BRB No. 98-0101

MARCUS A. McCORMICK	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Matthew H. Kraft (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: SMITH and BROWN, Administrative Law Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-2397) of Administrative Law Judge Fletcher E. Campbell, 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 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).

The facts involved in this case are not in dispute. Claimant worked for employer as an electrician for 14 years. He generally worked at the shipyard onboard ships and worked at other locations on no more than six occasions. Claimant injured his left knee on March 16, 1996, while obtaining parts at employer's Building 511, a warehouse located at the intersection of 45th Street and Warwick Avenue, in Newport News, Virginia. In order to access Building 511 from the

waterfront one must cross three public roads, Warwick Boulevard, Huntington Avenue and/or Washington Avenue, and pass through at least one security gate.[1] *See* Joint Stipulations, No. 17.

Asserting that Building 511 does not constitute a "situs" under Section 3(a) of the Act, 33 U.S.C. §903(a), employer maintained that claimant's claim falls exclusively under the Virginia Workers' Compensation Act, Va. Code §§65.2-100 to 65.2-1310, and as such objected to claimant's choice of physician, Dr. Tornberg, as he is not listed on its panel of physicians as provided for by the Virginia Act. *See* Va. Code §65.2-603.[2] Claimant thereafter filed the instant claim under the Longshore Act in order to obtain his free choice of physician. *See* 33 U.S.C. §907(b); 20 C.F.R. §702.403.

The only issue before the administrative law judge was whether claimant satisfied the situs requirement for coverage under the Act.[3] 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), and the Board's holding in *Kerby v. Southeastern Public Service Authority*, 31 BRBS 6 (1997), *aff'd mem.*, 135 F.3d 770 (4th Cir. 1998)(table), *pet. for cert. filed,* 66 U.S.L.W. 3774 (U.S. May 22, 1998)(No.97-1890), found that employer's Building 511, 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, and there is no evidence it was customarily used in repairing or building ships. 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 Building 511 is not a covered situs under the Act. Specifically, claimant contends that the entire area where Building 511 sits, with the exception of the public roadways, is owned exclusively by employer and thus is shipyard territory

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[1]Building 511 is more than ½ mile from the James River and is separated from the River by Warwick Boulevard, Huntington Avenue and Washington Avenue.

[2]Specifically, Section 65.2-603, in pertinent part, states that "[a]s long as necessary after an accident, the employer shall furnish or cause to be furnished, free of charge to the injured employee, *a physician chosen by the injured employee from a panel of at least three physicians selected by the employer . . . . The employee shall accept the attending physician*, unless otherwise ordered by the Commission . . . ." Va. Code §65.2-603 (emphasis added).

[3]The parties stipulated that claimant meets the status component for coverage under the Act. *See* 33 U.S.C. §902(3); Joint Stipulations, No. 1.

which qualifies as an “adjoining area” pursuant to the Fourth Circuit’s holding in *Sidwell*. 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).

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 employer’s Building 511 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 at 6, the Fourth Circuit recently affirmed the Board’s holding that claimants who 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 the 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 the 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.

More recently, the Board, in *Griffin v. Newport News Shipbuilding & Dry Dock*

Co., 32 BRBS 87 (1998), held that employer's parking lot, where claimant sustained his injury, is a separate and distinct parcel of land and thus, cannot be considered an "adjoining area" under Section 3(a) of the Act. Specifically, the Board held that the parking lot in question was not located on the same parcel as the shipyard, inasmuch as it is physically separated from employer's shipyard by a public street, Washington Boulevard, as well as by a security fence.

Similarly, in the instant case, it is uncontroverted that Building 511, where claimant was injured, while owned and operated by employer, is separated from employer's shipyard by public roads which do not adjoin navigable water. *See* Joint Stipulations, Nos. 15-20. Moreover, the main shipyard is fenced off along Washington Avenue from the public, and an employee badge or visitor's pass is required to enter the premises. *Id*., No. 17. Thus, as Building 511 is physically separated from employer's shipyard by public streets as well as a security fence, it must be deemed a separate and distinct piece of property rather than part of the overall shipyard facility. *See Griffin*, 32 BRBS at 87; *Kerby,* 31 BRBS at 6. Moreover, as in *Griffin*, since Building 511 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*, 142 F.3d 217 (4th Cir., 1998), *pet. for cert. filed*, U.S.L.W. (U.S. July 20, 1998)(No. 98-241). Consequently, as it is uncontroverted that Building 511 is not contiguous with navigable water, *see* Joint Stipulations, Nos. 14, 18-20, under the decision of the Fourth Circuit in *Sidwell,* it is not a covered site under Section 3(a).[4] *Contra Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir.1980), *cert. denied*, 452 U.S. 905 (1981) (concluding 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, court held a gear locker used to store equipment used in loading, located five blocks from the nearest dock covered under Section 3(a)). We therefore affirm the administrative law judge's denial of the claim, as it is consistent with controlling precedent in the Fourth Circuit.[5]

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[4]As the facts that the site is separate from the shipyard and is not contiguous to navigable water are controlling, we need not address the administrative law judge's statement that there is no evidence the warehouse itself was customarily used in building or repairing a vessel. The stipulated facts, however, state that claimant went to shipyard warehouses to obtain parts, and work with parts necessary for vessel construction may be integral to shipbuilding. *See generally White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980).

[5]Claimant argues that one of the primary purposes of the 1972 Amendments to the Act was to prevent workers from passing in and out of coverage during the course of the day, and thus, as his work normally occurred within employer's facility, he should be covered under the Act. This inquiry is relevant to a determination of a claimant's status under Section 2(3),

33 U.S.C. §902(3). *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). 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). As claimant's injury in the instant case occurred in employer's Building 511 which is not contiguous with navigable water, and thus cannot be considered an "adjoining area" under Section 3(a) of the Act, the fact that claimant's normal site of employment was the shipyard is not dispositive. *See generally Griffin*, 32 BRBS at 87.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge