



BRB No. 15-0016

MONTY J. CARTER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CAPTAIN ELLIOTT'S PARTY BOAT	)	
	)	DATE ISSUED: <u>Aug. 24, 2015</u>
and	)	
	)	
TEXAS MUTUAL INSURANCE	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Dennis L. Brown and Mike N. Cokins, Houston, Texas, for claimant.

Stephen T. Smith and Joy M. Brennan (Smith & Carr, PC), Houston, Texas, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2013-LHC-01817) of Administrative Law Judge Lee J. Romero, 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 administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained a back injury in the course of his work for employer on May 30, 2012. Employer operates five boats which, since 2007, have been used for offshore

tours and sightseeing. HT at 19-20. Employer's primary facility consists of two city blocks in Freeport, Texas, adjacent to the Brazos River, where it operates dock space, fuel and lube facilities, and a parking lot (Freeport facility). HT at 18; CX 7. Employer also has an office located about six blocks in-land from the Freeport facility, CX 7, as well as an equipment storage yard on two to three acres of land leased by employer in Angleton, Texas, (the Angleton yard), which is about 12 to 13 miles from its Freeport facility. HT at 18, 25, 51. Claimant, whose job title with employer was "port engineer," regularly repaired, maintained and refurbished employer's vessels both at its Freeport facility and at other facilities not owned by employer. *Id.* at 19-22, 25, 27. Claimant also regularly maintained the dock, and serviced spare parts and equipment, at employer's Freeport facility. *Id.*

At the time of his injury, claimant was repairing a fence at the Angleton yard. He notified employer of the incident but continued to work. On August 28, 2012, Dr. Watters diagnosed claimant with grade 1 spondylolisthesis at the L4-L5 level as well as a mild impingement at the L5-S1 level and ultimately recommended surgery to alleviate the symptomatic stenosis and lower back pain from the spondylolisthesis. Claimant had back surgery on August 23, 2013, and stated that he was told, at that time, that he might be able to return to light-duty work in approximately one year and, if all things went well, to full-duty work in two years. Claimant, however, had yet to return to any work as of the May 14, 2014 hearing. Meanwhile, claimant filed claims under the Texas workers' compensation statute and the Longshore Act.¹ Employer controverted the longshore claim, contending that claimant did not meet the situs test for coverage under the Act.

In his Decision and Order, the administrative law judge found that claimant's injury did not occur on a covered situs.² 33 U.S.C. §903(a). Specifically, the administrative law judge found that employer's Angleton yard is not an "other adjoining area" for purposes of coverage under the Act as it meets neither the geographic nor the functional relationship components of the situs test. Consequently, he denied the claim for benefits.

¹ The parties stipulated that claimant received state workers' compensation benefits for temporary total disability benefits through May 21, 2014, in the amount of \$41,425, and medical benefits, pursuant to the Longshore Act, totaling \$76,815.57.

² The administrative law judge, however, concluded that claimant satisfied the status requirement, since he spent 90 percent of his work time performing maritime functions and activities. 33 U.S.C. §902(3).

On appeal, claimant challenges the administrative law judge's finding that the Angleton yard is not a covered situs. Employer responds, urging affirmance. Claimant filed a reply brief.

Claimant contends that, as he spent 90 percent of his time repairing or refurbishing vessels and maintaining employer's docks and piers on a covered situs, i.e., at employer's Freeport facility, and as the exclusive purpose of the Angleton yard is to store equipment used for employer's maritime-related activities at its Freeport facility, his injury at the Angleton yard occurred on a covered situs pursuant to the decision in *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981). We reject claimant's contention.

For a claim to be covered by the Act, claimant's injury must have occurred upon the navigable waters of the United States, including any dry dock, or on a landward area covered by Section 3(a) of the Act, 33 U.S.C. §903(a). Moreover, claimant's work must have been maritime in nature pursuant to Section 2(3) of the Act, 33 U.S.C. §902(3), and not specifically excluded by any provision in the Act. *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977).³ Thus, in order to demonstrate that coverage exists, a claimant must separately satisfy both the "situs" and the "status" requirements of the Act. *Anaya v. Traylor Brothers, Inc.*, 478 F.3d 251 (5th Cir. 2007), *cert. denied*, 552 U.S. 814 (2008).

³ Citing *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977), claimant asserts that the broad interpretation to the term "area" by the Fifth Circuit in *Winchester*, must be applied in this case because it reduces the number of employees walking in and out of coverage in furtherance of the 1972 Amendments to the Act. Contrary to claimant's contention, the issue of "walking in and out of coverage" applies to the status inquiry generally and thus is not relevant to this appeal, which exclusively involves whether claimant was injured on a covered situs. See, e.g., *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002); *McGray Constr. Co. v. Hurston*, 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999); see also *Humphries v. Director, OWCP*, 834 F.2d 372, 20 BRBS 17(CRT) (4th Cir. 1987), *cert. denied*, 484 U.S. 1028 (1988).

With respect to the Section 3(a) situs requirement, the site of the claimant's injury must be an enumerated site (pier, wharf, dry dock, etc.), or an "other adjoining area" customarily used for a maritime purpose.⁴ There was no contention that the Angleton yard was a facility specifically enumerated in Section 3(a). Consequently, the administrative law judge correctly recognized that, in order to be considered a maritime situs, the site of claimant's injury would need to qualify as an "other adjoining area." In a case arising within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, such as this case, an area may be considered an "adjoining area" within the meaning of Section 3(a) only if it borders on or is contiguous with navigable waters and is customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel. *BPU Mgmt., Inc./Sherwin Alumina Co. v. Director, OWCP [Martin]*, 732 F.3d 457, 47 BRBS 39(CRT) (5th Cir. 2013); *New Orleans Depot Services, Inc. v. Director, OWCP [Zepeda]*, 718 F.3d 384, 47 BRBS 5(CRT) (5th Cir. 2013) (*en banc*);⁵ *Coastal Prod. Serv., Inc., v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009). The administrative law judge properly found the undisputed facts in this case establish that the Angleton yard, which is 12 to 13 miles from the Freeport facility on the Brazos Rivers, is landlocked and is not contiguous with navigable water.⁶ Decision and Order at 10-14. We therefore affirm the administrative

⁴ Section 3(a) of the Act states:

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 upon 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).

⁵ As the administrative law judge correctly stated, the Fifth Circuit has overruled the broad interpretation of "adjoining" it had adopted in *Winchester*, 632 F.2d 504, 12 BRBS 719, and instead adopted the Fourth Circuit's definition of "adjoining" as meaning "to border on" or "be contiguous with." *Zepeda*, 718 F.3d at 393-394, 47 BRBS at 11(CRT) (citing *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996)). Claimant's contention that the standard of *Winchester* applies in this case is, therefore, without merit.

⁶ The evidence establishes: (1) the Angleton yard does not border on nor is it contiguous with any navigable water, HT at 35, 51; (2) the Angleton yard is surrounded by a seven hundred acre ranch which, in and of itself, does not border any navigable

law judge's finding that the undisputed facts establish that claimant's injury while repairing a fence at employer's Angleton yard did not occur on a site covered by the Act as it is supported by substantial evidence and in accordance with law.⁷ *Martin*, 732 F.3d 457, 47 BRBS 39(CRT) *Zepeda*, 718 F.3d 384, 47 BRBS 5(CRT).

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

waters, *id.* at 29-30; (3) there is not a continuous piece of land from the Angleton yard to employer's Freeport facility along the Brazos River; and (4) there is no railroad connecting the Angleton yard with the Freeport facility.

⁷ As the site of claimant's injury does not meet the geographic component of the situs inquiry, we need not address the administrative law judge's finding that the site also lacked a functional relationship with navigable waters.