BRB No. 99-0573

JUAN ARJONA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INTERPORT MAINTENANCE COMPANY, INCORPORATED	)	DATE ISSUED: Mar. 1, 2000
	)	
and	)	
	)	
HARTFORD ACCIDENT AND INDEMNITY COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Phillip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

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

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand Denying Benefits of Administrative Law Judge Pamela Lakes Wood (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 at employer's facility located within the Oak Island Conrail yard. The facility is about ¼ mile from Newark Bay, a navigable waterway, and about ½ to 1 mile north of the Port Newark-Port Elizabeth Terminal. Employer's property occupies approximately 70 acres of land within the Conrail yard, and is bounded on the north, south, and east sides by Conrail railroad tracks. To the west, the facility is bounded by an interstate highway; there is no exit from this highway leading to or from employer's yard. There is no water access to the property; the only access is by three roads over the railroad tracks, one of which is undeveloped.

Employer is in the business of repairing intermodal containers which are owned by its customers. The owners lease the containers to "shipping" companies for use on ships, railroads and trucks, and upon expiration of these leases, the containers are brought to employer for repair and/or storage. 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 issued May 23, 1990, Administrative Law Judge Michael H. Schoenfeld initially found that considering the nature of employer's work which is related to maritime purposes, the 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 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 (5th Cir. 1980) (*en banc*), *cert. denied,* 452 U.S. 905 (1981). 33 U.S.C. §903(a). In addition, Judge Schoenfeld found that the status requirement is met, as claimant repairs containers used in maritime commerce. 33 U.S.C. §902(3). Lastly, Judge Schoenfeld remanded the case to the district director for consideration of the disability issues raised by the parties. Employer appealed this decision and the Board dismissed the appeal as interlocutory. *Arjona v. Interport Maintenance*, 24 BRBS 222 (1991). In his Decision and Order on remand dated April 26, 1994, Administrative Law Judge Reno E. Bonfanti found that the parties stipulated as to the merits,[1] pending an appeal of Judge Schoenfeld's coverage findings.

[1]The parties previously stipulated to issues regarding disability and permanent loss of use of claimant's left hand before the district director's as evidenced in his Compensation Order dated October 8, 1991. Employer appealed the district director's Order and the appeal was assigned BRB No. 92-1984. The Board, by Order dated September 23, 1992, dismissed employer's appeal stating that it did not

have jurisdiction to consider an appeal from the district director's office. *Arjona v. Interport Maintenance*, BRB No. 92-1984 (Sept. 23, 1992) (unpub. Order). The Board also stated that it would consider employer's appeal as a timely request for a hearing before an administrative law judge and thus, the case was remanded to the Office of Administrative Law Judges for further proceedings. *Id.*

In its Decision and Order dated July 18, 1997, the Board affirmed Judge Schoenfeld's original determinations that claimant satisfied the "status" requirement under Section 2(3) of the Act, 33 U.S.C. §902(3), and that the proximity of employer's site to the port is a factor supportive of finding that claimant's injury occurred on a covered "situs." *Arjona v. Interport Maintenance Co., Inc.*, 31 BRBS 86 (1997). The Board however vacated Judge Schoenfeld's conclusion that the "situs" requirement was satisfied, as in determining whether the employer's site is an "adjoining area" under Section 3(a), 33 U.S.C. §903(a), he did not specifically consider all of the relevant factors set forth in *Winchester*, 632 F.2d at 504, 12 BRBS at 719, and *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). *Arjona,* 31 BRBS at 88. The case was therefore remanded to the administrative law judge for further consideration. *Id.*

In her decision issued February 3, 1999, Administrative Law Judge Pamela Lakes Wood (the administrative law judge) determined that claimant did not meet his burden of establishing that his injury occurred upon a maritime situs under Section 3(a) of the Act, 33 U.S.C. §903(a), and therefore concluded that claimant failed to establish the requisite coverage for his claim. Accordingly, benefits were denied. On appeal, claimant challenges the administrative law judge's denial of benefits. Employer responds, urging affirmance.

Claimant first contends that the administrative law judge's decision violates the Administrative Procedure Act (APA) since she did not engage in a discussion and evaluation of the evidence and did not comply with the Board's directive to weigh the various factors. In particular, claimant asserts that as the "situs" inquiry in this case involves a legal issue, it was inappropriate for the administrative law judge to resort to the holding in *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT) (1994), to find that claimant did not satisfy his burden of proof, and thus, avoid applying the relevant law to the undisputed facts on this issue. With regard to situs, claimant argues that the issue of an "adjoining area" should involve consideration of the entire area of Port Newark, and thus should not, as the Board directed, be limited only to the confines of employer's facility. Claimant argues that where, as in the instant case, employer's facility is located within an area comprehensively devoted to maritime commerce, it should be regarded as a maritime situs irrespective of the employer's motivation in selecting the site.

The APA requires an administrative law judge to adequately detail the rationale behind her decision, analyze and discuss the relevant evidence of record, and explicitly set forth the reasons for her acceptance or rejection of such evidence. 5 U.S.C. §557(c)(3)(A); *see Santoro v. Maher Terminals, Inc.,* 30 BRBS 171 (1996); *Cotton v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 380 (1990); *Cairns v. Matson Terminals, Inc.,* 21 BRBS 252 (1988). In *Greenwich Collieries*, the United States Supreme Court held that the "true doubt" rule improperly shifts the burden of persuasion to the employer and therefore conflicts with Section 7(c) of the

APA, 5 U.S.C. §556(d), which requires the proponent of a rule or order to bear the burden of persuasion. Thus, if the evidence is in equipoise, the claimant is not entitled to benefits. *Santoro*, 30 BRBS at 171. As claimant correctly states, however, the issue in the instant case is a strictly legal one, as all of the facts are adduced and all that is required is application of law to these facts.[2] *See generally Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied,* 119 S.Ct. 444 (1998); *George v. Lucas Marine Constr.*, 28 BRBS 230 (1994), *aff'd mem.*, No. 94-70660 (9th Cir. May 30, 1996). Resolution of the coverage issue under Section 3(a) turns on application of the relevant case precedent to the facts regarding the location of the site of injury. As this analysis leads to the conclusion that claimant's injury did not occur on a covered situs, we affirm the administrative law judge's conclusion, although on a different rationale.

Section 3(a) of the Act provides that:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but 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).

[2] *Greenwich Collieries* does not disturb statutory presumptions operating in claimant's favor, and Section 20(a) provides claimant with a presumption that, "in the absence of substantial evidence to the contrary,. . . the claim comes within the provisions of the Act." 33 U.S.C. §920(a). Whether this presumption applies to the facts underlying the coverage issues presented by Sections 2(3) and 3(a), 33 U.S.C. §902(3), 903(a), is not an issue we need resolve as the question presented involves a legal issue. *Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied,* 119 S.Ct. 444 (1998).

33 U.S.C. §903(a)(1994). Under Section 3(a), coverage is determined by the nature of the place of work at the moment of injury. *Melerine v. Harbor Constr. Co.*, 26 BRBS 97 (1992). To be considered a covered situs, an "adjoining area" must have a maritime nexus, but it need not be used exclusively or primarily for maritime purposes.[3] *See Winchester*, 632 F.2d at 504, 12 BRBS at 719. 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 504, 12 BRBS at 719; *Herron*, 568 F.2d at 137, 7 BRBS at 409. In determining whether claimant's injury occurred on an "adjoining area" under Section 3(a), the administrative law judge applied, as directed by the Board, the functional relationship test enunciated in *Herron*. Factors to be considered in determining whether a site is an "adjoining area" under that test include: 1) the particular suitability of the site for the maritime uses referred to in the Act; 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 feasible given all the circumstances of the case. *Id.*, 568 F.2d at 141, 7 BRBS at 411. The Board has applied this test in several cases instructive to the case at bar.

In *Bennett v. Matson Terminals, Inc.*, 14 BRBS 526 (1981), *aff'd sub nom. Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir., 1982), the employer's container refurbishment site was 12 miles from the Oakland terminal, 750 feet from a waterway and ½ mile from a deep water port. The Board held there was a functional nexus between the Oakland terminal and the refurbishment site, but that, applying *Herron*, the remaining factors were insufficient to support a situs finding. Specifically, the Board held that the site was not particularly suited for maritime purposes, its choice was governed by economic factors, and the adjoining businesses were not primarily maritime. Moreover, the Board held that the proximity to the deep water port was merely fortuitous, as employer had no relationship with that facility. The Ninth Circuit summarily affirmed the Board's decision as consistent with *Herron*.

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[3]As the administrative law judge noted, the United States Court of Appeals for the Third Circuit, within whose jurisdiction the instant case arises, issued *Nelson v. American Dredging Co.*, 143 F.3d 780, 32 BRBS 115(CRT) (3d Cir. 1998), after the Board issued its last decision in this case. *Nelson* addresses the situs issue in terms of whether an area actually contiguous to navigable waters was customarily used by an employer for loading, unloading, *etc.* As the administrative law judge properly found, it does not aid in disposing of the situs issue in the instant case, as employer's facility is not adjacent to navigable waters. We note, however, that the court rejected the restrictive reading of situs adopted by 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*, 518 U.S. 1028 (1996).

In *Lasofsky v. Arthur J. Tickle Engineering Works, Inc.*, 20 BRBS 58 (1987), *aff'd mem.,* 853 F.2d 919 (3d Cir. 1988*)*, employer's container repair facility was located 2-3 miles from the waterfront. Applying *Herron* and *Bennett*, the Board affirmed the administrative law judge's findings that the location was not particularly suitable for maritime commerce, adjoining properties were not primarily maritime in nature, the employer chose the site because of a favorable lease, and the employer had not attempted to locate closer to the Port due to evidence that trucking costs did not play into the selection equation. *See also Palma v. California Cartage*, 18 BRBS 119 (1986).

Similarly, in *Gonzalez v. Ocean Voyage Ship Repair,* 26 BRBS 12 (1992), the employer's ship fabrication and repair facility was one mile from navigable waters and ½ mile from the Port of Long Beach, in an area surrounded by residences, and both maritime and non-maritime businesses. The administrative law judge found that the site was selected based on a variety of factors, including a reasonable drive to the port (within 15-20 minutes), proximity to suppliers, cost and availability of other buildings, presence of an acceptable power supply, and availability of parking. The administrative law judge further found that a site closer to the waterfront was not chosen because of the distance to suppliers and the higher cost of that site. The Board affirmed the finding that this location was not a covered situs, based on the *Herron* factors, as the administrative law judge rationally found that only the driving distance from the port was a factor in favor of coverage. In this regard, moreover, the administrative law judge noted that the employer had declined an even closer facility, so that the chosen site was not as close as feasible.

Applying *Herron* and *Bennett*, the administrative law judge determined that claimant did not establish that employer's premises constitute a maritime situs.[4] As the administrative law judge found, the site was chosen by economic factors considered by businesses generally, and specifically, by the low per-acre cost of the rent as indicated by Mr. Tatge's unrefuted testimony. *See Felt v. San Pedro Tomco*,

[4]As the record establishes, and the administrative law judge found, employer's Oak Island facility is a separate and distinct entity geographically set apart from Port Newark. *Melerine*, 26 BRBS at 97; *Anastasio v. A.G. Ship Maintenance*, 24 BRBS 6, 9 (1990). While Mr. Tatge testified to the relative proximity of the Ports of Newark and Elizabeth, he nevertheless stated that employer leases property from Conrail, consisting of about 70 acres within the Oak Island Conrail yard, bounded on the North, South, and East by Conrail tracks and property and on the west by an interstate highway from which there is no exit leading to or from employer's yard. Thus, employer's facility is not within Port Newark and therefore claimant's contention that the issue of "adjoining area" should involve a consideration of the entire area of Port Newark is without merit.

25 BRBS 362 (1992)(Stage, C.J., dissenting), *appeal dismissed sub nom. Felt v. Director, OWCP*, 11 F.3d 951, 27 BRBS 165 (CRT)(9th Cir. 1993); *Lasofsky*, 20 BRBS at 58; *Bennett*, 14 BRBS at 526. She found that the adjoining properties, which included a warehouse, a trucking terminal, a limousine facility, a sewage treatment plant, a railway switching yard, and a metal processing plant, were not shown to be primarily devoted to maritime business pursuits. *See Gonzalez*, 26 BRBS at 12; *Felt*, 25 BRBS at 362; *Anastasio v. A.G. Ship Maintenance*, 24 BRBS 6 (1990); *Lasofsky*, 20 BRBS at 58; *Bennett*, 14 BRBS at 526. Additionally, the administrative law judge stated that while the location of the site is of some economic benefit to employer due to its proximity to the port, the site is not otherwise particularly suited for maritime purposes.[5] *Gonzalez*, 26 BRBS at 12; *Bennett,* 14 BRBS at 526. The administrative law judge then concluded, upon consideration of all of the factors, that the evidence is, at best, in equipoise on the issue of whether employer's Oak Island facility constitutes a maritime situs within the meaning of Section 3(a) of the Act.

[5]The administrative law judge also noted that the proximity of the rail yards might be of some economic benefit to employer, but that the record was not developed on this issue.

Despite this basis for her conclusion regarding whether the site of injury is covered under Section 3(a), the administrative law judge fully addressed the evidence relevant to the *Herron* factors and her findings of fact regarding the site of injury are supported by substantial evidence. The administrative law judge's decision is sufficient to satisfy the requirements of the APA, 5 U.S.C. §557(c)(3)(A). Moreover, the conclusion that claimant's injury did not occur on a covered situs comports with applicable law.[6] It is clear that employer's property does not have a sufficient functional nexus to maritime activity to warrant a finding of coverage under the Act, as only the proximity of the site the port and the economic benefit it allows employer in lowering its customers' costs of transporting containers between the port and the yard supports a finding of coverage. As in *Gonzalez*, 26 BRBS at 12, this factor alone is insufficient to support a finding of a covered situs. *See also Lasofsky,* 20 BRBS at 61; *Palma,* 18 BRBS at 122; *Bennett*, 14 BRBS at 530. Consequently, we affirm the administrative law judge's finding that claimant's injury did not occur on a situs covered under the Act.

Accordingly, the administrative law judge's Decision and Order on Remand Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

[6]Accordingly, any error in the administrative law judge's discussion of the burden of proof and in the use of the language "at best, in equipoise" is harmless.