BRB No. 98-988

DAVID R. NIXSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MOBIL MINING AND MINERALS	)	DATE ISSUED:_____
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Petitioners	)	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, Houston, Texas, for claimant.

Thomas C. Fitzhugh III and J. Corbin Van Arsdale (Fitzhugh & Elliott, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (97-LHC-238) 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 supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer is a fertilizer manufacturer whose facilities adjoin the Houston Ship Channel. It receives raw materials (sulphur, anhydrous ammonia, phosphate rock, and sulfuric acid) by truck, railway and barges, and it produces sulfuric acid, phosphoric acid, ammonium thiosulfate (liquid fertilizer), and two grades of solid fertilizer called dioammonium phosphate and monoammonium phosphate. The finished product is shipped out by trucks, railway, barges and ships.

Claimant and employer stipulated that claimant was injured on January 16, 1994, during the course of his employment,[1] and that employer paid claimant benefits under the Texas workers' compensation statute for his injuries, but that if the administrative law judge found claimant to be a covered employee under the Longshore Act, he would be entitled to greater benefits for the same periods of time. Further, they stipulated that, during the year preceding his injury, between 41 and 50 percent of claimant's work involved loading and unloading vessels. At the time of his injury, claimant was classified as an "A" operator. An "A" operator undertakes various duties including operating the marine loader to load finished product on to barges, operating the Buhler to unload phosphate rock from barges, operating the loading units in Buildings 9 and 10, and driving the diesel locomotive. *See* Tr. at 31; *see also Gavranovic v. Mobil Mining & Minerals*, __ BRBS __, BRB No. 98-741 (February 19, 1999).[2] On the day of his injury, claimant was assigned to the locomotive crew to keep the railcars moving and the units supplied with railcars to load. Tr. at 103.

[1]Claimant's left arm was crushed between two railcars during the switching procedure. He filed a claim for compensation for the left arm injury as well as for a psychological injury. Emp. Ex. 2.

[2]*Gavranovic* is a consolidated appeal involving two employees who worked at employer's facility. One employee was classified as an "A" operator, and one was a "C" operator. *Gavranovic*, slip op. at 2-3.

The administrative law judge found that employer's facility adjoins the Houston Ship Channel and is suited for its purpose of receiving raw materials and shipping finished product along the waterway. Based on this proximity to a navigable waterway and the occurrence of the maritime activities of loading and unloading barges and ships, the administrative law judge found that employer's facility has a maritime nexus. Decision and Order at 14. Further, in accordance with *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981), the administrative law judge found that employer's entire facility, including the rail line on which claimant was injured, is an "adjoining area" customarily used for maritime activity and, therefore, is a covered situs under Section 3(a) of the Act. 33 U.S.C. §903(a); Decision and Order at 15. With regard to claimant's status, the administrative law judge noted the parties' stipulation regarding the percentage of claimant's duties which were maritime during the year preceding his injury, as well as claimant's testimony that he had a daily expectation of being assigned to maritime work 50 percent of the time, and he found that claimant is subject to regular maritime work assignments. Decision and Order at 16-17. Consequently, he concluded that claimant fulfilled the status requirement of Section 2(3) of the Act, 33 U.S.C. §902(3). Decision and Order at 17.[3] Employer appeals the administrative law judge's decision regarding coverage, and claimant responds, urging affirmance.

Employer contends the administrative law judge erred in concluding that its entire facility, including the rail line where claimant was injured, is a covered situs under the Act. Employer also challenges the administrative law judge's determination that claimant is a covered employee, as he is a land-based worker who was injured while performing land-based work on the railway. The issues raised herein by employer are the same issues raised by employer in *Gavranovic*. *See Gavranovic*, slip op. at 5. In *Gavranovic*, the Board rejected employer's various arguments and held that, under the controlling law of the United States Court of Appeals for the Fifth Circuit, *Winchester*, 632 F.2d at 504, 12 BRBS at 719, employer's entire facility constitutes a covered situs under the Act. Specifically, in light of its location adjacent to the Houston Ship Channel, a navigable waterway, and in light of the occurrence of significant maritime activity on the docks at employer's facility, loading and unloading barges and ships, the Board affirmed the administrative law judge's conclusion that the entire facility is an "adjoining area" which is "customarily used" for maritime purposes. *Gavranovic*, slip op. at 7-8; *see Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31

[3]The administrative law judge also determined that employer is liable for a Section 14(e), 33 U.S.C. §914(e), penalty and interest. Decision and Order at 17-18. These findings have not been challenged on appeal.

BRBS 199 (CRT) (5th Cir. 1998); *Winchester*, 632 F.2d at 504, 12 BRBS at 719; *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998); *Melerine v. Harbor Const. Co.*, 26 BRBS 97 (1992). Further, the Board affirmed the administrative law judge's determination that claimants met the status requirement, rejecting employer's argument that the "moment of injury" test prevents coverage. The Board held that the Fifth Circuit's "moment of injury" test is used to broaden, not narrow, coverage under the Act. *Gavranovic*, slip op. at 8; *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104 (CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 8 BRBS 787 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979); *McGoey v. Chiquita Brands Int'l*, 30 BRBS 237 (1997); *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989). Finally, in light of the occupational nature of claimants' work as "A" and "C" operators, and their regular involvement in loading and unloading barges, the Board held that the administrative law judge correctly determined they were covered under Section 2(3) of the Act. *Gavranovic*, slip op. at 8-9; *see* 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46, 23 BRBS 96 (CRT) (1989); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 273, 6 BRBS 150, 165 (1977); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981).

Because the present case involves the same facility and the same employee classification and duties as the Board addressed in *Gavranovic*, we reject employer's contentions on appeal for the reasons set forth in *Gavranovic*. We affirm the administrative law judge's findings that employer's entire facility is a covered situs and that claimant is a covered employee pursuant to Sections 2(3) and 3(a) of the Act. Consequently, we affirm the award of benefits to claimant. *Gavranovic*, slip op. at 8-9; *see also Schwalb*, 493 U.S. at 40, 23 BRBS at 96 (CRT); *Caputo*, 432 U.S. at 249, 6 BRBS at 150; *Winchester*, 632 F.2d at 504, 12 BRBS at 719.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge