

BRB No. 97-609

JOHN R. GARLOW)	
)	
Claimant-Respondent)	
)	
v.)	DATE ISSUED:
)	
SOUTHEASTERN PUBLIC SERVICE AUTHORITY)	
)	
Self-Insured Employer-Petitioner)	DECISION and ORDER

Appeal of the Order Granting the Motion for a Partial Summary Decision and the Decision and Order Awarding Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden and Matthew H. Kraft (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Palmer S. Rutherford (Wilcox & Savage, P.C.), Norfolk, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Order Granting the Motion for a Partial Summary Decision and the Decision and Order Awarding Benefits (96-LHC-644) of Administrative Law Judge Richard K. Malamphy 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, a welder for employer, injured his back on April 22, 1995, when he fell off scaffolding on the side of a boiler. Employer paid claimant state workers' compensation benefits until 9/4/96, when claimant returned to work with employer in a light-duty capacity. Claimant filed a claim for benefits under the Act on October 10, 1995.

Employer contested coverage under the Act, see 33 U.S.C. §§902(3), 903(a), and claimant requested that the case be transferred to the Office of Administrative Law Judges for resolution of this issue. The parties stipulated that the facts at issue are identical to the facts presented by the cases of *Kerby v. Southeastern Public Service Authority*, BRB No. 96-705, and *Rodriguez v. Southeastern Public Service Authority*, BRB No. 96-716.¹ The facts involved in those consolidated cases were not in dispute: In 1989, employer, a public service authority created under the laws of the Commonwealth of Virginia, entered into a contract with the United States Navy to operate and maintain a power plant that had been built adjacent to the Norfolk Naval Shipyard (NNS). NNS is located on land contiguous with the Southern Branch of the Elizabeth River. The United States Navy owns the real estate on which both its shipyard and the power plant are located, as well as the physical power plant building. The parcel of land on which the power plant is located is separated from NNS by a privately owned railroad spur. The power plant and NNS are each surrounded by a chain link fence which separates each property from the railroad spur and each other. Employer's employees do not have access to NNS by virtue of being such an employee; rather, access must be obtained by permission from NNS.

The power plant is designed to generate steam and electricity by burning refuse which is obtained from a local trash collection facility which is owned and operated by employer. The steam generated by the power plant goes directly to NNS where it is used for heating and hot water for shore facilities and ships. All of the electricity generated by the power plant goes to a switch yard operated by NNS. The electricity is then sent from the switch yard to NNS in order to satisfy NNS's electrical requirements. Once these power requirements are met, excess electricity is sent back to the switch yard and sold to Virginia Power. *Kerby*, 31 BRBS at 6-7. The parties agree that claimant's duties as a boiler plant mechanic at the power plant in the instant case were the same as those of claimant Rodriguez and included maintenance and repair of the equipment which produced the steam and electricity sent to NNS.

¹The Board consolidated these cases for purposes of decision in an Order dated December 10, 1996. 20 C.F.R. §802.104; *Kerby v. Southeastern Public Service Authority*, 31 BRBS 6 (1997), *appeal pending*, No. 97-1323 (4th Cir.). By Order dated February 12, 1997, the Board denied employer's motion to consolidate the instant case with the other two.

Initially, the administrative law judge addressed claimant's motion for a partial summary decision and found that the administrative law judge's decision in *Rodriguez v. Southeastern Public Service Authority*, 30 BRBS 226 (ALJ)(1996), addressed the identical issues of status and situs presented in the instant case. Thus, based on that decision, the administrative law judge's summarily found that both the status and situs requirements are established. Subsequently, as the parties stipulated to the other issues in contention, the administrative law judge issued a Decision and Order awarding claimant temporary total disability benefits from April 23, 1995 to September 2, 1996.

On appeal, employer contends that the instant case is controlled by the Board's decision in *Kerby v. Southeastern Public Service Authority*, 31 BRBS 6 (1997), *appeal pending*, No. 97-1323 (4th Cir.), in which the Board held that the power plant where the claimant was injured is not a covered situs under Section 3(a) of the Act, 33 U.S.C. §903(a). Employer also contends that the administrative law judge erred in finding that claimant was a covered employee under Section 2(3) of the Act, 33 U.S.C. §902(3). Claimant responds, urging affirmance of the administrative law judge's findings.

In determining whether the claimants were injured on a covered situs in *Kerby*, the Board reviewed the evidence regarding the location of the power plant and noted that it is separated from NNS by not only the fences that surround each property but by the privately owned railroad tracks which run between the two properties, as well as by the personnel practices of NNS, and thus the power plant must be considered to be located on land separate and distinct from NNS, notwithstanding its ownership by NNS. Consequently, the Board held that as a separate and distinct piece of property, the power plant must be contiguous with navigable waters, in order to be considered an "adjoining area"² under the holding of the United States Court of Appeals for the Fourth Circuit in *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (CRT)(4th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 2570 (1996), and it was uncontroverted that the plant does not adjoin navigable waters. *Kerby*, 31 BRBS at 11; *see also Parker v. Director, OWCP*, 75 F.3d 929, 30 BRBS 10 (CRT)(4th Cir. 1996), *cert. denied*, 117 S.Ct. 58 (1996). Therefore, as this case is identical to *Kerby*, and for the reasons stated therein, we reverse the administrative law judge's determination that claimant was injured on a covered situs under Section 3(a). The award of benefits is therefore vacated.³

²Section 3(a) states that the injury must occur on the navigable waters of the United States, or on certain enumerated sites, or on "[an] other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel." 33 U.S.C. §903(a).

³Although, given the recommended disposition of this issue, the Board need not reach employer's contentions regarding the administrative law judge's determination that claimant was a covered employee, we note that the Board held in *Kerby* that the employment duties of claimant Rodriguez in maintaining and operating equipment at the power plant were sufficient to confer coverage under Section 2(3) of the Act. *Kerby*, 31

BRBS at 10. Therefore, as the parties stipulate that the claimant in the instant case had the same job description as Rodriguez, we affirm the administrative law judge's finding that claimant is a covered employee under Section 2(3) of the Act. *Id.*

Accordingly, the Order Granting the Motion for a Partial Summary Decision and the Decision and Order Awarding Benefits of the administrative law judge are reversed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge