BRB No. 99-432

ENRIQUE URESTI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PORT CONTAINER INDUSTRIES, INCORPORATED	)	DATE ISSUED: Aug. 21, 2000
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	DECISION and ORDER
Employer/Carrier-Respondents	)	DENYING MOTION for RECONSIDERATION

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Harry C. Arthur, Houston, Texas, for claimant.

Andrew Z. Schreck, Houston, Texas, for employer/carrier.

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

SMITH, Administrative Appeals Judge:

Employer has filed a timely motion for reconsideration of the Board's decision in this case, *Uresti v. Port Container Industries, Inc.*, 33 BRBS 215 (2000) (Brown, J., dissenting). 33 U.S.C. '921(b)(5); 20 C.F.R. '802.407. For the reasons set forth herein, we deny the motion for reconsideration.

To reiterate the facts of this case, claimant worked as a truck driver carrying steel materials from the docks to storage warehouses or yards. Claimant's duties included waiting for the loading to occur, "flagging" the crane operator so that the load was placed properly on the trailer, and securing the load to the trailer prior to driving it to its place of storage within the port. Tr. at 61, 72-73, 144, 153, 158-159.

Approximately three weeks after he was hired, on July 24, 1997, claimant's supervisor, Joel Ramirez, assigned claimant to work in a warehouse in the port area to assist in the unloading of angle irons from a rail car. Claimant hooked and unhooked the irons from the crane, and in order to do this, he had to climb a ladder attached to the rail car. As he was climbing the ladder, claimant lost his footing and tried to hang on using his left hand, but fell approximately 12 feet to the concrete floor below. Claimant was diagnosed as having ruptured his pectoralis major tendon, and surgery was unsuccessful. Cl. Exs. 3, 8, 17; Tr. at 49.

The Board reversed the administrative law judge's findings that claimant did not satisfy the status and situs requirements for coverage under the Act. 33 U.S.C. §§902(3), 903(a). It held that, as the warehouse is located in the Port of Houston, and as a portion of the goods regularly passing through the warehouse is maritime cargo, the warehouse has a sufficient geographic and functional maritime nexus such that the site is covered under Section 3(a). *Uresti*, 33 BRBS at 217. The Board also held that claimant's job driving a truck within the port satisfied the status requirement, as hauling cargo from shipside to the storage facility is part of the overall process of unloading. *Id.* at 219-220; *see P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979). As a result, the Board remanded the case for consideration of the merits of the claim. *Uresti*, 33 BRBS at 220. Judge Brown dissented, expressing the opinion that because claimant was injured in a warehouse designated for loading and unloading trucks and railcars, he was not injured on a situs with a functional relationship to maritime activities. *Id.* at 220-221.

In its motion for reconsideration, employer argues that the Board erred in reversing the administrative law judge's denial of coverage. With regard to the situs issue, employer contends not only that the Board engaged in a *de novo* review of the case by giving great weight to the estimation that five percent of the cargo in the warehouse where claimant was injured is maritime, but that the decision conflicts with the Board's decision in *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998), that is, the warehouse is not an adjoining area customarily used for unloading vessels as it is only used to load/unload trucks and railcars. With regard to status, employer argues that because its employees are agents of the consignee, their duties should not be treated as the final step in the maritime process but rather should be considered the initial step in land transportation.

We first address employer's contentions regarding status. Although employer asserts that its drivers are not performing the duties of longshoremen but instead are performing the duties of truck drivers, and that the Port of Houston is one of the few ports which allows consignees to receive their own cargo at the docks or have an agent pick it up for storage and later delivery, employer's argument that the situation

herein is most similar to the situation in *Martinez v. Distribution Auto Service*, 19 BRBS 12 (1985), is flawed. In *Martinez*, as in *Dorris v. Director, OWCP*, 808 F.2d 1362, 19 BRBS 82(CRT) (9th Cir. 1987), and *Zube v. Sun Refining & Marketing Co.*, 31 BRBS 50 (1997), *aff'd mem.*, No. 97-3382 (3d Cir. July 31, 1998), the claimant worked for the consignee of the goods, and his duties required him to pick up the goods at the dock and transport it *away from* the port area. In that regard, the facts are highly distinguishable from the case at bar where claimant's work was confined to the port area. *See Triguero v. Consolidated Rail Corp.*, 932 F.2d 95 (2d Cir. 1991) (cargo transported from dockside storage facility to port's rail facility); *Warren Bros. v. Nelson*, 635 F.2d 552, 12 BRBS 714 (6th Cir. 1980) (gravel transported from dockside hopper to manufacturer's facility within port area); *Waugh v. Matt's Enterprises, Inc.*, 33 BRBS 9 (1999) (scrap metal hauled from barges to scrap field). Moreover, in *Novelties Distribution Corp. v. Molee*, 710 F.2d 992, 15 BRBS 168(CRT) (3d Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984), the United States Court of Appeals for the Third Circuit held that the fact that a claimant is the agent of the consignee is irrelevant, as it is the functional relationship of his duties with maritime activity that is paramount. In *Molee*, as in *Triguero*, *Nelson*, *Waugh*, and the instant case, the claimant transported maritime cargo within the port area from dockside to various storage facilities. Such activity is considered an intermediate step in the loading process and is covered. *Ford*, 444 U.S. at 69, 11 BRBS at 320. Therefore, we reject employer's contention that claimant does not meet the status requirement, and we affirm the Board's decision in this respect.

With regard to the situs issue, employer contends this case is controlled by the Board's decision in *Stroup*, 32 BRBS 151. We disagree, as the sites at issue in the two cases differ in material aspects. Therefore, we also deny employer's motion for reconsideration of the situs issue, and we reaffirm the conclusion that claimant was injured on a covered situs.

Coverage under Section 3(a) of the Act, 33 U.S.C. §903(a), is determined by the nature of the place of work at the moment of injury. *Melerine v. Harbor Constr. Co.*, 26 BRBS 197 (1992). To be considered a covered situs, a site must have a maritime nexus, but it need not be used exclusively or primarily for maritime purposes. *See Textports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (1980) (*en banc*) (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *Melerine*, 26 BRBS at 197; *Stroup*, 32 BRBS at 151. The United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, has adopted a broad view of the situs test, refusing to restrict the test by fence lines or other boundaries. Specifically, the court stated that the perimeter of an "area" is to be defined by function and that the character of surrounding properties is but one factor to be considered. An area can be considered an "adjoining area" within the meaning of the Act if it is in the

vicinity of navigable waters, or in a neighboring area, and it is customarily used for maritime activity. *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729;[1] *see also Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). Thus, the geography and the function of an area are of utmost importance. *Stroup*, 32 BRBS at 154.

The exact location of employer's warehouse is not available from the record, but it is clear that employer's facility is located within the Port of Houston. Tr. at 191. Under the Fifth Circuit's rule in *Winchester*, this is all that is necessary to establish the geographic element of the situs requirement. *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729; *see also Nixson v. Mobil Mining & Minerals*, No. 99-60273 (5th Cir. Feb. 7, 2000), *aff'g* BRB No. 98-988 (March 2, 1999), *petition for cert. filed*, No. 00-44 (July 6, 2000); *Gavranovic v. Mobil Mining & Minerals*, 33 BRBS 1 (1999).[2] As

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[1]In *Winchester*, the Fifth Circuit held that a gear room located five blocks from the nearest dock constituted a covered situs because it was in the vicinity of the navigable waterway, it was as close to the docks as feasible, and it had a nexus to maritime activity in that it was used to store gear which was used in loading process. *Winchester*, 632 F.2d at 514-516, 12 BRBS at 726-729.

[2]The Fifth Circuit, *Nixson*, slip op. at 2 (emphasis added), stated the following

the administrative law judge found that claimant was not injured on a covered situs based solely on the *functional* element, it is to that issue which we now turn.

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regarding the definition of "area" as that term is used in Section 3(a) of the Act:

> We have carefully reviewed the stipulated facts regarding both the particular site where the accident occurred and the surrounding area constituting Mobil's facility contiguous to the Ship Channel in light of the applicable law as set forth in the briefs of counsel to this court and discussed in oral argument before us. Particularly in light of our standard of review of this case and the seminal case in this court [citing *Winchester*], we are convinced that *the "area," as distinguished from the pinpoint site of the accident, is a covered situs* pursuant to the plain wording of §903(a) of the LHWCA.

There is undisputed evidence credited by the administrative law judge which demonstrated that the function of the warehouse in question is to load and unload railcars and trucks, and that 95 percent of the materials are transported only by either train or truck. However, there is also credited evidence that five percent of the materials passing through the warehouse travel within maritime commerce, as they have been or will be transported by ship. Tr. at 193-194, 200. Employer argues that the evidence demonstrating that most of the materials moving through the warehouse are domestic is sufficient to support the administrative law judge's decision that claimant's injury did not occur on a covered situs used for loading and unloading vessels.[3] Thus, it argues there is substantial evidence of record to support the administrative law judge's conclusion that the warehouse is not a place "customarily used" for maritime activities and thus is not a covered situs.

