BRB No. 93-886

CHARLES McGRATH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SEA STAR STEVEDORING COMPANY	)	DATE ISSUED:
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and Order Denying Reconsideration of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

William D. Hochberg (Levinson, Friedman, Vhugen, Duggan & Bland), Seattle, Washington, for claimant.

Thomas G. Johnson (Bauer, Moynihan & Johnson), Seattle, Washington, for employer.

Laura Stomski (J. Davitt McAteer, Acting Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and Order Denying Reconsideration (91-LHC-1871) of Administrative Law Judge Thomas Schneider 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 worked as a "tire man" for employer, Sea Star Stevedoring. His duties, including repairing tires, changing wheels, and other maintenance and repair activities on refrigerated containers or trailers, were usually performed at the Totem Ocean Trailer Express (TOTE) yard, which adjoined Commencement Bay and was used for loading and unloading vessels. However, on July 24, 1990, claimant injured his knee while rolling two tires across the parking lot of the Alaska Overland Express (AOLE) yard. Claimant had been sent to the AOLE yard to retrieve tires belonging to the TOTE yard from some of AOLE's equipment. The AOLE yard is 1 mile from the TOTE yard and 100 feet from a waterway that leads to the bay. AOLE is a subsidiary of a grocery company in Alaska. The AOLE yard is used to gather various products at its warehouse and consolidate the goods into trailers for shipping.[1]

The administrative law judge found that claimant's injury did not occur on navigable waters or on a situs enumerated in Section 3(a) of the Act, 33 U.S.C. §903(a). Moreover, the administrative law judge found that as the AOLE yard is not customarily used for loading or unloading a vessel it was not an "adjoining area" under the Act. Consequently, the administrative law judge found that the injury did not occur on a covered situs, and thus denied benefits. The administrative law judge denied claimant's motion for reconsideration.

On appeal, claimant contends that the administrative law judge erred in finding that he was not working on a maritime situs at the time of the injury. Employer responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs (the Director), responds, contending that the administrative law judge erred in failing to consider whether the AOLE yard qualifies as a "terminal," which is an enumerated situs. In addition, the Director contends that the AOLE yard is an "adjoining area" as defined by the United States Court of Appeals for the Ninth Circuit.

[1]The trailers in this case appear to be similar to containers as AOLE consolidates groceries from various sources into the trailers, which are then driven directly onto the ship where they are lashed down for the journey to Alaska. H. Tr. at 49.

In analyzing whether claimant was injured on an "adjoining area" under Section 3(a),[2] the administrative law judge did not employ the "functional relationship" test set forth by the United States Court of Appeals for the Ninth Circuit in *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978), inasmuch as he initially concluded that the AOLE yard is not "customarily used" for loading and unloading vessels. The administrative law judge noted that it was not disputed that the AOLE yard was used for loading groceries into containers on wheels (trailers) which were then driven onto the ships at the TOTE yard. The administrative law judge also found that AOLE only hires drivers who do not load or unload containers, trailers or other cargo from ships. Thus, the administrative law judge concluded that since the injury occurred in AOLE's parking lot, which is not customarily used for loading or unloading vessels, the injury is not covered under the Act.

Initially, we vacate the administrative law judge's finding that since only containers, and not the vessels themselves, are loaded at the AOLE yard, the AOLE yard is not used for loading and unloading vessels as that phrase is interpreted under the Act. In considering the question of status under 33 U.S.C. §902(3), the Supreme Court of the United States noted in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977), that containerization permits the time consuming work of stowage and unstowage to be performed on land in the absence of the vessel. *Caputo*, 432 U.S. at 265, 6 BRBS at 163. Thus, the Court held that loading a container is part of the loading of the ship even though it is performed on the shore and not in the ship's cargo holds. *Id*. The Court rejected the "point of rest" theory that provided coverage only for those who first moved the cargo to its first resting place in the unloading process and who last handled it in the loading process. *Id.*, 432 U.S. at 275-279, 6 BRBS at 166-169; *see Childs v. Western Rim Co.*, 27 BRBS 208 (1993). In addition, when addressing the question of situs in *Caputo*, the Court noted that one of the claimants had been injured on a pier which was used only for stripping and stuffing containers and for storage. The Court summarily rejected the employer's argument that this pier was not customarily used by an employer for loading or unloading a vessel, noting that this work is an integral part of the overall loading and unloading process. *Caputo*, 432 U.S. at 280 & n.42, 6 BRBS at 170 & n.42.

Inasmuch as the administrative law judge in the present case found that it was undisputed that the AOLE yard was used to load groceries that had been brought in by truck to be packed into

[2]Section 3(a) of the Act provides that:

> [C]ompensation shall be payable under this chapter... 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)(1988).

trailers for shipping, we vacate the administrative law judge's summary finding that the AOLE yard was not customarily used by an employer for loading or unloading a vessel, as it is not in accordance with law. The case must be remanded for the administrative law judge to reconsider whether claimant's injury occurred on a covered situs.

Specifically, the administrative law judge in the present case did not analyze whether the AOLE yard met the "functional relationship" test in order to be found an "adjoining area" under Section 3(a) of the Act. In *Herron*, the Ninth Circuit, in whose jurisdiction this case arises, stated 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 that does not in all cases depend on physical contiguity with navigable waters. The court stated that in determining whether a site is an "adjoining area," 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 of the circumstances.

Herron, 568 F.2d at 141, 7 BRBS at 411; *see also Brown v. Bath Iron Works Corp.*, 22 BRBS 384 (1989)(situs inquiry looks to the relationship of the place of injury with navigable waters). *Cf. Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (CRT) (4th Cir. 1995) (rejecting *Herron* test and requiring actual contiguity with navigable waters). As the administrative law judge did not consider the four factors in determining whether the site is an "adjoining area," we remand the case to the administrative law judge for further consideration consistent with the Ninth Circuit's decision in *Herron*.

In the alternative, the Director contends that the administrative law judge erred in failing to consider whether the AOLE yard is a "terminal," an enumerated situs under the Act. The Director notes that a terminal is defined as "either end of a carrier line (as a railroad, trucking, or shipping line or airline) with classifying yards, dock and lighterage facilities, management offices, storage, sheds, and freight and passenger stations." *Webster's Ninth New Collegiate Dictionary* 1217 (1983). Thus, the Director argues that as the AOLE yard was the end of a trucking line where goods were received from suppliers and consolidated for shipment to Alaska, it is a terminal according to the definition of the term.

In *Hurston v. Director, OWCP*, 989 F.2d 1547, 26 BRBS 180 (CRT) (9th Cir. 1993), the United States Court of Appeals for the Ninth Circuit held that the phrase "any adjoining pier" which adjoins navigable water is unqualified,

whereas "other adjoining area" is qualified so as to require a relationship to maritime activity. [footnote omitted] Thus, unless the injury occurs on a pier, wharf, dry dock, terminal, building way, or marine railway adjoining navigable waters, to be covered it must occur on "other adjoining areas" which are "customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." When, however, the injury occurs on a pier, so long as it is adjoining navigable waters, it is within the situs requirement.

Hurston, 989 F.2d at 1549, 26 BRBS at 184 (CRT). In *Hurston*, the court held that a pier used solely for oil drilling purposes was a situs enumerated in the Act, despite its non-maritime purpose.

The administrative law judge in the instant case denied benefits inasmuch as he found, in determining whether the AOLE yard was an "adjoining area," that the injury occurred on a site which was not customarily used for loading or unloading vessels. However, pursuant to the decision in *Hurston*, an enumerated situs need not be used for loading and unloading a vessel and the administrative law judge did not consider whether the AOLE yard was an adjoining terminal under the Act. Therefore, the administrative law judge, on remand, should also consider the Director's contention that the AOLE yard is an adjoining terminal under the Act, and thus is an enumerated situs.[3] *Hurston*, 989 F.2d at 1553, 26 BRBS at 184 (CRT).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3]We need not address claimant's contentions on appeal regarding the status requirement as the administrative law judge did not reach this issue.