BRB Nos. 90-1744
90-1744A

RICHARD SCOTT THOMAS	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
INDIANA MICHIGAN ELECTRIC COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
INSURANCE COMPANY OF NORTH AMERICA	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Robert L. Cox, Administrative Law Judge, United States Department of Labor.

Steven C. Schletker, Covington, Kentucky, for claimant.

Christopher B. Power (Robinson & McElwee), Charleston, West Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (88-LHC-1648) of Administrative Law Judge Robert L. Cox 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). The Board 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).

On June 18, 1986, claimant, while working as a utility worker for employer, sustained injuries to his left thumb, tenth rib and lung when he fell through the ceiling of employer's building, striking a metal partition in the room below. Claimant returned to his usual employment duties on October 28, 1987, worked for two days, and was thereafter placed on layoff status, due to a reduction-in-force, pursuant to the union contract in effect at that time. Claimant had not returned to gainful employment through the date of the formal hearing.

In his Decision and Order, the administrative law judge initially concluded that the situs requirement of Section 3(a), 33 U.S.C. §903(a), had been satisfied. Next, the administrative law judge determined that claimant was capable of performing his usual employment duties with employer as of October 28, 1987, the date he returned to work, that alternatively employer had established the availability of suitable alternate employment, and that claimant had demonstrated no loss of wage-earning capacity; the administrative law judge thus denied claimant's claim for either permanent total or permanent partial disability compensation.

On appeal, claimant contends that the administrative law judge erred in finding that he was capable of performing his usual employment duties and that employer had established the availability of suitable alternate employment. Employer cross-appeals, contending that, while the administrative law judge's findings on disability should be affirmed, the administrative law judge erred in finding that claimant was injured on a covered situs.

I. Jurisdiction.

Employer contends that the administrative law judge erred in concluding that claimant was injured on a covered maritime situs.[1] The situs requirement for establishing coverage under the Act is contained in Section 3(a), 33 U.S.C. §903(a), which provides that claimant's injury must occur 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). Although the United States Court of Appeals for the Fourth Circuit, in which this case arises, has not adopted a specific test for the purpose of determining whether an "adjoining area" is covered by the Act, *see Humphries v. Director, OWCP*, 834 F.2d 372, 20 BRBS 17 (CRT)(4th Cir. 1987), *cert. denied*, 108 S.Ct. 1585 (1988), other courts have focused on the functional relationship or nexus between the "adjoining area" and marine activity on navigable waters.[2] *See Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981); *Brady-*

[1]Employer does not challenge the administrative law judge's determination that claimant's work activities satisfied the status requirement for jurisdiction under Section 2(3) of the Act, 33 U.S.C. §902(3).

[2]In *Humphries*, 834 F.2d at 372, 375, 20 BRBS at 17, 24 (CRT), the court stated that a "broad interpretation of the maritime situs requirement is warrented on statutory and policy grounds."

Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978); *Lasofsky v. Arthur J. Tickle Engineering Works, Inc.*, 20 BRBS 58 (1987), *aff'd mem.*, 853 F.2d 919 (3d Cir. 1988).

The administrative law judge, in analyzing whether claimant was injured on a maritime situs pursuant to Section 3(a), cited with approval the "functional relationship" test set forth by the United States Court of Appeals for the Ninth Circuit in *Herron*, 568 F.2d at 137, 7 BRBS at 409, and later adopted by the Board 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). In *Herron*, the Ninth Circuit indicated that in order to further the goal of uniform coverage, the phrase "adjoining area" in Section 3(a) should be read to describe a functional relationship between the site and navigable water; in determining whether a site is an adjoining area, the court stated that consideration should be given to the following factors:

(1) the particular suitability of the site for the maritime uses referred to in the statute;

(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 is feasible given all the circumstances in the case.

See Herron, 568 F.2d at 141, 7 BRBS at 411.

Similarly, in *Winchester*, 632 F.2d at 504, 12 BRBS at 719, the United States Court of Appeals for the Fifth Circuit stated that the perimeter of an "area" is defined by function and that only those areas customarily used for significant maritime activity are covered; the court further noted, however, that fence lines and other designations by an employer do not end the inquiry in defining a covered area. Thus, citing to *Winchester*, the Board has stated that if the general area in which an accident or injury occurs is a "maritime area," then the requisite maritime nexus has been established. *See Hagenzeiker v. Norton Lilly & Co.*, 22 BRBS 313 (1989).

In the instant case, it is uncontroverted that employer's Lakin facility, which adjoins the Ohio River, consists of a dock, dry dock, wire shop, and pump room, as well as the building in which claimant was injured. Employer's witnesses described the Lakin complex as a repair facility for employer's boats and barges. *See* Hearing transcript at 111, 137. The building in which claimant was injured is located approximately 100 feet from the waterfront, and contains administrative offices, a supply warehouse, and a component rebuild shop. In his Decision and Order, the administrative law judge determined that employer's entire Lakin facility constitutes a covered maritime situs and that, as the building in which claimant was injured is located within that facility, it also is a maritime area covered by the Act. We hold that the administrative law judge's determination that claimant was injured on a maritime situs can be upheld, as the record contains no evidence to undermine the administrative law judge's finding that employer's entire Lakin facility is a maritime area covered by the Act. *See Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991). Thus, as the administrative law judge's findings are rational, are supported by substantial evidence of record, and are in accordance with applicable law, we affirm the administrative law judge's conclusion that claimant was injured on a maritime situs. *See Herron*, 568 F.2d at 137, 7 BRBS at 409; *Ricker*, 24 BRBS at 201.

II. Disability.

Claimant, on appeal, contends that the administrative law judge erred in finding that he was capable of performing his usual employment duties; specifically, claimant alleges that the administrative law judge erred in concluding that his usual employment duties with employer required that he lift no more than 50 pounds. It is well-established that claimant bears the burden of establishing the nature and extent of any disability sustained as a result of a work-related injury. *See Anderson v. Todd Shipyards Corp.*, 22 BRBS 20 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 66 (1985). In order to establish a *prima facie* case of total disability, claimant must establish that he is unable to return to his usual work. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

In the instant case, the administrative law judge credited and relied upon the testimony of Drs. Lentz and Craythorne, as well as the testimony of Mr. Cobb, in concluding that claimant was capable of resuming his usual employment duties with employer as of October 28, 1987, at which time claimant did return to his usual employment duties with employer. Dr. Lentz, claimant's initial treating physician, released claimant to return to work without restrictions on October 27, 1987. Emp. Ex. 1, 2. Dr. Craythorne, an orthopedic surgeon, testified that claimant was capable of returning to his usual employment duties with employer as of October 9, 1987, provided that claimant was not required to lift more than 50 pounds on his own. *See* Craythorne depo. at 16-17, 27. Mr. Cobb, claimant's dock supervisor, testified that utility workers are not required to lift objects in excess of 50 pounds; rather, workers are instructed to request assistance when lifting any heavy objects.[3] *See* Hearing transcript at 132.

[3]Claimant acknowledged that, pursuant to the union contract in effect at the time of his employment, he was not to lift over 50 pounds without assistance. *See* Hearing transcript at 89.

We hold that the administrative law judge committed no error in relying upon the testimony of Drs. Lentz and Craythorne, and the testimony of Mr. Cobb, in concluding that claimant was capable of resuming his usual employment duties with employer as of October 28, 1987, since the administrative law judge is entitled to weigh the evidence and draw his own inferences from it, *see generally Wheeler v. Interocean Stevedoring, Inc.*, 21 BRBS 33 (1988), and he is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Thus, as the administrative law judge's credibility determinations are rational and within his authority as factfinder, and as these credited opinions constitute substantial evidence to support the administrative law judge's ultimate findings, we affirm the administrative law judge's determination that claimant was capable of resuming his usual employment duties with employer as of October 28, 1987. *See generally Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). As claimant has thus failed to establish a post-injury loss in wage-earning capacity, the administrative law judge's denial of permanent total and permanent partial disability compensation is affirmed.[4]

[4]As claimant has failed to establish that he is incapable of performing his usual employment duties, we need not address claimant's contentions regarding the administrative law judge's finding that employer has established the availability of suitable alternate employment.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge