BRB No. 96-1443

JUAN ARJONA	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INTERPORT MAINTENANCE COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
HARTFORD ACCIDENT AND INDEMNITY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Reno E. Bonfanti, Administrative Law Judge, and the Decision and Order Awarding Benefits of Michael H. Schoenfeld, Administrative Law Judge,United States Department of Labor.

Richard A. Cooper (Fischer Brothers), New York, New York, for employer/ carrier.

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

PER CURIAM:

Employer appeals the Decision and Order of Administrative Law Judge Reno E. Bonfanti and the Decision and Order Awarding Benefits of Administrative Law Judge Michael H. Schoenfeld (88-LHC-458) 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a container repairman, was injured on June 6, 1985, when he cut his left hand with an electric saw while repairing a container. Claimant sought benefits under the Act. Claimant sustained his injury at employer's facility located within the Oak Island Conrail yard. The record reflects that the yard is about ¼ mile from Newark Bay, a

navigable waterway, and about ½ to 1 mile north of the Port Newark-Port Elizabeth Terminal. The property occupies approximately seventy acres of land within the Conrail yard, and is bounded on the north, south, and east by Conrail railroad tracks. On the west, the yard is bounded by an interstate highway from which there is no exit leading to or from employer's yard. There is no water access to the property; the only access that exists is through three roads over the railroad tracks, one of which is undeveloped. Employer is in the business of repairing intermodal containers. Its customers are the owners of the containers. The owners lease the containers to "shipping" companies for use on ships, railroads and trucks. The containers are brought to employer for repair after a lease expires. Employer does not transport the containers. When repairs are complete the owner is notified; the owner then sends a truck to pick up the container, or the container is stored with employer.

In his Decision and Order, Administrative Law Judge Schoenfeld initially found that considering the nature of employer's work which is related to maritime purposes, the close proximity of its yard to the port, and the fact that employer is located in a railroad yard with tracks leading to and from the port for loading and unloading containers, employer is located in an overall area that is used to facilitate the loading and unloading of maritime cargo and therefore meets the Act's situs test, citing *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (1980). 33 U.S.C. §903(a). In addition, the administrative law judge found that the status requirement is met, as claimant repairs containers used in maritime commerce.[1] 33 U.S.C. §902(3).

[1]The administrative law judge also remanded the case to the district director for consideration of the disability issues raised by the parties. *Arjona v. Interport Maintenance*, Case No. 88-LHC-458 (May 23, 1990). Employer appealed this decision and the Board dismissed the appeal as interlocutory. *Arjona v. Interport Maintenance*, 24 BRBS 222 (1991). In a Decision and Order on remand, Administrative Law Judge Bonfanti found that the parties stipulated as to the merits, pending an appeal of Administrative Law Judge Schoenfeld's coverage findings. Employer perfected its appeal of the coverage issues by appealing Administrative Law Judge Bonfanti's decision. Inasmuch as the Board did not receive a copy of employer's timely notice of its appeal of Judge Bonfanti's decision until August 6, 1996, the one-year review period provided by Public Laws 104-134 and 104-208 begins on that date.

Employer contends on appeal that the Judge Schoenfeld erred in finding that claimant established the situs and status requirements under the Act. Claimant has not responded to this appeal.

Specifically, employer contends on appeal that the administrative law judge erred in finding that the situs requirement is established inasmuch as employer based its site selection on being able to control a large piece of property at very low cost, and as employer does not have access to the rail lines which run through Oak Island. Employer also contends that the surrounding usages are entirely non-maritime in nature and include: a rail yard which does not communicate with the port complex; a sewage treatment plant; a warehouse for Toys-R-Us; a trucking depot; a limousine storage and refurbishment facility; and an industrial park.

