BRB No. 12-0463

DENNIS H. RADFORD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ARCELORMITTAL LaPLACE, LIMITED LIABILITY COMPANY	)	DATE ISSUED: 05/15/2013
	)	
and	)	
	)	
ARCELORMITTAL USA, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Ben E. Clayton (Clayton Law Firm, L.L.C.), Slidell, Louisiana, for claimant.

Joseph B. Guilbeau (Juge, Napolitano, Guilbeau, Ruli & Frieman), Metairie, Louisiana, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2011-LHC-01837) of Administrative Law Judge Clement J. Kennington 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).

Claimant worked for employer from June 27, 2007, to January 30, 2009, as the Director of Engineering. Claimant described employer's facility as 400 acres adjacent to the Mississippi River. It included a dock for receiving and shipping from ocean-going vessels or river barges. Tr. at 19-20. The dock was separated from the rest of the facility by a "berm" or levee. *Id*. at 20. The landward side of the facility was the main property, bounded by public roads and included office complexes and a mini-mill complex that housed the melt shop, caster, rolling mill, as well as the shipping and handling department. *Id*. At the plant, scrap steel, which arrives at the facility by rail, truck, barge, or ship is melted and formed into "billets" for sale and use in general industrial applications. *Id*. at 61-62. Sometimes the finished billets are shipped to customers.

As employer's Director of Engineering, claimant's job duties were to plan, communicate, and develop improvement projects at employer's facility, and to assist the maintenance department by mentoring and advising younger engineers. Claimant considered himself "a walk-around guy" in that he believed part of his duty was to continually observe and report things that appeared to be non-compliance issues. Tr. at 21, 30. Claimant testified that, in his position with employer, he typically would spend 75 to 80 percent of his time in his office, and he estimated that less than 5 percent of his time was spent on projects associated with the dock either at his desk or, sometimes, at the dock. *Id*. at 21, 64-65. Claimant testified that he was regularly exposed to loud noises at the mill and melt shop, and the only loud noises at the dock area were the dropping of scrap metal, trucks backing up, or the sound from heavy trucks driving down the road to the levee. *Id*. at 40-43.

Based on the date of an audiogram, claimant suffered a hearing loss as of September 15, 2010. Claimant subsequently filed a claim under the Act, alleging that his hearing loss was caused by injurious noise at employer's dock and landward facility. In his decision, the administrative law judge found that claimant's injury did not occur on a covered situs, and that claimant's duties as employer's Director of Engineering did not satisfy the Act's status requirement. 33 U.S.C. §§902(3), 903(a). Accordingly, the administrative law judge denied benefits. Claimant appeals the administrative law judge's decision that he is not covered by the Act. Claimant additionally argues that employer did not bear its burden of showing it did not expose claimant to injurious noise under Section 20(a), 33 U.S.C. §920(a). Employer responds, urging affirmance of the administrative law judge's decision.

For a claim to be covered by the Act, a claimant must establish that his 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 his 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), 903(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 Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150

(1977). Thus, if the injury did not occur on navigable waters, 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).

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). The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has construed "adjoining area" to require both a geographic and functional nexus with navigable water. An "adjoining area" must be a discrete shoreside structure or facility that is actually contiguous with navigable waters; it must have a maritime nexus, but it need not be used exclusively or primarily for maritime purposes. *New Orleans Depot Serv., Inc. v. Director, OWCP [Zepeda]*, ___ F.3d ___, 2013 WL 1798608 (5th Cir. Apr. 29, 2013)(*en banc*). Where a facility is used for both maritime and non-maritime functions, case precedent recognizes that there is a point at which the loading and unloading process ceases, and the manufacturing process begins, and vice versa.[1] *Dryden v. The Dayton Power & Light Co.*, 43 BRBS 167 (2009); *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998); *Melerine v. Bayou Steel Corp.*, 26 BRBS 97 (1992). Thus, the inquiry in "mixed-use cases," *i.e.*, those involving a site with both a manufacturing and a maritime component, concerns whether the claimant's injury occurred in the area used for loading or unloading vessels, as that area has a functional relationship with navigable water. *See Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002), *aff'g* 35 BRBS 99 (2001); *see also D.S. [Smith] v. Consolidation Coal Co.*, 42 BRBS 80 (2008), *aff'd sub nom. Consolidation Coal Co. v. Benefits Review Board*, 629 F.3d 322, 44 BRBS 101(CRT) (3d Cir. 2010); *Maraney v. Consolidation Coal Co.*, 37 BRBS 97 (2003); *Dickerson v. Mississippi Phosphates Corp.*, 37 BRBS 58 (2003); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001).

[1]This statement is consistent with cases holding that employees whose duties are integral to a manufacturing process rather than to a longshoring or shipbuilding process are not engaged in maritime employment pursuant to Section 2(3) of the Act. *See Coyne v. Refined Sugars, Inc.*, 28 BRBS 372 (1994); *Garmon v. Aluminum Co. of America-Mobile Works*, 28 BRBS 46 (1994), *aff'd on recon.*, 29 BRBS 15 (1995).

In finding that employer's mini-mill complex is not an "adjoining area," the administrative law judge found that the complex is geographically separated from navigable water by a public road and levee and is functionally distinct from the dock area because its purpose is the processing of scrap metal and manufacturing of steel. Decision and Order at 14. Claimant challenges this finding, arguing that his work duties satisfy the situs requirement. Cl. Br. at 28. Contrary to claimant's assertion, his work duties have no bearing on the "adjoining area" inquiry.[2] *Zepeda*, 2013 WL 1798608 at *6; *Bianco*, 403 F.3d at 1058, 36 BRBS at 60(CRT). Further, as the mill complex at issue here is the same site found to be lacking a functional relationship with navigable water in *Stroup* and *Melerine*, for the reasons therein, we affirm the administrative law judge's finding that employer's mill complex is not a covered situs. *Stroup*, 32 BRBS at 155; *Melerine*, 26 BRBS at 101.

We additionally reject claimant's assertion that the administrative law judge erred in failing to find that he was injured at the dock, which is an enumerated situs. The administrative law judge found that claimant was not injured at the dock based on the sound assessment conducted at Bayou Steel in May 2000 demonstrating that the highest recorded noise levels anywhere near the dock were 85 dB from passing trucks, and Dr. Seidemann's testimony that exposure to 90 decibels for eight hours a day is a threshold for noise to be injurious and that exposure below that intensity, 85 decibels for 8 to 12 hours a day, is not sufficient to rise to the level of being potentially hazardous. Decision and Order at 11, 14; Tr. at 16; EX 8. Moreover, claimant testified that the loudest noises he heard at the dock on the limited occasions he was there were from the crane dropping scrap metal into dump trucks, trucks backing up, and heavy trucks driving up and down the road to the levee. Tr. at 43, 48. As it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant's hearing loss did not occur on the dock. *See Ceres Gulf, Inc. v. Director, OWCP [Plaisance]*, 683 F.3d 225, 46 BRBS

[2]Contrary to claimant's implication, the Fifth Circuit's holding in *Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), does not render the situs inquiry moot to "avoid the anomaly of a worker walking in and out of coverage." In *Hudson*, the Board and Fifth Circuit explicitly affirmed an administrative law judge's finding that an oil production area of an artificial island was not separate and distinct from the loading area and, therefore, constituted an "adjoining area."

Moreover, although Congress was concerned with workers walking in and out of coverage in adopting the 1972 amendments to the Act, the Fifth Circuit has explicitly acknowledged Congress's concern was with workers engaged in maritime activity walking in and out of coverage near the water's edge and that Congress recognized that boundaries to coverage would remain. *Zepeda*, 2013 WL 1798608 at *7.

25(CRT) (5th Cir. 2012); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). Based on the foregoing, we affirm the administrative law judge's finding that claimant did not establish that he was injured on a covered situs. *See Bianco*, 304 F.3d 1053, 36 BRBS 57(CRT). Therefore, we affirm the denial of benefits.[3]

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

[3]As we affirm the administrative law judge's finding that the Act's situs requirement is not satisfied in this case, we need not address claimant's remaining arguments.