

BRB No. 97-1266

JAMES H. GRIFFIN, JR. )  
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 Claimant-Petitioner ) DATE ISSUED:  
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 v. )  
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 NEWPORT NEWS SHIPBUILDING )  
 AND DRY DOCK COMPANY )  
 )  
 Self-Insured )  
 Employer-Respondent ) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits For Injury That Occurred On March 21, 1995 of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein and Matthew H. Kraft (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Melissa R. Link (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits For Injury That Occurred On March 21, 1995 (96-LHC-1229) of Administrative Law Judge Richard K. Malamphy 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

The facts involved in this case are not in dispute. Claimant injured his back on the morning of March 21, 1995, when, while walking through one of employer's parking lots on his way to his job at employer's shipyard, he was required to step

out of the way of a driverless car which was slowly rolling towards him.<sup>1</sup> The parking lot in which this incident occurred is located across Washington Avenue, a public road, from employer's fenced off shipyard, and is owned and maintained by employer for the use of its employees. Claimant filed a claim under the Act for temporary total disability compensation for various periods of time in 1995 and 1996. 33 U.S.C. §908(b).

The only issue before the administrative law judge was whether claimant satisfied the situs requirement for jurisdiction under the Act. In his Decision and Order, the administrative law judge, relying on the holding of the United States Court of Appeals for the Fourth Circuit 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), found that the parking lot in which claimant was injured was not a covered situs under Section 3(a) of the Act, as it was separated from employer's fenced off shipyard by public roads, was not used in repairing or building ships, and was not an integral part of the shipyard. Thus, the administrative law judge denied claimant benefits on this basis. On appeal, claimant contends that the administrative law judge erred in finding that employer's parking lot is not a covered situs under the Act. Specifically, claimant contends that the private road which separates employer's shipyard from the parking lot is inconsequential, and that since the parking lot is owned and operated by employer for the benefit of its employees, it should be deemed to be a part of employer's shipyard premises. Employer responds, urging affirmance of the administrative law judge's decision.

Section 3(a) provides that:

Compensation shall be payable under this chapter . . . only if the disability or death results 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).

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<sup>1</sup>Claimant testified that he threw his hands up onto the rolling car, sidestepped out of the way, then, with the assistance of another person, tried to stop the car by grabbing hold of the side-view mirror. Tr. at 20-21. Claimant was able to work the day of the accident. Tr. at 22-23.

33 U.S.C. §903(a)(1994)(emphasis added). In *Sidwell*, 71 F.3d at 1134, 29 BRBS at 138 (CRT), the Fourth Circuit, within whose jurisdiction this case arises, held that an area is "adjoining" navigable waters only if it is contiguous with or otherwise touches navigable waters. To be included as an "other adjoining area" under the Act, the court held that the area must be a discrete shoreside structure or facility which is "customarily used by employer in loading, unloading, repairing, dismantling, or building a vessel." *Sidwell*, 71 F.3d at 1139, 29 BRBS at 143 (CRT); see also *Parker v. Director, OWCP*, 75 F.3d 929, 30 BRBS 10 (CRT)(4th Cir.), cert. denied, 117 S.Ct. 58 (1996); *Humphries v. Director, OWCP*, 834 F.2d 372, 20 BRBS 17 (CRT)(4th Cir. 1987).

We affirm the administrative law judge's finding that the parking lot at issue in the case at bar is not a covered situs under the Fourth Circuit's decision in *Sidwell*. In a case involving a similar factual situation, *Kerby v. Southeastern Public Service Authority*, 31 BRBS 6 (1997), *aff'd mem.*, 135 F.3d 770 (4th Cir. 1998)(table), the Fourth Circuit recently affirmed the Board's holding that claimants who had sustained injuries at a power plant owned by employer, which provided electricity in part for employer's shipyard, did not satisfy the situs requirement. In *Kerby*, the location of the power plant wherein claimants were injured was separated from employer's shipyard by fences which surrounded each property, by privately owned railroad tracks which ran between the two properties, and by the personnel practices of employer's shipyard which did not provide for unrestricted access between the two properties. Based upon these undisputed facts, the Board determined that the power plant must be considered to be located on land separate and distinct from the shipyard, notwithstanding its ownership by the shipyard; consequently, the Board held that, as a separate and distinct piece of property, the power plant must be contiguous with navigable waters in order to be considered an "adjoining area" under the holding of the Fourth Circuit in *Sidwell*. As it was uncontroverted that the power plant did not adjoin navigable waters, the Board held that it could not be considered such an area under the controlling circuit court precedent. *Kerby*, 31 BRBS at 11.

Similarly, in the instant case, it is uncontroverted that the parking lot where claimant was injured, while owned and operated by employer for its employees, is separated from employer's shipyard by Washington Avenue, a public road, and is surrounded by three other public roads. See Cl. Ex. 1; Emp. Ex. A. Moreover, the shipyard itself is fenced off along Washington Avenue from the public, and an employee badge or visitor's pass is required in order to enter the shipyard. Tr. at 41-42. Thus, as the parking lot at issue here is physically separated from employer's shipyard by a public street as well as a security fence, it must be deemed to be a separate and distinct piece of property rather than part of the overall shipyard facility.

See *Kerby*, 31 BRBS at 6. Claimant's reliance on the fact that the parking lot is owned and maintained by employer, and is thus part of the shipyard premises, see *Shivers v. Navy Exchange*, No. 96-2578, 1998 WL 246148 (4th Cir. May 18, 1998), is misplaced. Although claimant correctly asserts that the court in *Sidwell* stated, "it is the parcel of land that must adjoin navigable waters, not the particular square foot on which a claimant is injured," *Sidwell*, 71 F.3d at 1140 n.11, 29 BRBS at 144 n.11 (CRT), the parking lot in this case was not located on the same parcel as the shipyard. Since employer's parking lot is a separate and distinct parcel of land, it cannot be considered an "adjoining area" under Section 3(a) of the Act. See also *Jonathan Corp. v. Brickhouse*, No. 97-1039, 1998 WL 191616 (4th Cir. April 23, 1998). As it is uncontroverted that the parking lot is not contiguous with navigable water, see Tr. at 43, we affirm the administrative law judge's determination that claimant was not injured on a covered situs under Section 3(a), as it is consistent with *Sidwell*.<sup>2</sup>

Accordingly, the Decision and Order Denying Benefits For Injury That Occurred On March 21, 1995 of the administrative law judge is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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JAMES F. BROWN  
Administrative Appeals Judge

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<sup>2</sup>As we affirm the administrative law judge's determination that claimant failed to satisfy the situs requirement on this basis, claimant's argument with regard to the administrative law judge's finding that claimant "was not engaged in pursuing the Employer's business at the time of the injury," Decision and Order at 6, need not be addressed.

REGINA C. McGRANERY  
Administrative Appeals Judge