Section 3(a) provides that the injury must occur 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)(1988). In analyzing whether claimant's injury occurred on an "adjoining area" under Section 3(a), the administrative law judge cited *Winchester*, 632 F.2d at 504, 12 BRBS at 719. In *Winchester*, the United States Court of Appeals for the Fifth Circuit concluded that a determination of whether an "adjoining area" is covered by the Act should focus on the functional relationship or nexus between the "adjoining area" and marine activity on navigable waters. *See also Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). Factors which have been considered in determining whether a site is an "adjoining area" under Section 3(a) have included: 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.[2] *See Herron*, 568 F.2d at 141, 7 BRBS at 411; *Melerine v. Harbor*

[2]This case arises in the jurisdiction of the United States Court of Appeals for the

Construction Co., 26 BRBS 97 (1992).

In the instant case, Judge Schoenfeld found that employer's place of business is in a rail yard about ¼ mile from Newark Bay and ½ to 1 mile north of the Port Newark-Port Elizabeth Terminal. The administrative law judge also found that as employer's business involves repairing containers used by vessels, railroad cars, or trucks, 75 percent of which are used for shipping cargo on vessels, employer has an economic advantage over competitors who are not located as close to the port by reducing trucking costs for its customers and reducing time for delivery to and from the port. Thus, the administrative law judge, in finding situs, concluded that as employer's work is functionally related to maritime purposes, has close proximity to the port, and is located within a railroad yard with tracks leading to and from the port for loading and unloading containers in maritime commerce, "employer is located in an overall area that is used facilitate maritime loading and unloading." Decision and Order at 6.

Third Circuit, which has not definitively addressed the situs requirement since the Supreme Court held that a claimant must satisfy both the situs test of Section 3(a) and the status test in Section 2(3) in order to be covered by the Act. *See P.C. Pfeiffer Co. V. Ford*, 444 U.S. 69, 11 BRBS 320 (1979)*; Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249, 6 BRBS 150 (1977). The Board has held that the Third Circuit's decisions in *Dravo Corp. v. Maxin*, 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), to the effect that only an employment nexus with maritime activity is necessary for coverage are of limited precedential value in view of the Supreme Court's decisions in *Caputo* and *Ford*. *Cabaliero v. Bay Refractory Co., Inc.*, 27 BRBS 72 (1993). A more recent Third Circuit case, *Sea-Land Service, Inc. v. Rock,* 953 F.2d 56, 25 BRBS 112 (CRT)(3d Cir. 1992), states both requirements, but did not involve a situs issue.

Initially, while acknowledging employer's contention that it chose its location based solely on its low cost, the administrative law judge found that the proximity of the site to the port is a benefit to employer, inasmuch as the proximity reduces trucking costs for employer's customers and this gives employer an economic advantage over its competitors. Employer contends that the speed of turnaround is not important because the containers are not in active use. However, contrary to employer's contention, the administrative law judge did not find that the speed of turnaround was important; rather, the administrative law judge found that employer had the advantage of reducing the time and costs for trucking the containers to and from the port, depending on the requirements of the customers. Thus, as the administrative law judge's inference is reasonable, we reject employer's contention that the administrative law judge erred in finding that the proximity of the site to the port provided employer an economic benefit, even if employer would not always benefit from its closeness to the port.[3]

[3]Employer contends that it does not know when or where each container will be used again, and that it only receives containers at the end of a lease. Thus, the proximity of the port to employer's facility will not always be a factor, as some of the containers are used in trucking and on the railroads.

Employer also contends on appeal that the administrative law judge erred in finding that the tracks in the Conrail yard lead to and from the port for loading and unloading containers in connection with maritime commerce. The uncontradicted evidence of record is that the railroad does not go into the port and that employer does not have access to the rail lines. Tr. at 66-67, 126. Moreover, employer contends that the rail lines surrounding the property inhibit accessibility for trucks by being blocked by trains at any given time and thus the site is not strategically located for any maritime purpose. Although we affirm the administrative law judge's finding that the proximity of the site to the port supports a finding of a covered situs, in determining whether the site is an "adjoining area" under Section 3(a), the administrative law judge did not specifically consider the other factors, such as whether the site is particularly suited for maritime uses or whether the adjoining properties are devoted to maritime commerce. Moreover, the administrative law judge erred in his finding regarding the accessibility of the rail lines between employer's facility and the port. Therefore, as there is evidence of record that may support employer's contention, and the administrative law judge did not address the weight of these factors in his decision, we vacate the administrative law judge's decision and remand the case for further consideration consistent with this opinion.[4] *See also Gonzalez v. Ocean Voyage Ship Repair*, 26 BRBS 12 (1992)*; Davis v. Doran Co. Of California*, 20 BRBS 121 (1987) *aff'd mem.*, 865 F.2d 1257 (4th Cir. 1989); *Bennet v. Matson Terminals, Inc.*, 14 BRBS 536 (1981), *aff'd sub nom. Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982).

In addition to the situs requirement, in order to be covered under the Act, a claimant also must satisfy the status requirement of Section 2(3) of the Act, 33 U.S.C. §902(3) (1988). *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150

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[4]Employer argues that the Oak Island facility fails to satisfy the situs test under the standard set forth in *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (CRT)(4th Cir. 1995), *cert. denied*, 116 S.Ct. 2570 (1996). In *Sidwell*, the United States Court of Appeals for the Fourth Circuit construed the phrase "other adjoining area" to require continguity with navigable waters, or a location within the boundaries of a marine terminal that is contiguous with such waters. We decline to adopt this holding in cases arising outside the Fourth Circuit, *see Kerby v. Southeastern Public Service Authority*, BRBS ____, BRB No. 96-0705 (Feb. 26, 1997), in view of the Board's longstanding application of the criteria outlined in *Herron*, 568 F.2d at 137, 7 BRBS at 409 and *Winchester*, 632 F.2d 504, 12 BRBS at 719. *See, e.g., Melerine v. Harbor Construction Co.,* 26 BRBS 97 (1992); *Anastasio v. A.G. Ship Repair*, 24 BRBS 6 (1990); *Brown v. Bath Iron Works Corp.*, 22 BRBS 384 (1989); *Lasofsky v. Arthur J. Tickle Engineering Works*, 20 BRBS 58 (1987), *aff'd mem.*, 853 F.2d 919 (3d Cir. 1988); *Sawyer v. Tideland Welding Service*, 16 BRBS 344 (1984); *Thornton v. Brown & Root, Inc.*, 16 BRBS 311 (1984); *Dixon v. John J. McMullen & Associates*, 13 BRBS 707 (1981). We, note, moreover, that the United States Court of Appeals for the Second Circuit has cited the *Herron* factors with approval. *Triguero v. Consolidated Rail Corp.*, 932 F.2d 95 (2d Cir. 1991). An approach to the situs issue broader than that espoused in *Sidwell* and *Parker* also is appropriate given the Third Circuit's caselaw on this subject. *See* n.2, *supra*.

(1977). Employer contends the administrative law judge erred in using union and association memberships as hallmarks of status, and that while employer repairs intermodal shipping containers, it does not know where they were or will be used.

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), *aff'g* 22 BRBS 309 (1989). 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). Although the administrative law judge in the instant case noted that employer is a member of the Metro Marine Contractors Association and is required to hire repair workers solely from the International Longshore Association's local union, the administrative law judge based his conclusion that claimant is a maritime employee pursuant to Section 2(3) on the finding that claimant's repair work is essential to the movement of maritime cargo and the continued use of the equipment in longshoring operations. Decision and Order at 6. As it is undisputed that claimant repaired intermodal containers, some of which were used for maritime purposes, we affirm the administrative law judge's finding that claimant established the status requirement. *Id.*

Accordingly, Judge Schoenfeld's finding that the evidence establishes that claimant's injury occurred on a covered situs under Section 3(a) of the Act is vacated, and the case is remanded for further consideration consistent with this opinion. However, Judge Schoenfeld's finding that claimant is a covered employee pursuant to Section 2(3) of the Act is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER

Administrative Appeals Judge