BRB Nos. 99-0206
and 99-0206A

RICHARD KENT	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
NORFOLK SHIPBUILDING	)	DATE ISSUED: 10/29/99
AND DRY DOCK CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
Cross-Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Richard E. Garriott, Jr. (Clarke, Dolph, Rapaport, Hardy & Hull, P.L.C.), Norfolk, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order (97-LHC-1923, 1924) of Administrative Law Judge Fletcher E. Campbell, 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 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 injured his back on the morning of March 8, 1994, when, while walking through employer's parking lot on his way to his job at employer's shipyard, he was struck by a truck driven by another employee. The parking lot in which this incident occurred is located across a public road from employer's fenced off shipyard and is owned and maintained by employer for the use of its employees. The parties stipulated that the parking lot is surrounded on all four sides by public streets. Tr. at 78; Jt. Ex. 1. Claimant explained that in order to get to the shipyard gate, it was necessary for him to go back to the main road and walk about 50 meters beyond the shipyard fence. Tr. at 18-20, 23-28; Jt. Ex. 1. In a second claim for benefits under the Act, claimant alleges that he subsequently hurt his back while at work on December 18, 1996, when he was sent to the bottom of a ship to verify fuel levels, and was climbing back out.

In his Decision and Order, the administrative law judge, relying on the decision in *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (CRT)(4th Cir. 1995), *cert. denied,* 116 S.Ct. 2570 (1996), found that the parking lot in which claimant was injured in 1994 is not a covered situs under Section 3(a) of the Act, 33 U.S.C. §903(a). Thus, the administrative law judge denied claimant benefits for this injury. With respect to the December 18, 1996 injury, the administrative law judge, after noting that causation was the only issue controverted, found that claimant was entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption, that employer failed to rebut that presumption, and that claimant is thus entitled to temporary total disability compensation and medical benefits for the disability resulting from the December 1996 incident.

On appeal, claimant contends that the administrative law judge erred in finding that employer's parking lot is not a covered situs under the Act. Employer responds, urging affirmance. On cross-appeal, employer challenges the administrative law judge's finding that claimant is entitled to compensation for the December 18, 1996, injury, contending that claimant's present condition is the natural progression of his prior injury. Claimant responds to employer's cross-appeal, urging that the administrative law judge's decision awarding benefits for the December 18,1996, injury be affirmed.

We will first address the administrative law judge's determination that the parking lot where claimant was injured on March 8, 1994, is not a covered situs under the Act. Section 3(a) provides that:

> Compensation shall be payable under this chapter . . . only if the disability or death results from an injury occurring on 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)(1994)(emphasis added). In *Sidwell*, 71 F.3d at 1134, 29 BRBS at 138 (CRT), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that an area is "adjoining" navigable waters only if it is contiguous with or otherwise touches navigable waters. To be included as an "other adjoining area" under the Act, the court held that the area must be a discrete shoreside structure or facility which is "customarily used by employer in loading, unloading, repairing, dismantling, or building a vessel." *Sidwell*, 71 F.3d at 1139, 29 BRBS at 143 (CRT); *see also Parker v. Director, OWCP*, 75 F.3d 929, 30 BRBS 10 (CRT)(4th Cir.), *cert. denied*, 117 S.Ct. 58 (1996).

We affirm the administrative law judge's finding that the parking lot at issue in the case at bar is not a covered situs under the Fourth Circuit's decision in *Sidwell.* In *Griffin v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 87 (1998), a case almost identical factually to the instant case, the Board held that the employer's parking lot, where the claimant sustained his injury, is a separate and distinct parcel of land and thus, cannot be considered an "adjoining area" under Section 3(a) of the Act. Specifically, the Board held that the parking lot in question was not located on the same parcel as the shipyard, inasmuch as it was physically separated from the employer's shipyard by a public street as well as by a security fence.

Similarly, in the instant case, it is uncontroverted that the parking lot where claimant was injured, while owned and operated by employer, is separated from employer's shipyard by public roads which do not adjoin navigable water. *See* Stip. 7; Jt. Ex. 1. Moreover, the main shipyard is fenced off from the public, and an employee must show his badge to enter the premises. Tr. at 35. Thus, as the parking lot is physically separated from employer's shipyard by public streets as well as a security fence, it must be deemed a separate and distinct piece of property rather than part of the overall shipyard facility. *See Griffin*, 32 BRBS at 89; *see also McCormick v. Newport News Shipbuilding & Dry Dock Co.,* 32 BRBS 207 (1998); *Kerby v. Southeastern Public Service Authority,* 31 BRBS 6 (1997), *aff'd mem,* 135 F.2d 770 (4th Cir. 1998)(table). Moreover, as in *Griffin*, since the parking lot is a separate and distinct parcel of land, it cannot be considered an "adjoining area" under Section 3(a) of the Act. *See also Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86 (CRT) (4th Cir. 1998), *cert. denied,* 119 S.Ct. 590 (1998). Consequently, as it is uncontroverted that the parking lot in this case is not contiguous with navigable water, under the decision of the Fourth Circuit in *Sidwell,* it is not a covered site under Section 3(a).[1]

[1]Claimant argues that one of the primary purposes of the 1972 Amendments to the Act was to prevent workers from passing in and out of coverage during the course of the day, and thus, he should be covered under the Act. This inquiry is relevant to a determination of a

claimant's status under Section 2(3), 33 U.S.C. §902(3). *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *See Melerine v. Harbor Const. Co.*, 26 BRBS 97 (1992); *Alford v. MP Industries of Florida*, 16 BRBS 261 (1984). As claimant's injury in the instant case occurred in employer's parking lot which is not contiguous with navigable water, and thus cannot be considered an "adjoining area" under Section 3(a) of the Act, the fact that claimant was about to enter employer's main facility where he was to begin his shift is not dispositive. *See generally Griffin*, 32 BRBS at 87.

Claimant's reliance on the fact that the parking lot is owned and maintained by employer, and is thus part of the shipyard premises, is misplaced, as the fact that an injury occurs in the course of employment does not necessarily mean that it occurred on a covered situs. *See Griffin,* 32 BRBS at 89.[2] Although claimant correctly asserts that the court in *Sidwell* stated that "it is the parcel of land that must adjoin navigable waters, not the particular square foot on which a claimant is injured," *Sidwell,* 71 F.3d at 1140 n.11, 29 BRBS at 144 n.11 (CRT), the parking lot in this case was not located on the same parcel as the shipyard. *Griffin,* 32 BRBS at 89. Since employer's parking lot is a separate and distinct parcel of land, it cannot be considered an "adjoining area" under Section 3(a) of the Act. *See Jonathan Corp.*, 142 F.3d at 217, 32 BRBS at 86 (CRT).

Lastly, claimant's arguments based on the law of other circuits lack merit, as the Fourth Circuit specifically declined to follow the opinions of other circuits and

[2]Claimant argues that the Board's decision in *Griffin v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 87 (1998), is in conflict with the Fourth Circuit's opinion in *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 8 BRBS 241 (4th Cir.), *cert. denied*, 439 U.S. 979 (1978). In *Sidwell,* the Fourth Circuit cited *Graham* as a case in which it had previously considered this issue in a one-paragraph discussion "without purporting to offer a comprehensive test." 71 F.3d at 1137, 29 BRBS at 141 (CRT). The Fourth Circuit's decision in *Sidwell* was issued subsequent to that in *Graham*, and thus constitutes controlling caselaw within that circuit regarding the issue of situs. Hence, the Board's decision in *Griffin* was correct.

held that an "adjoining area" under Section 3(a) must actually be contiguous to navigable waters in order to meet the situs test. *Sidwell,* 71 F.3d at 1139, 29 BRBS at 142 (CRT); *see also Parker*, 75 F.3d at 929, 30 BRBS at 10 (CRT).[3] Accordingly, as it is uncontroverted that the parking lot is not contiguous with navigable water, we affirm the administrative law judge's determination that claimant was not injured on a covered situs under Section 3(a), as it is consistent with *Sidwell*.

We next address employer's assertions of error regarding claimant's claim for benefits resulting from his December 18, 1996, work injury. Specifically, employer challenges the administrative law judge's determination that claimant sustained a new injury on December 18, 1996, arguing that any disability thereafter is the result of the natural progression of the 1994 injury in the parking lot.

In order to be entitled to the Section 20(a) presumption, claimant must establish a *prima facie* case by showing that he suffered a harm and that either a work-related accident occurred or that working conditions existed which could have caused or aggravated the harm. *See Konno v. Young Bros., Ltd.,* 28 BRBS 57 (1994); *Perry v. Carolina Shipping Co.*, 20 BRBS 90 (1987). Once claimant has established his *prima facie* case, he is entitled to invocation of the Section 20(a) presumption linking his harm to his employment. *See Stevens v. Tacoma Boatbuilding Co.*, 23 BRBS 191 (1990). Upon invocation of the presumption, the burden shifts to employer to rebut the presumption with substantial evidence that claimant's condition was not caused or aggravated by his employment. *See Swinton v. J. Frank Kelly, Inc.*, 554 F.2d 1075, 4 BRBS 466 (D.C. Cir.), *cert. denied*, 429 U.S. 820 (1976); *Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119 (CRT)(4th Cir. 1997); *Merrill v. Todd Pacific Shipyards Corp.,* 25 BRBS 140 (1991).

[3] *Cf. Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir.1980), *cert. denied*, 452 U.S. 905 (1981) (concluding that a determination of whether an "adjoining area" is covered by the Act should focus on the functional relationship or nexus between the "adjoining area" and marine activity on navigable waters, court held a gear locker used to store equipment used in loading, located five blocks from the nearest dock, covered under Section 3(a)).

In awarding benefits for disability ensuing after the December 18, 1996 incident at work, the administrative law judge invoked the Section 20(a) presumption that a new injury or an aggravation of the prior injury occurred that day, based on claimant's credible testimony and the medical records of Dr. Morales. Employer contends that claimant failed to establish that an injury occurred on December 18, 1996, because claimant admitted he has experienced consistent pain since his 1994 injury. This argument fails to address the crux of the administrative law judge's conclusion, *i.e.,* that employer failed to rebut the Section 20(a) presumption by producing evidence that claimant's condition was not aggravated by the work event. It also does not demonstrate error in the administrative law judge's invocation of the presumption, as it is supported by substantial evidence and accords with law. Claimant's testimony that after he went down into ship's hull, "[he] couldn't get up, and got a pain in [his] back," Tr. at 22, and then he proceeded to first aid, is uncontroverted. Moreover, Dr. Morales's office note of December 18, 1996, states that claimant "reinjured his back," and that he is "[n]on-fit for two days and then fit for light-duty with restrictions." Cl. Ex. 5. Lastly, the parties stipulated that claimant was disabled from work from the date of this incident through December 22, 1996. Tr. at 11. As employer cites to no evidence in the record that claimant did not reinjured himself at work on the day in question, and did not offer any evidence that the disability thereafter is the result of the natural progression of the 1994 injury, we affirm the administrative law judge's finding that claimant sustained a new injury or aggravation and his consequent award of disability compensation for the 1996 injury. *See generally Buchanan v. Int'l Transportation Services*, 31 BRBS 81 (1997).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON
Acting Administrative Appeals Judge