 2010, the date he was released to return to regular duty by Dr. Likover. As employer presented no evidence regarding the availability of suitable alternate employment during this time frame,[3] the administrative law judge concluded that claimant is entitled to temporary total disability benefits from February 15, 2006, to July 31, 2006, permanent total disability benefits from July 31, 2006, to May 6, 2010, and that he suffered no disability from that point forward. 33 U.S.C. §908(a), (b). The administrative law judge also awarded claimant medical benefits under Section 7, 33 U.S.C. §907. On reconsideration, the administrative law judge rejected employer's argument that he erred by rejecting the parties' stipulation that claimant suffered no permanent disability. The administrative law judge, however, found that claimant's work with WACH constituted suitable alternate employment. He, thus, modified his decision to reflect claimant's entitlement to permanent partial rather than permanent total disability benefits from May 22, 2009, to May 6, 2010. 33 U.S.C. §908(c)(21), (h).

On appeal, employer challenges the administrative law judge's findings that claimant established he was injured on a covered situs and is thus covered by the Act, as well as his rejection of the parties' stipulation that claimant suffered no permanent disability as a result of his work injury. Claimant responds, urging affirmance of the administrative law judge's decision.

Employer contends the administrative law judge erred in finding that claimant established the situs element pursuant to Section 3(a) of the Act, 33 U.S.C. §903(a). In support of its contention, employer argues that the cross-tunnel is physically separated from the docks by several hundred yards, it is 25-30 feet underground, and is devoted solely to transferring bauxite from one phase of the manufacturing process to the next without regard to whether a vessel is at the dock. Thus, employer avers that this area serves no functional role in the loading and/or unloading process. Employer further argues that the Board's decision in *Gavranovic v. Mobil Mining & Minerals*, 33 BRBS 1 (1999), is factually distinguishable from this case and thus, does not, in contrast to the administrative law judge's finding, support the conclusion that the cross-tunnel is a covered situs.

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[2]Claimant received some benefits under the Texas workers' compensation statute.

[3]The administrative law judge observed that employer's labor market survey was moot as it identified numerous sedentary and light duty jobs available for the time period of May 25, 2010, to June 3, 2010.

For a claim to be covered by the Act, a claimant must establish that his injury occurred on a site described in Section 3(a) and that he is a maritime employee under Section 2(3) of 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 coverage under the Act, a claimant must satisfy both the "situs" and "status" requirements.[4] Section 3(a) 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); *Texports Stevedoring Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981). In this case, as claimant was not injured on navigable waters or on an enumerated site, his injury must have occurred in an "other adjoining area customarily used by an employer" in loading or unloading a vessel. 33 U.S.C. §903(a); *Charles v. Universal Ogden Services*, 37 BRBS 37 (2003); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001)(*en banc*); *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998); *Melerine v. Harbor Constr. Co.*, 26 BRBS 97 (1992).

Where a facility is used for both maritime and non-maritime functions, case precedent recognizes that there is a point at which the loading and unloading process

[4]The administrative law judge's finding that claimant satisfied the status requirement, as he spent at least some time in indisputably longshoring operations unloading vessels, is affirmed as it is in accordance with law and unchallenged on appeal. *See* 33 U.S.C. §902(3); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

ceases,[5] and the manufacturing process begins and vice versa.[6] *Dryden v. The Dayton Power & Light Co.*, 43 BRBS 167 (2009); *Stroup*, 32 BRBS 151; *Melerine*, 26 BRBS 97. The inquiry in "mixed-use cases," *i.e.*, those involving a site with both a manufacturing and a maritime component, concerns whether the claimant's injury occurred in the area used for loading or unloading vessels, as that area has a functional relationship with navigable water. *See Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002), *aff'g* 35 BRBS 99 (2001); *see also D.S. [Smith] v. Consolidation Coal Co.*, 42 BRBS 80 (2008), *aff'd sub nom. Consolidation Coal Co. v. Benefits Review Board*, 629 F.3d 322, 44 BRBS 101(CRT) (3d Cir. 2010); *Maraney v. Consolidation Coal Co.*, 37 BRBS 97 (2003); *Dickerson v. Mississippi Phosphates Corp.*, 37 BRBS 58 (2003); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001).

In addressing situs, the administrative law judge found that this case is analogous to *Gavranovic*, 33 BRBS 1, since the area where claimant sustained his injury, *i.e.*, the cross-tunnel under Building 15, is linked to the unloading process at the dock. The administrative law judge found particularly significant to this case, the Board's statement, in *Gavranovic*, that "[i]n light of the location of employer's facility [the Board observed that the entire facility and the building in question are adjacent to navigable water and to the docks where barges are loaded and unloaded] and because significant maritime activity (loading and unloading barges) occurs on the docks at employer's facility . . . claimants' injuries . . . occurred on a covered situs." Decision and Order at 18 *quoting Gavranovic*, 33 BRBS at 5. In this case, the administrative law judge found that vessels

[5]As claimant was injured on a facility located adjacent to Corpus Christi Bay, a geographic nexus with navigable waters is established. *See Texports Stevedoring Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *Dryden v. The Dayton Power & Light Co.*, 43 BRBS 167 (2009). The issue, therefore, in this case is whether the site of injury has a functional relationship with navigable waters.

[6]This statement is consistent with cases holding that employees whose duties are integral to a manufacturing process rather than to a longshoring or shipbuilding process are not engaged in maritime employment pursuant to Section 2(3) of the Act. *See Coyne v. Refined Sugars, Inc.*, 28 BRBS 372 (1994); *Garmon v. Aluminum Co. of America-Mobile Works*, 28 BRBS 46 (1994), *aff'd on recon.*, 29 BRBS 15 (1995).

with the raw material, bauxite, are unloaded at employer's dock and transferred via conveyor belt to employer's storage shed, *i.e.*, Building 15, which is the building in which claimant's injury occurred. The administrative law judge therefore concluded that claimant was injured on a covered situs even though he may not have been engaged in maritime employment at the time of injury.

In *Gavranovic*, 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 where the injuries occurred and the dock were not separate and distinct areas and thus concluded it was an "adjoining area." The Board affirmed the administrative law judge's determination that the building was a covered situs. The building where the injury occurred was not used in the manufacturing process and was linked to another building in which the loading process occurred. *Gavranovic*, 33 BRBS at 2, 4-5.

In *Dickerson*, in contrast, the Board held that a phosphoric acid plant, although located within a port facility, was not an "adjoining area" under the Act because it was geographically and functionally separate from the docks. That is, it was not connected to the docks by conveyor belt or any other means, and it was solely used in the manufacturing process and had no relationship to customary maritime activity. *Dickerson*, 37 BRBS at 62. The Board distinguished *Gavranovic* from *Dickerson* because the building in which the *Gavranovic* claimants were injured was used to store fertilizer products awaiting transshipment by vessel, the building was near navigable water, and the building was connected to the docks by conveyor belts. *Dickerson*, 37 BRBS at 63; *see also Uresti v. Port Container Industries, Inc.*, 33 BRBS 215 (Brown, J., dissenting), *aff'd on recon.*, 34 BRBS 127 (Brown, J., dissenting) (2000) (warehouse located in port and used to store cargo after it was unloaded from ships prior to entering stream of land transportation is covered as the storage facility is part of the overall process of unloading). Because the plant in *Dickerson* was not connected to the docks and did not house products arriving from or destined for vessels, it was not a covered situs. *Dickerson*, 37 BRBS at 63.

In *Bianco*, 304 F.3d 1053, 36 BRBS 57(CRT), the United States Court of Appeals for the Eleventh Circuit held that a claimant who was injured in the production departments of a gypsum production plant, adjacent to the navigable Turtle and East Rivers, is not covered by the Act. The court rejected the claimant's arguments that the entire facility should be considered covered because maritime activity occurred in another area of the plant where the raw gypsum was unloaded from vessels. The court

declined to expand coverage, concluding that, were it to hold the entire facility covered, "irrespective of what [the employer] does at different areas therein[,]" it "would effectively be writing out of the statute the requirement that the adjoining area "be customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." *Bianco*, 304 F.3d at 1060, 36 BRBS at 62(CRT).

In *Dryden*, 43 BRBS 167, the claimant was injured at an outdoor site located within a conveyor belt system and between employer's power plant and the Ohio River. Coal was unloaded from river barges and transported by conveyor belts from the barges to the plant. The Board held that the claimant was injured within the part of employer's facility used for unloading coal and thus, in an "adjoining area." Specifically, the Board noted that the claimant's injury within the vicinity of employer's conveyor belt system was in an area used for a maritime activity, the unloading of coal barges, and not within the electricity generating area of employer's facility. Moreover, the Board noted that the outdoor area of employer's conveyor belt system has a functional relationship with the Ohio River, as it is adjacent to the river, and is customarily used for the maritime activity of unloading coal from barges. Stating that there is no basis in the existing law for apportioning this conveyor unloading system outside of the power plant into covered and uncovered situses, the Board affirmed the administrative law judge's finding that the site of the claimant's injury is an "adjoining area" under Section 3(a) and his finding of coverage under the Act, notwithstanding his erroneous finding that the entire facility is a covered situs.

The issue in this case is whether claimant was injured in an area that has a functional relationship with navigable waters, such that it is an "adjoining area." The administrative law judge's reliance on *Gavranovic* in this case is appropriate given that the record establishes that no manufacturing takes place in the building where claimant was injured. HT at 93-94. Moreover, claimant submitted an aerial photograph of part of employer's facility which shows bauxite being off-loaded from the docks via the overhead conveyor belt to the storage shed building, as well as the location of claimant's injury in a tunnel under this building. CX 1. This photograph shows that the storage shed building is connected to the docks by a conveyor belt;[7] it also shows that the area in which claimant sustained his injury, *i.e.*, the cross-tunnel conveyor belt, is directly beneath the storage shed building in which the off-loaded bauxite is delivered. The photograph supports the administrative law judge's finding that there is a functional

[7]Employer's Legal and External Affairs Coordinator, Thomas B. Ballou, Jr., conceded that "the conveyor that runs down the top of the building [the storage sheds] is integral to offloading the ships." HT at 96.

nexus between the docks and the building in which claimant's injury occurred.[8] *See Dryden,* 43 BRBS 167.

We affirm the administrative law judge's finding that the storage shed building constitutes an adjoining area pursuant to Section 3(a) of the Act. The building adjoins navigable waters, is connected to the docks by conveyor belts, and is used in furtherance of employer's unloading process; the building is not used for manufacturing. *Dryden,* 43 BRBS 167. On these facts, the building has a functional relationship with navigable waters and the administrative law judge rationally found this case analogous to *Gavranovic* and, hence, that claimant's injury occurred on a covered situs. Consequently, as claimant was injured in an area adjoining navigable waters customarily used for unloading barges, he was injured on a covered situs. *Winchester*, 632 F.2d 504, 12 BRBS 719. Therefore, we affirm the administrative law judge's finding that claimant's injury is within the coverage of the Act. *Uresti*, 33 BRBS 215; *Gavranovic*, 33 BRBS 1.

Employer next contends the administrative law judge erred in failing to inform the parties that their stipulation that claimant suffered no permanent disability would be rejected. The parties submitted joint stipulations which were approved at the formal hearing by the administrative law judge. The stipulation included the statement: "9. Permanent disability: No Percentage: N/A." JX 1; HT at 9. In his initial decision, the administrative law judge, however, rejected this stipulation, finding that an impairment rating is not relevant in terms of determining disability in this case involving an unscheduled back injury and that the stipulation is otherwise not supported by the record.

[8]Additionally, the record contains testimony, noted by the administrative law judge, from claimant and Mr. Ballou, which bolsters the administrative law judge's conclusion that claimant's injury occurred on a covered situs. Claimant testified: that if the storage sheds became overloaded with bauxite, it could shut down the unloading process; that his work, including the shoveling of fallen bauxite back onto the cross-tunnel conveyor belt, "was always loading and unloading;" that the purpose of the area at the underground conveyor where his accident occurred is to feed the process plant from the storage shed; and that his job shoveling the bauxite in the underground cross-tunnel area assisted with the transfer of bauxite "to the process system." HT at 31-37, 52. While Mr. Ballou stated that the reclaim conveyor system and the cross-tunnel conveyor "cannot be used to load or unload vessels," he conceded it is "the only way of pulling [bauxite] out of storage [sheds] in order to send it to the other storage facility past building 24" where it awaits further processing in the rod mills. EX 15; HT at 97. Mr. Ballou added that, at least theoretically, if the cross-tunnel area was not routinely cleaned up and thus, left to fill with debris, employer could not offload any other vessels containing bauxite without pushing the bauxite outside and exposing it to the elements. HT at 103.

Decision and Order at 23. With regard to the latter rationale, the administrative law judge found that the evidence supports the conclusion that, post-injury, claimant was unable to work at anything but sedentary employment until he was examined by Dr. Likover on May 6, 2010, who stated that claimant was capable of returning to regular duty work as of that date.[9] The administrative law judge observed that although Dr. Taxis opined that claimant should be able to return to work at regular duty in 2006, his release was limited, as the physician stated claimant could return to work only if there was no excessive stress to claimant's lumbar spine. The administrative law judge also credited the opinions of claimant's treating physicians, Drs. Walker and Masciale, who limited claimant to light duty or sedentary work throughout the relevant period of time up until May 6, 2010. The administrative law judge thus concluded that, since employer did not submit evidence of suitable alternate employment for periods prior to May 6, 2010, claimant is entitled to permanent total disability benefits from July 31, 2006 to May 6, 2010. *Id.* at 24.

Employer filed a motion for reconsideration of the administrative law judge's rejection of the stipulation. The administrative law judge provided the parties an opportunity to further develop the record on the issue of claimant's permanent disability.[10] In his decision on reconsideration, the administrative law judge reiterated his decision to reject the parties' stipulation that claimant suffered no permanent disability as a result of his work injury. Decision and Order on Reconsideration at 6. The administrative law judge found that the stipulation is not supported by the evidence and that claimant was unable to return to his usual work until May 6, 2010. As claimant obtained work at WACH on May 22, 2009, the administrative law judge awarded

[9]The administrative law judge, however, accorded diminished weight to Dr. Likover's opinion that claimant should have been able to return to full-duty work in January or February 2008, following his surgery in March 2007, because the physician examined claimant only once, more than fours years after the injury had occurred. Moreover, the administrative law judge found that Drs. Walker and Masciale's opinions, limiting claimant to light-duty work, should be afforded the most weight since the record establishes that they are claimant's treating physicians.

[10]The administrative law judge granted employer thirty days to develop the issue of claimant's permanent disability and employer submitted additional evidence consisting of the depositions of claimant and his present supervisor, Mark Wendland, and a vocational rehabilitation report and labor market survey dated March 3, 2011. Employer did not present any additional medical evidence. Rather, in its March 16, 2011, "Rejoinder Brief Regarding Post-Hearing Evidence," employer argued that its motion for reconsideration should be granted, and that the evidence conclusively establishes claimant suffered no permanent disability.

claimant permanent total disability from the date of maximum medical improvement, August 1, 2006 to May 21, 2009, and permanent partial disability for a loss of wage-earning capacity from May 22, 2009 to May 6, 2010.

Stipulations are binding upon the parties when they are received into evidence. 29 C.F.R. §18.51. As the administrative law judge correctly observed on reconsideration, he is not obligated to accept stipulations entered into by the parties, but if he rejects them, he must provide the parties with prior notice that he will not accept them, his rationale for doing so, and an opportunity to submit evidence in support of their positions. *See Dodd v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 245 (1989); *Beltran v. California Shipbuilding & Dry Dock Co.*, 17 BRBS 225 (1985); *Phelps v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 325 (1984). Although the administrative law judge erred originally by not providing the parties with notice and an opportunity to present evidence in support of the rejected stipulation, the administrative law judge corrected that error in response to employer's motion for reconsideration. In this regard, the parties received notice of the administrative law judge's rejection of the stipulation, as well as his explanation for taking such action, by virtue of his initial decision, and the administrative law judge, through the reconsideration process, provided employer the opportunity to develop evidence regarding the issue of claimant's permanent disability.

Moreover, the administrative law judge rejected the stipulation for the legally correct reason that the absence of a permanent impairment rating does not establish the absence of disability within the meaning of the Act. *See, e.g., Nardella v. Campbell Machine, Inc.*, 525 F.2d 46, 3 BRBS 78 (9th Cir. 1975); *American Mutual Ins. Co. of Boston v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970). Rather, disability is measured by both physical and economic results of the injury. *Id.; see* 33 U.S.C. §908(c)(21), (h). Moreover, the administrative law judge rationally found that the stipulation was not supported by the credited medical evidence of record as the physicians restricted claimant from performing his usual work until May 6, 2010. Employer has not established error in the administrative law judge's rejection of the stipulation. We therefore affirm the administrative law judge's rejection of the parties' stipulation that claimant sustained no permanent disability. As there is no substantive challenge to the administrative law judge's award of benefits, and as it is supported by substantial evidence, it is affirmed.

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge