

JILES NELSON HALE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ALABAMA DRY DOCK AND	)	DATE ISSUED:
SHIPBUILDING CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Order Denying Motion for Reconsideration of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks & Fleming, P.C.), Mobile, Alabama, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order and Order Denying Motion for Reconsideration (89-LHC-3526) of Administrative Law Judge James W. Kerr, Jr., denying benefits 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 if they 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 underwent audiometric testing on May 8, 1987, which revealed a 16 percent binaural hearing loss. He filed a claim for benefits under the Act on July 1, 1987, for work-related hearing loss. Claimant alleged that he was exposed to injurious noise during the course of his employment as a tack welder with employer in 1944 and 1945. Employer contested the claim on the ground, *inter alia*, that claimant's employment did not satisfy the situs requirement of the Act, 33 U.S.C. §903(a) (1970)(amended 1972 and 1984). At the formal hearing, on July 25, 1990, employer cross-examined claimant regarding his deposition testimony that he did not work aboard ships. *See* EX 13 at 48-49. Claimant testified at the hearing that he worked both on land and aboard ships. In its post-hearing brief, employer argued that claimant is not entitled to benefits based on the discrepancy between his deposition and hearing testimony regarding shipboard employment. Employer asserted that claimant's testimony is not credible and that he is therefore ineligible for

benefits under Section 3(a) of the Act, 33 U.S.C. §903(a)(1970)(amended 1972 and 1984), and the holding in *Paul v. General Dynamics Corp.*, 16 BRBS 290 (1984), because he did not work on navigable waters.

The administrative law judge agreed with employer that claimant's hearing testimony was not credible. Pursuant to *Paul*, the administrative law judge found that claimant failed to establish he was injured on a situs covered under the Act because he did not work aboard ships on navigable waters. See *Paul*, 16 BRBS at 291; 33 U.S.C. §903(a) (1970). Accordingly, benefits were denied. Claimant's motion for reconsideration was summarily denied. On appeal, claimant contends that the administrative law judge erred in finding that he did not work upon navigable waters and therefore erred by finding that the situs requirement of Section 3(a) of the Act prior to its amendment in 1972 is not satisfied. Alternatively, claimant contends that the Board should apply the holding in *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1433, 23 BRBS 113 (CRT)(9th Cir. 1990), that jurisdiction is determined with reference to the law in effect at the time of manifestation of the injury, to his case. Employer has not responded to this appeal.

We need not address claimant's first contention, as we agree that the latter is dispositive of the issue raised in this case. In determining that claimant's employment did not satisfy the pre-1972 Amendment situs requirement of Section 3(a),<sup>1</sup> the administrative law judge stated that coverage under the Act is determined with reference to the law in effect at the time of the event that causes the injury, regardless of when the full effect of the injury becomes manifest, citing *Paul*, 16 BRBS at 290. The administrative law judge considered the inconsistencies between claimant's deposition and hearing testimony concerning whether he worked on board ships on navigable waters, and he concluded that claimant was not credible due to the inconsistent testimony. Thus, he found that claimant did not work on navigable waters and did not establish coverage under the pre-1972 Act.

Subsequent to the administrative law judge's Decision and Order and Order Denying Reconsideration, the Board overruled the holding in *Paul* that coverage under the Act is determined with reference to the law in effect at the time of the event that causes the injury. In *Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991)(*en banc*), *aff'd sub nom. Insurance Co. of North America v. U.S. Dept. of Labor*, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), *cert. denied*, 113 S.Ct. 1253 (1993), the Board adopted the position of the United States Court of Appeals for the Ninth Circuit in *SAIF Corp.*, 908 F.2d at 1434, 23 BRBS at 113 (CRT), and held that coverage under the Act must be determined with reference to the law in effect at the time an injury becomes manifest. *Peterson*, 25 BRBS at 75-76; see also *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990). In the instant case, there is no evidence contradicting claimant's testimony that he underwent an initial audiometric evaluation that revealed a loss of hearing on May 8, 1987. Thus, claimant's injury became manifest subsequent to 1984 and the Act as amended in 1972 and 1984 is applicable to the issue of coverage in this case. See *Peterson*, 25 BRBS at 71; 33 U.S.C. §§902(3), 903(a)(1988). Accordingly, we agree with claimant that the administrative law judge's reliance on *Paul* and pre-

---

<sup>1</sup>Prior to its amendment in 1972, Section 3(a) contained the Act's only jurisdictional element. In order to be covered under this section, the disability had to result from an injury "occurring upon the navigable waters of the United States (including any dry dock) . . . ." 33 U.S.C. §903(a)(1970)(amended 1972 and 1984).

1972 Section 3(a) must be vacated.

In order for a claimant to be covered under the post-1972 Act both the situs requirement of Section 3(a) and the status requirement of Section 2(3) must be satisfied. *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Martin*, 24 BRBS at 121-123. It is uncontested that claimant worked at employer's shipyard facility. Moreover, it is well settled that an entire shipyard facility is considered a covered situs under amended Section 3(a) of the Act, 33 U.S.C. §903(a).<sup>2</sup> *See Martin*, 24 BRBS at 122-123 (and cases cited therein). Since employer's shipyard is a covered situs, claimant is covered by Section 3(a) as amended. *Peterson*, 25 BRBS at 76.

With regard to the status requirement of Section 2(3) of the Act as amended,<sup>3</sup> employer did not contest claimant's testimony that he welded turnbuckles onto equipment. Claimant testified that the turnbuckle enables a crane to hoist machinery aboard ships. EX 13 at 48-49; Tr. at 13. The Board and the courts have held that employees engaged in any aspect of shipbuilding are considered maritime employees under Section 2(3) of the Act. *See Peterson*, 25 BRBS at 76; *Martin*, 24 BRBS at 123. *See also Alford v. American Bridge Division, U.S. Steel Corp.*, 642 F.2d 807, 13 BRBS 268 (5th Cir. 1981), *modified on other grounds*, 655 F.2d 86, 13 BRBS 837 (5th Cir. 1981), *cert. denied*, 455 U.S. 927 (1982). As there is no basis in the record for concluding that claimant's work was not related to shipbuilding, we hold that he is a maritime employee under Section 2(3). *Peterson*, 25 BRBS at 77; *Martin*, 24 BRBS at 123. Thus, since the situs and the status requirements have been met, we reverse the administrative law judge's finding that claimant is not covered under the Act, and we hold that claimant is covered under the Act pursuant to Section 2(3) and Section 3(a) as amended.

---

<sup>2</sup>Section 3(a), 33 U.S.C. §908(a)(1988), states:

[C]ompensation 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).

<sup>3</sup>Section 2(3) of the Act, 33 U.S.C. §902(3)(1988), states in pertinent part:

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. . . .

The administrative law judge's Decision and Order lists eight issues other than jurisdiction that claimant and employer were unable to resolve. Decision and Order at 2. Because the administrative law judge relied on *Paul* to deny benefits pursuant to Section 3(a) of the pre-1972 Act, he did not address these issues. Accordingly, we vacate the denial of benefits and remand this case for the administrative law judge to address the relevant evidence and to resolve the remaining contested issues.<sup>4</sup>

Accordingly, the administrative law judge's Decision and Order and Order Denying Motion for Reconsideration are reversed with regard to the denial of coverage under the Act. The denial of benefits is vacated, and the case is remanded for further proceedings consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Acting Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

JAMES F. BROWN  
Administrative Appeals Judge

---

<sup>4</sup>We note that the administrative law judge held that claimant failed to establish he was exposed to injurious noise during the course of his employment with employer. Decision and Order at 3. To resolve the contested issue of causation on remand, the administrative law judge must address whether claimant was exposed to injurious noise at employer's entire shipyard facility, rather than limit the inquiry to whether claimant was exposed to noise on ships on navigable waters.