We reject employer's argument, and reaffirm our decision, distinguishing *Stroup* and relying on *Gavranovic*. In *Stroup*, the Board held that a worker injured in a warehouse shipping bay at a steel manufacturing plant was not injured on a covered situs. *Stroup*, 32 BRBS at 155. The Board stated that the shipping bay, which was used to store finished steel products and to load trucks, which then transported the steel overland or carried it to barges or rails for further shipment, did not serve a maritime function, affirming the administrative law judge's finding that "there is nothing inherently maritime about storing and loading steel onto trucks. . . ." *Stroup*, 32 BRBS at 154. Specifically, the situation in *Stroup* involved the point at which the manufacturing process ends and the maritime process begins. Thus, loading finished steel products onto a truck, bound for a barge or any other destination, constitutes the last step in the manufacturing process at the steel plant. The maritime process, therefore, did not begin in *Stroup* until the steel reached the docks and was readied for loading onto a barge. The lack of a maritime function in the shipping bay of the plant, in conjunction with its distance from the employer's dock facility where loading and unloading occurred, which was a notably separate and distinct facility,[4] led the Board to affirm the administrative law judge's finding that the injury in the shipping bay, even while loading a truck with steel bound for a

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[3]We reject employer's assertion that the Board conducted a *de novo* review of the facts. Rather, the Board addressed the legal argument regarding whether the regular maritime transport of five percent of the materials was sufficient to constitute "customary use" of the area in the loading and unloading process.

[4]The warehouse/shipping bay was situated ¼ to ½ mile from the dock, separated therefrom by a levee and a public road.

barge, did not occur on a covered situs because it met neither the geographic nor the functional criterion of *Winchester*. *Stroup*, 32 BRBS at 154-155.

The facility in *Gavranovic*, however, met both the geographic and the functional criteria. In *Gavranovic*, the employer was a fertilizer manufacturer which received raw materials and sent finished product via truck, barges and railway, and its entire facility was adjacent to the navigable waters in order to accommodate the receipt and shipping of such goods. Although the claimants were injured when they were working in a building used to store the finished product and to load trucks and railcars, the building was also used regularly to replenish the supply in an adjacent building, via conveyors, and this supply moved directly to vessels via conveyors. The Board held that the claimants were injured on a covered situs.[5] Specifically, the Board held that although the specific building in which they were injured, which was situated adjacent to the Houston Ship Channel, was not directly linked to the barges or vessels being loaded or unloaded, part of employer's business involved sending and receiving goods by barges or vessels – a distinctly maritime activity. *Gavranovic*, 33 BRBS at 5. The Board distinguished *Stroup* as follows:

> Although the facility at which claimants herein work is a manufacturing operation, and the building in which they were injured is not directly involved with the loading or unloading of barges or vessels, part of employer's business involves sending and receiving goods by barges or vessels – a distinctly maritime activity. Moreover, the geography of the facility herein can be distinguished from the facility in *Stroup*, as here, the entire facility and the building in question are adjacent to navigable water and to the docks where barges are loaded and unloaded. [citation omitted] In light of the location of employer's facility and because significant maritime activity (loading and unloading barges) occurs on the docks at employer's facility, we affirm the administrative law judge's determination that claimants' injuries in these cases occurred on a covered situs.

Gavranovic, 33 BRBS at 5. This holding was validated by the Fifth Circuit when it affirmed the Board's determination in *Nixson*, wherein the injury occurred at the same facility as in *Gavranovic*. *See* n.2, *supra*.

As in *Gavranovic*, and unlike *Stroup*, the warehouse herein is located within

[5]Both claimants also worked in the adjacent building containing the materials which moved directly to barges.

an overall area used for a maritime purpose, the Port of Houston. As it is located in the port area itself, rather than a separate facility like the manufacturing plant in *Stroup*, it is within a covered situs. Moreover, insofar as the specific building where the injury occurred is concerned, a portion of the manufactured goods handled at that location travel in maritime commerce. For those goods, the warehouse is the last step in transshipment, and it represents the point of departure from the port area into overland transportation. *See Ford,* 444 U.S. at 69, 11 BRBS at 320 (status case based on intermediate steps which illustrates the point at which the transition occurs between land and maritime transportation). The evidence in this case establishes that an estimated five percent of the cargo which is transported through the warehouse arrives or departs on vessels. This fact was credited by the administrative law judge when he credited testimony that 95 percent of the materials through the warehouse is domestic, shipped only by truck or train. The five percent is evidence that the warehouse in question is used "customarily" or regularly in maritime commerce. Therefore, the Board properly reversed the administrative law judge's finding to the contrary, holding that this was a "sufficient functional nexus to maritime activity." *Uresti*, 33 BRBS at 217-218. Moreover, to look at the function of the warehouse alone is to narrowly construe the term "area," and the Fifth Circuit has declined to do so. Employer cannot escape the fact that the building is in the Port of Houston, and the function of the port, necessarily, involves the movement of cargo. Consequently, claimant was injured on a covered situs.

Accordingly, employer's motion for reconsideration is denied, and the Board's decision in this case is affirmed. 20 C.F.R. '802.409.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur:

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MALCOLM D. NELSON, Acting
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, dissenting:

For the reasons set forth in my dissenting opinion, *Uresti*, 33 BRBS at 220-221, I would grant employer's motion for reconsideration, and affirm the administrative law judge's finding that claimant was not injured on a covered situs.

JAMES F. BROWN
Administrative Appeals Judge