BRB No. 11-0637

KRISTY REBSTOCK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RAY BAUDOIN BUILDERS, INCORPORATED	)	DATE ISSUED: 05/22/2012
	)	
and	)	
	)	
LOUISIANA HOME BUILDERS ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer's Motion for Summary Judgment of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Lawrence A. Arcell, New Orleans, Louisiana, for claimant.

William S. Bordelon (Bordelon & Shea, L.L.P.), Houma, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Employer's Motion for Summary Judgment (2011-LHC-0043) of Administrative Law Judge C. Richard Avery 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).

The facts of this case are undisputed and both parties moved for summary decision before the administrative law judge. GOL DOCKS, LLC, leased property in Port Fourchon, Louisiana. The property, number 618 on the map, is in an area that was marked for port expansion. GOL DOCKS' sister company, Gulf Offshore Logistics (GOL), entered into a contract with employer to erect and paint six customer buildings and three warehouses on the property. Employer subcontracted with Gary Baudoin to paint the buildings, and Gary Baudoin hired and paid claimant to work as a painter. Her sole job was to paint the insides of the buildings.

The overall GOL plan was for the facility to be a "shore base" so it could provide logistics services to the boating and offshore oil and gas industries. GOL would rent the buildings and storage space to customers. The customers could store materials that were bound for or coming from vessels and/or they could use office space or living space for their dispatchers who directed the movement of the materials. The customers' vessels could dock at the slip and be loaded or unloaded, based on the dispatcher's orders, by GOL's cranes and contracted personnel. Cl. M/SJ Exh. B at 11-24. The customer buildings are raised buildings, allowing parking beneath them; the warehouses are at ground level. The buildings are approximately 150 feet from navigable water.

On June 27, 2008, after finishing painting for the day, claimant was carrying a tool box and descending an extension ladder to the ground outside one of the buildings when her foot got tangled with the ladder's rope. She fell approximately eight feet and hurt her neck. Claimant has not worked since. Gary Baudoin paid her wages for a short time, then employer paid her compensation; however, claimant stated that her compensation ceased in July 2009.[1] Claimant filed a claim for benefits under the Longshore Act.

The administrative law judge addressed motions for summary decision from both parties.[2] The administrative law judge relied on *Tarver v. Bo-Mac Contractors, Inc.*, 384 F.3d 180, 38 BRBS 71(CRT) (5th Cir. 2004), *cert. denied*, 544 U.S. 948 (2005), and found that, as the slip, the pier, and the buildings, including the one at which claimant was injured, were still under construction and not yet being used for a maritime purpose, claimant was not injured on a covered situs pursuant to Section 3(a) of the Act, 33 U.S.C. §903(a). Decision and Order at 3. The administrative law judge also found that, even if claimant had been injured on a covered situs, she did not meet the status test, 33 U.S.C. §902(3), as her land-based activity was not integral to loading or unloading a vessel

[1]Employer provided state workers' compensation coverage to the employees of Gary Baudoin.

[2]Employer's carrier also separately filed a motion for summary decision.

pursuant to *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). Decision and Order at 3. The administrative law judge granted employer's motion for summary decision and dismissed the claim. Claimant appeals the decision, and employer responds, urging affirmance.

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §§18.40(c), 18.41(a). Summary decision is also proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Here, the administrative law judge found that claimant did not establish the essential status and situs elements of her claim, and he granted employer's motion for summary decision.

Claimant contends the administrative law judge erred because she was injured during the course of her employment painting "a newly built structure to be used for offshore vessel dispatchers (status)," which was located on an "active waterway used for maritime purposes . . . (situs)."[3] Employer responds that the administrative law judge correctly found that the site was not being used for maritime purposes at the time of claimant's injury; therefore, she did not meet the situs requirement, and her painting of the uncompleted building did not meet the status requirement. For a claim to be covered by the Act, a claimant must establish that her injury occurred upon the navigable waters of the United States, including any dry dock, or that it occurred on a landward area covered by Section 3(a), and that her work is maritime in nature pursuant to Section 2(3) and is not specifically excluded by any provision in the Act. 33 U.S.C. §§902(3), 3(a); *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*

[3]We reject claimant's statement in her brief that she was injured on an "uncompleted pier." Although the bulkhead/pier was not ready for ships to dock, claimant was not injured on the pier. She was injured 150 feet from the water under a customer building. *See generally R.V. [Villaverde] v. J. D'Annunzio & Sons*, 42 BRBS 63 (2008), *aff'd mem. sub nom. Villaverde v. Director, OWCP*, 335 F. App'x 79 (2d Cir. 2009).

Terminal Co. v. Caputo, 432 U.S. 249, 6 BRBS 150 (1977). Thus, in order to demonstrate that coverage exists, a claimant must separately satisfy both the "situs" and the "status" requirements of the Act. *Id.*; *see also Coastal Prod. Serv., Inc., v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009).

Situs

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). To be considered a covered situs, a site must have a maritime nexus, but it need not be used exclusively or primarily for maritime purposes. *See Textports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (en banc), *cert. denied*, 452 U.S. 905 (1981); *Melerine v. Harbor Construction Co.*, 26 BRBS 197 (1992). 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 504, 12 BRBS 719. The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, takes a broad view of the term "adjoining area" and refuses to restrict it by fence lines or other boundaries; nevertheless it requires the area to have a functional nexus with maritime activities and a geographical nexus with navigable waters. *Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31 BRBS 199(CRT) (5th Cir. 1998); *Winchester*, 632 F.2d 504, 12 BRBS 719; *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001) (en banc). However, the court has held that future maritime use of an undeveloped area does not convey coverage if the area was not being used for maritime purposes at the time of the injury. *Tarver*, 384 F.3d 180, 38 BRBS 71(CRT); *Boomtown Belle Casino v. Bazor*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003); *see also Nelson v. Guy F. Atkinson Constr. Co.*, 29 BRBS 39 (1995), *aff'd mem. sub nom. Nelson v. Director, OWCP*, 101 F.3d 706 (9th Cir. 1996) (table) (area to be navigable in the future); *but see Trotti & Thompson v. Crawford*, 631 F.2d

1214, 12 BRBS 681 (5th Cir. 1980);[4] *Wakeley v. Knutson Towboat Co.*, 44 BRBS 47 (2010) (site used for maritime purposes at time of injury but not at time of adjudication).

Claimant's injury did not occur on an enumerated site, 33 U.S.C. §903(a), as it occurred at a customer building 150 feet from the water at GOL's facility. The question is whether her injury occurred on an "adjoining area." To be considered an "adjoining area" under the broad interpretation of the Fifth Circuit, the area need only have a geographical and a functional nexus with maritime commerce. *See Zepeda v. New Orleans Depot Services, Inc.*, 44 BRBS 103 (2010). In this case, there is no question the property has a geographical nexus, as there was navigable water in the slip adjacent to GOL's facility at the time of claimant's injury. Moreover, the property itself sits within the boundaries of Port Fourchon, which is adjacent to navigable water and is used for maritime purposes.

In finding that claimant was not injured on a covered situs, the administrative law judge relied only on the fact that GOL's pier and buildings were still under construction and had not yet served any maritime purpose. Pursuant to *Tarver*, he found that claimant had not established the Section 3(a) situs requirement. However, *Tarver* may be distinguished as the construction site therein was not within the boundaries of a port but was on an undeveloped parcel of dry land near the intra-coastal waterway in an area that had not previously facilitated navigation. *Tarver*, 384 F.3d 180, 38 BRBS 71(CRT); *see also Bazor*, 313 F.3d 300, 36 BRBS 79(CRT) (neither the tent nor the floating casino was an adjoining area as neither had yet to be used for maritime purposes). Here, the land on which GOL's facility was being built was within the boundaries of Port Fourchon, and a port is a covered situs. *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991), *aff'd sub nom. Ins. Co. of North America v. U. S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14(CRT) (2d Cir. 1992), *cert. denied*, 507 U.S. 909 (1993); *Smith*, 878 F.2d 843, 22 BRBS 104(CRT);[5] *Uresti v. Port Container Industries, Inc.*, 33 BRBS 215 (Brown, J.,

[4]The *Crawford* court reasoned that a pier under construction was merely substituting one covered situs (a pier) for another (the navigable water over which the pier was being built). Therefore, the fact that the pier was under construction and not yet being used for its maritime purpose did not take away from the fact that the area was already a covered situs. The *Tarver* court described the *Crawford* case as having "created an exception to this general rule [that situs is determined by the nature of the area at the time of the injury], where a construction site – although not serving a maritime purpose – was carved out of a covered situs and promised to support navigation in the future." *Tarver*, 384 F.3d at 181, 38 BRBS at 72(CRT).

[5]In *Smith*, the Fifth Circuit held that a structural fitter working in the employer's active shipyard, which was adjacent to navigable waters, was injured on a covered situs.

dissenting), *aff'd on recon.*, 34 BRBS 127 (2000) (Brown, J., dissenting);[6] *Ricker v. Bath Iron Works Corp*., 24 BRBS 201 (1991). There is no case law that supports apportioning a port into covered and uncovered areas unless there also is a manufacturing facility on the site. *See, e.g., Peterson*, 25 BRBS 71 (entire shipyard covered); *Smith*, 878 F.2d 843, 22 BRBS 104(CRT) (entire shipyard covered); *Uresti*, 33 BRBS 215 (entire port covered); *Ricker*, 24 BRBS 201 (entire shipyard covered); *compare with Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002) (mixed-use facility; entire facility not covered); *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998) (mixed-use facility; entire facility not covered). Because the administrative law judge limited his situs discussion to GOL's specific property which had not been used for maritime purposes previously and did not consider its position within the port as a whole, we vacate his decision that claimant has not met the situs element, and we remand the case to the administrative law judge for reconsideration of the issue pursuant to relevant law.

Status

Section 2(3) provides that "the term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker. . . ." 33 U.S.C. §902(3). To satisfy this requirement, a claimant need only "spend at least some of [her] time in indisputably longshoring operations." *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). That is, a claimant satisfies the "status" requirement if she is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See* 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). This includes those workers injured while maintaining or repairing buildings and machinery essential to the shipbuilding and the

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The court stated that he was engaged in maritime activities in an area that adjoined the water, and, therefore, was covered under the Act. *Smith*, 878 F.2d 843, 22 BRBS 104(CRT).

[6]In *Uresti*, the Board held that a truck driver who carried loads within the Port of Houston from the docks to the warehouses, worked on a covered situs because the port meets the geographical nexus, and the building customarily was used for maritime activities. Moreover, the Board stated that looking at the function of the building alone was to construe "area" too narrowly in the Fifth Circuit and that the "function of the port, necessarily, involves the movement of cargo." *Uresti*, 34 BRBS at 130.

loading/unloading processes. *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT); *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981).

The administrative law judge found that "even if" claimant had been injured on a covered situs, she has not satisfied the status requirement because her work did not involve, and was not integral to, loading or unloading a vessel or "the type of activity that could be considered maritime in nature." Decision and Order at 3 (citing *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT)). Claimant contends this finding is erroneous. She argues that she was injured during the course of her employment painting a building that would be used in the loading and unloading process.[7] Again, the administrative law judge's decision did not involve a complete discussion of the relevant law in the Fifth Circuit. *See Crawford*, 631 F.2d 1214, 12 BRBS 681; *see also Ward v. Director, OWCP*, 684 F.2d 1114, 15 BRBS 7(CRT) (5th Cir. 1982).[8] Consequently, we vacate the finding and remand the case for further consideration of the status issue.

In *Crawford*, the Fifth Circuit affirmed the Board's determination that the claimant's injury during construction on an uncompleted pier not only satisfied the situs requirement but also satisfied the status requirement under the Act as amended in 1972. The court determined that it must look to the purpose of the work and not solely to the particular skills used. Thus, a carpenter involved in pier construction was performing covered activity because, although his construction skills could be used for maritime or non-maritime purposes, the purpose for his particular employment was to further maritime commerce by building a pier at which ships could be loaded or unloaded. The *Crawford* court, relying on factually-analogous *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 6 BRBS 229 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977), explained that there is no real distinction between initial construction and repairs:

> [In *Kininess*], the shipbuilding company had purchased a disassembled crane. The crane, like a new dock under construction, had not been put to use by the company. Kininess was injured while he was sandblasting the

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[7]Claimant makes an analogy between her employment and those jobs in, for example, *Price v. Norfolk & Western Railway Co.*, 618 F.2d 1059 (4th Cir. 1980), and *Kerby v. Southeastern Public Service Authority*, 31 BRBS 6 (1997), *aff'd mem.*, 135 F.3d 770 (4th Cir.), *cert. denied*, 525 U.S. 816 (1998). This case arguably is distinguishable from *Price* and *Kerby* as they involved shipyard employees whose regular duties included the maintenance or repair of shipyard structures whereas claimant was a contractor employee who would leave the job site when her painting duties were completed.

[8]*Compare with Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT) (4th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995).

> parts of the crane as part of the crane assembly process. We first held that the employee's status was determined by whether his work directly furthered the shipbuilding goals of his employer. In the case at hand, Crawford's work undeniably furthered a similar goal of the Port of Beaumont: loading and unloading vessels. We secondly held in *Kininess* that initial construction was no different under the LHWCA than repair work:
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> > ... coverage under the Act should not depend on whether the crane was in actual operation when Kininess was injured.... Repair and maintenance of machines used in shipbuilding is an essential aspect of the business.... While a distinction might be drawn between a crane being held in storage pending use and an active crane disassembled for repair, the policy of liberal construction indicates that such fine lines are inappropriate when determining coverage under the Act.

Crawford, 631 F.2d at 1220-1221, 12 BRBS at 686 (quoting *Kininess*, 554 F.2d at 178, 6 BRBS at 230); *see also Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982) (pier repair); *Ingalls Shipbuilding Corp. v. Morgan*, 551 F.2d 61, 5 BRBS 754 (5th Cir.), *cert. denied*, 434 U.S. 966 (1977) (ship construction). Thus, based on the analyses in these cases, and in *Schwalb*, the administrative law judge must determine whether claimant's involvement with the construction phase of the warehouses and customer buildings is integral to loading and/or unloading vessels and, thus, is covered employment.

Accordingly, the administrative law judge's Decision and Order Granting Employer's Motion for Summary Judgment is vacated, and the case is remanded for further consideration in accordance with this opinion.[9]

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[9]If, on remand, the administrative law judge finds that the status and situs requirements are met, he must address and resolve any remaining issues between the parties in this claim.