

BRB No. 96-0360

JOSH NELSON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
AMERICAN DREDGING COMPANY)	DATE ISSUED:_____
)	
)	
and)	
)	
SIGNAL MUTUAL INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	
)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

David M. Linker (Freedman and Lorry), Philadelphia, Pennsylvania, claimant.

Francis M. Womack (Lawrie, Cozier & Vivencio), Mount Arlington, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (94-LHC-3277) of Administrative Law Judge Ralph A. Romano denying benefits 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).

At the time of the injury in this case, employer was engaged in a beach renourishment project on Fenwick Island, Delaware. This project consisted of widening the beach by pumping sand from ten miles offshore onto the beach. On September 7, 1992, 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 approximately fifty feet from the water's edge. *See* April 27, 1995 HT at 43-44. Employer voluntarily paid claimant temporary total disability benefits from October 12, 1992 to June 3, 1993, and from November 8, 1993 to December 14, 1993. 33 U.S.C. §908(b). Although the parties entered into settlement discussions, no settlement agreement was presented to the administrative law judge for approval.

In his Decision and Order, the administrative law judge found that claimant's work was not covered by the Act. He concluded that the "situs" requirement of Section 3(a), 33 U.S.C. §903(a), had not been satisfied and that claimant's job was not maritime employment within the "status" requirement of Section 2(3), 33 U.S.C. §902(3), of the Act. Accordingly, the administrative law judge denied the claim. Claimant appeals this decision.

On appeal, claimant requests that the Board either enforce his Section 8(i), 33 U.S.C. §908(i), settlement agreement, or remand the case to the administrative law judge for further consideration of this issue. Claimant additionally challenges the administrative law judge's conclusion that he failed to satisfy the situs and status tests for coverage under the Act. Employer responds, urging affirmance of the administrative law judge's decision.

We first address claimant's assertion that the administrative law judge erred in considering the issue of coverage in his decision. Specifically, claimant asserts that because employer failed to raise this issue before the district director, it waived its right to challenge this issue before the administrative law judge. We disagree. It is well established that if, during the course of a hearing, the evidence presented warrants consideration of an issue or issues not previously considered, the hearing may be expanded to include the new issue. 20 C.F.R. §702.336(a); *see Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1, 3 (1990); *Lewis v. Norfolk Shipbuilding & Dry Dock Corp.*, 20 BRBS 126, 129 (1987). In the instant case, employer listed the coverage issue in its pre-hearing statement, Form LS-18, *see* 20 C.F.R. §702.317, and the issue was addressed by the parties during the formal hearing before the administrative law judge. *See* April 27, 1995 HT at 18-19. Thus, as the issue was timely raised, we hold that the administrative law judge committed no error in addressing the issue of coverage in his decision. *See Hall*, 24 BRBS at 1; *Lewis*, 20 BRBS at 126.

We next address claimant's contention that the administrative law judge erred in concluding that he is not covered under the Act. In order to be covered under the Act, a claimant must satisfy both the "situs" requirement of Section 3(a), which specifies areas covered by the Act, and the "status" requirement of Section 2(3), which provide that the Act's coverage extends to maritime employees. *See 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).

Claimant initially contends that he satisfied the situs requirement of the Act since he sustained an injury on navigable waters; alternatively, claimant avers that the beach where he was injured is an "adjoining area" and thus a covered maritime situs. Section 3(a) provides coverage for disability resulting from an injury occurring on 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). Accordingly, coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *See Melerine v. Harbor Construction Co.*, 26 BRBS 97 (1992); *Alford v. MP Industries of Florida*, 16 BRBS 261 (1984).

Initially, claimant concedes that his injury occurred on the beach, *see* Claimant's brief at 12; thus, we reject the argument that it occurred on actual navigable waters. It is also clear that the injury did not occur in one of the areas specifically enumerated in Section 3(a). In analyzing whether claimant's injury occurred on an "adjoining area" under Section 3(a), the administrative law judge employed the "functional relationship" test set forth by the United States Court of Appeals for the Ninth Circuit in *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). In *Herron*, the Ninth Circuit stated that in determining whether a site is an "adjoining area," consideration should be given to the following factors:

1. The particular suitability of the site for the maritime uses referred to in the statute,
2. Whether adjoining properties are devoted primarily to uses in maritime commerce,
3. The proximity of the site to the waterway, and
4. Whether the site is as close to the waterway as is feasible given all of the circumstances.

See Herron, 568 F.2d at 141, 7 BRBS at 411; *see also Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *cf. Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (CRT)(4th Cir. 1995)(site must be contiguous to navigable water). The Board has applied the *Herron* factors in analyzing the coverage of a particular site under Section 3(a). *See, e.g., Anastasio v. A.G. Ship Maintenance*, 24 BRBS 6 (1990). Thus, in order to be a covered area, a site must be used for one of the maritime purposes stated in the statute.¹ *See Silva v. Hydro-Dredge Corp.*, 23 BRBS 123 (1989).

¹We note that this case arises within the appellate jurisdiction of the United States Court of Appeals for the Third Circuit. This court has not specifically addressed the situs requirement since its decisions in *Dravo Corp. v. Maxon*, 545 F.2d 374 (3d Cir. 1976), and *Sea-Land Service, Inc. v. Director, OWCP*, 540 F.2d 629, 4 BRBS 289 (3d Cir. 1976), which held that the employment nexus with maritime activities rather than the site of the injury is controlling. These cases were decided prior to the Supreme Court's decision in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977), and the Third Circuit has acknowledged in a case involving the status requirement that the Act requires that an employee meet both the status and situs tests. *Sea-Land*

In addressing the factors set forth in *Herron*, the administrative law judge concluded that the site of claimant's injury was not an "adjoining area" because the beach where claimant fell was suitable for no maritime purpose, there is no evidence that adjoining properties were anything other than unimproved beaches, the waters adjoining the beach had not been shown to be navigable for purposes of maritime commerce, and the site had not been chosen for its proximity to navigable waters. *See* Decision and Order at 5. Moreover, the administrative law judge found that the beach upon which claimant fell appears to be a "natural" or recreational area containing no piers, bulkheads, or other facilities where vessels could berth, and that, thus, the beach was not shown to have been used in any way to facilitate or further maritime commerce or transportation.

We affirm the administrative law judge's finding that claimant was not injured on a covered situs. Initially, we note that the site is "adjoining" and "contiguous" to navigable water; it cannot seriously be contended that the Atlantic Ocean off the coast of Delaware is not navigable water or that it is not used for maritime commerce. That an injury occurs in an area adjacent to navigable waters does not end the situs inquiry, as the area must be "customarily used by an employee for loading, unloading, repairing, dismantling or building a vessel." In this case, the record is devoid of evidence supporting a finding that the site of claimant's injury was used for traditional maritime purposes. Rather, it is uncontroverted that the site of claimant's injury is an unimproved beach fronting the ocean.² We therefore affirm the administrative law judge's finding that claimant was not injured on a covered situs. *See Lasofsky v. Arthur J. Tickle Engineering Works, Inc.*, 20 BRBS 58 (1987), *aff'd mem.*, 853 F.2d 919 (3d Cir. 1988); *Palma v. California Cartage Co.*, 18 BRBS 119 (1986). Claimant additionally challenges the administrative law judge finding that he failed to satisfy the status test of Section 2(3). Section 2(3) defines an "employee" for purposes of coverage under the Act as any person engaged in maritime employment, including, *inter alia*, any longshoreman or other person engaged in longshoring operations. *See* 33 U.S.C. §902(3)(1988). While maritime employment is not limited to the occupations specifically enumerated in Section 2(3), claimant's employment must bear a relationship to the loading, unloading, constructing, or repairing of a vessel. *See generally Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 110 S.Ct. 381, 23 BRBS 96 (CRT)(1989); *Kennedy v. American Bridge Co.*, 30 BRBS 1, 3 (1996); *Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329, 334 (1992).

Service, Inc. v. Rock, 953 F.2d 56, 25 BRBS 112 (CRT)(3d Cir. 1992); *see Cabaleiro v. Bay Refractory Co., Inc.*, 27 BRBS 29 (1993). In any event, under the case law in every circuit, the area must have a maritime use in order to be covered.

²Claimant argues that his work involved unloading sand from a dredge, *see* status discussion, *infra*, and that the beach thus falls within Section 3(a) due to the "discharge" of sand from the vessel. Claimant's brief at 13. We do not agree that the discharge of sand onto the beach makes it an area "customarily" used for unloading a vessel, since the customary use of the beach is recreation. *See also Sidwell v. Express Containers Services, Inc.*, 74 F.3d 1134, 29 BRBS 138 (CRT)(4th Cir. 1995)(an adjoining area must be a "discrete structure or facility, the very *raison d'etre* of which is its use in connection with navigable waters.")

In the instant case, the administrative law judge determined that claimant's work was not maritime in nature; specifically, the administrative law judge found that claimant's bulldozing activities in furtherance of a beach renourishment project had no relationship with either maritime commerce or the construction or repair of vessels. Despite claimant's attempts to characterize his bulldozing activity as integral to the unloading process, we agree with the administrative law judge that the bulldozing activities performed by claimant for employer in this case involved the movement of sand as part of the process of rebuilding the beach, rather than maritime commerce. Inasmuch as claimant's bulldozing duties were integral to employer's beach renourishment project rather than longshoring activities, we affirm the administrative law judge's determination that these duties are insufficient to confer coverage under the Act. *See Caputo*, 432 U.S. at 249, 6 BRBS at 150; *Schwalb*, 493 U.S. at 40, 23 BRBS at 96 (CRT); *Garmon v. Aluminum Co. of America-Mobile Works*, 28 BRBS 46, 49 (1994).

Lastly, claimant contends that the administrative law judge erred in failing to enforce the Section 8(i), 33 U.S.C. §908(i) settlement agreement placed into the record at the January 13, 1995, formal hearing.³ Attaching numerous documents to his Petition for Review, including a copy of his proposed settlement agreement with employer, claimant requests that the Board either issue an order enforcing the settlement or remand the case to the administrative law judge for further findings regarding this document. It is well established that the Board is precluded from considering new evidence that was not submitted to the administrative law judge nor may the Board conduct a *de novo* review of the evidence. *See Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78 (CRT) (5th Cir. 1991); *Hansley v. Bethlehem Steel Corp.*, 9 BRBS 498.2, 499 (1978). Moreover, claimant failed to raise this issue during the April 27, 1995, formal hearing before the administrative law judge, *see* April 27, 1995 HT at 5, and the record is devoid of evidence of a completed settlement agreement between the parties. Therefore, the administrative law judge committed no error with regard to the proposed settlement. Inasmuch as no settlement application was submitted to the administrative law judge in accordance with the regulations found in 20 C.F.R. §§702.241-702.243, we deny the relief requested by claimant.

Finally, claimant's counsel has filed a fee petition with the Board in this case requesting attorney's fees totalling \$875 for five hours of services rendered at the rate of \$175 per hour. Claimant, however, is not entitled to a fee as he has been unsuccessful on appeal. *See* 33 U.S.C. §928.

Accordingly, the Decision and Order of the administrative law judge is affirmed.

³At the first hearing held on January 13, 1995, claimant's counsel stated that the parties had reached a settlement agreement, but because there were other outstanding issues, *i.e.*, an outstanding welfare lien, jurisdiction, and nature and extent of disability, a written agreement pursuant to Section 8(i) would be forthcoming. *See* January 13, 1995 HT at 4-7. Consequently, the administrative law judge ordered the record to remain open for 45 days to allow the parties to submit their Section 8(i) settlement agreement. *Id.* at 7. Thus, contrary to claimant's assertion, no settlement agreement was submitted into evidence during the January 1995 hearing.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge