BRB No. 12-0083

TIN NGUYEN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
B.V. WESTON CONSTRUCTION, LLC	)	DATE ISSUED: 10/31/2012
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
ELAND ENERGY, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

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

Dean A. Sutherland, New Orleans, Louisiana, for B.V. Weston Construction, LLC.

Sidney W. Degan, III, Christopher J. Stahulak, and Simone H. Yoder (Degan, Blanchard & Nash), New Orleans, Louisiana, for Eland Energy, Incorporated, and American Home Assurance Company.

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

PER CURIAM:

Claimant appeals the Decision and Order (2011-LHC-637) of Administrative Law Judge Patrick M. Rosenow 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. On February 26, 2006, claimant was injured in an explosion on the East Potash field of an oil and gas production facility owned by Sundown Energy and operated by Eland Energy. Stipulations at 1. Before Hurricane Katrina struck, petroleum and natural gas flowed through pipelines into production equipment located in East Potash for processing and storage. *Id*. at 2; Exhibit A. Oil was pumped from the storage tanks into barges for transportation to a refinery. Stipulations at 2. Natural gas flowed through other pipelines, either to land for sale to customers or to the compressor barge in the East Potash field. *Id*. In August 2005, Hurricane Katrina extensively damaged the Sundown/Eland production facility, grounding the compressor barge, destroying everything else, and terminating all production. *Id*. The facility, except for a part of the load-out pipe, which could be reused, and the barge, which was refloated, was demolished. *Id*.; Exhibits A-C. Sundown/Eland hired several contractors, including B.V. Weston, claimant's employer, to reconstruct its facility.[1] Stipulations at 1-2. Although the facility had not produced oil since the hurricane, and no oil had been pumped through the pipeline, some oil remained in the storage tank. On February 26, 2006, while claimant was welding the pipelines that would be used to pump oil from the storage tanks to barges and/or trucks, the pipeline exploded and claimant was injured.[2] *Id*. at 2. After the explosion, claimant began receiving benefits under the state

[1]The East Potash field was redesigned to be smaller and more efficient and to accommodate oil tanker trucks as well as barges. Exhibit A at 67, 137-138; Exhibit B at 134; Exhibit C at 112-114.

[2]Had the explosion not occurred, construction activities would have continued for at least another two or three weeks before any loading or unloading activities would have been possible at East Potash. Exhibit B at 145-147; Exhibit C at 36.

workers' compensation program, but B. V. Weston terminated those payments after claimant filed a claim under the Longshore Act.[3]

The administrative law judge found that claimant did not satisfy the status requirement of Section 2(3), 33 U.S.C. §902(3), because his work was not integral to the loading or unloading of vessels at the time of his injury, pursuant to *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). The administrative law judge, therefore, denied benefits under the Act.[4] On appeal, claimant contends the administrative law judge erred in finding that his employment did not meet the status requirement of Section 2(3). He further asserts that he was injured on a covered situs under 33 U.S.C. §903(a). B.V. Weston (employer) and Eland Energy (Eland) respond in separate briefs, urging affirmance. Claimant filed a reply brief to which Eland responded.

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 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 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 his time in indisputably longshoring operations." *Caputo*, 432 U.S. 249, 273, 6 BRBS 150, 165; *Boudloche v. Howard Trucking Co.*, 632 F.2d

[3]Claimant also filed a state tort suit against B.V. Weston, Eland, and Sundown. 33 U.S.C. §933(a). Eland was dismissed as claimant's borrowing employer as it, therefore, is immune from tort liability. Sundown was dismissed on a motion for summary judgment. *Nguyen v. Weston*, 20 So.3d 548 (La. App. 4th Cir. 2009); *see* 33 U.S.C. §905(a); Stipulations at 3. The disposition of the suit against B.V. Weston is not known.

[4]The administrative law judge did not address any other issue.

1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). The Act covers those workers injured while maintaining or repairing buildings and machinery essential to the shipbuilding or the loading/unloading processes, *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 82, 11 BRBS 320, 328 (1979); *Caputo*, 432 U.S. at 272-274, 6 BRBS at 165; *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981); as well as those workers injured during the construction of "inherently maritime" structures, such as piers and dry docks, *Pittman Mechanical Contractors, Inc. v. Director, OWCP [Simonds]*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *Hawkins v. Reid Associates*, 26 BRBS 8 (1992). The term "harbor worker" includes "at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships). . . ." *Stewart v. Brown & Root, Inc.*, 7 BRBS 356, 365 (1978), *aff'd sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980); *see Healy Tibbitts Builders, Inc. v. Director, OWCP*, 444 F.3d 1095, 40 BRBS 13(CRT) (9th Cir. 2006); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Crawford v. Trotti & Thompson, Inc.*, 9 BRBS 685 (1979) *aff'd*, 631 F.2d 1214, 12 BRBS 681 (5th Cir. 1980).

The administrative law judge found that, although claimant's work would permit the loading of oil onto barges in the future, claimant did not meet the status requirement because his work welding pipelines had no connection to the loading process at the time of the injury. The administrative law judge explained that claimant had not been repairing equipment essential to the loading process; rather, he was constructing "what was essentially a new facility," which was inoperable at the time of the injury. Decision and Order at 5-6 (citing *Terlemezian v. J.H. Reid General Contracting*, 37 BRBS 112 (2003)). The administrative law judge also found that claimant was not constructing an "inherently maritime structure." Therefore, the administrative law judge found that claimant was not engaged in maritime employment.

In challenging the administrative law judge's finding that he is not covered by the Act, claimant asserts that his work is maritime because he was welding a pipeline that would be used in the loading process. He contends the administrative law judge's distinction between new construction and repair work does not comport with the law of the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises. We agree that the administrative law judge did not fully discuss relevant case precedent. Therefore, we remand the case for further findings.

As an initial matter, we note that the only case specifically cited by the administrative law judge in support of his decision is factually distinguishable from this case. In *Terlemezian*, 37 BRBS 112, the Board upheld an administrative law judge's finding that a "dock builder foreman," working on a road project designed to improve movement in land-based traffic through a port, was not a maritime employee because the claimant's work was directed at improving the port's roadways and was not an essential aid to the loading process. The claimant did not establish a nexus between the road project and the actual loading and unloading of containers or moving cargo in intermediate steps within the port. Although the Board also stated that any potential future effects of the claimant's work on maritime concerns could not support a finding of status, that holding cannot be disassociated from the facts, which are significantly different than those in this case. The claimant in *Terlemezian* worked on a road project within a port; the project might, in some unspecified way, have a future effect on maritime commerce. In contrast, claimant herein worked on a pipeline that would be directly used to load oil onto vessels. *See Hudson*, 555 F.3d 426, 42 BRBS 68(CRT) (claimant engaged in maritime employment where he transferred oil from platform holding tank to storage vessel and transport barges).

Moreover, as claimant contends, the administrative law judge did not discuss relevant Fifth Circuit case precedent. The Fifth Circuit has specifically stated that employment activities not intrinsically maritime in nature "become 'maritime employment'" when "undertaken to enable a ship to engage in maritime commerce." *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 813, 27 BRBS 103, 107(CRT), *reh'g en banc denied*, 8 F.3d 24 (5th Cir. 1993), *cert. denied*, 511 U.S. 1086 (1994) (citations omitted). In *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 12 BRBS 681 (5th Cir. 1980), the Fifth Circuit affirmed the Board's determination that the claimant's injury during construction of an uncompleted pier not only satisfied the situs requirement but also the status requirement. 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 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 [Act] than repair work:
>
> > 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 686-687 (quoting *Kininess*, 554 F.2d at 178, 6 BRBS at 230); *see also Hullinghorst Industries*, 650 F.2d 750, 14 BRBS 373 (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).[5] Moreover, cases have held covered: construction workers engaged in digging trenches for utility lines during the replacement of berthing wharves, *Healy Tibbits,* 444 F.3d 1095, 40 BRBS 13(CRT), and at a submarine repair facility under construction, *Hawkins,* 26 BRBS 8; and a welder who replaced pipelines on piers because the pipes were integral to the loading and unloading of ships. *Simonds,* 35 F.3d 122, 28 BRBS 89(CRT). As the administrative law judge discussed the status issue only in term of the *Terlemezian* decision and not under other relevant law, we vacate his finding that claimant was not engaged in maritime employment. We remand the case for further consideration of whether claimant spent at least some of his time engaged in work integral to the loading of vessels. *Schwalb,* 493 U.S. 40, 23 BRBS 96(CRT); *Caputo,* 432 U.S. 249, 6 BRBS 150.

Claimant also asserts that his injury occurred on a covered situs pursuant to Section 3(a). The administrative law judge did not address this issue; therefore, we decline to address it in the first instance. If, on remand, the administrative law judge

[5]Thus, unlike the United States Court of Appeals for the Fourth Circuit, Fifth Circuit precedent does not necessarily distinguish between initial construction and repairs. *See Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT) (4th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995); *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); *Moon v. Tidewater Constr. Co.*, 35 BRBS 151 (2001).

finds that claimant was engaged in maritime employment, then he must address whether claimant's injury occurred on a covered situs consistent with law. *See, e.g., New Orleans Depot Services, Inc. v. Director, OWCP*, 689 F.3d 400, 46 BRBS 41(CRT) (5th Cir. 2012); *Tarver v. Bo-Mac Contractors, Inc.*, 384 F.3d 180, 38 BRBS 71(CRT) (5th Cir. 2004), *cert. denied*, 544 U.S. 948 (2005); *Thibodeaux v. Grasso Prod. Mgmt., Inc.*, 370 F.3d 486, 38 BRBS 13(CRT) (5th Cir. 2004); *Boomtown Belle Casino v. Bazor*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003); *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Textports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (en banc), *cert. denied*, 452 U.S. 905 (1981). If claimant meets both the status and situs requirements, then the administrative law judge must address the remaining defenses raised by employer and Eland, as well as any other disputed issues.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration in accordance with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge