



**LHWCA BULLETIN NO. 14-02**

**Issue Date: October 29, 2013**

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**Subject:** Standard for determining Longshore and Harbor Workers' Compensation Act (LHWCA) situs coverage.

**Background:** Since its inception, the LHWCA has compensated injuries sustained on "the navigable waters of the United States." *Director, OWCP v. Perini North River Assoc.*, 459 U.S.297 (1983). In 1972, Congress expanded the definition of navigable waters to include certain enumerated shoreside areas, namely adjoining piers, wharves, dry docks, terminals, building ways, or marine railways, as well as "other adjoining area[s] customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. § 903(a).

An "other adjoining area" consists of two components:

- (1) Geographic: whether the site of the injury adjoins navigable waters, and
- (2) Functional: whether the area is customarily used by the employer for loading, unloading, repairing, dismantling, or building a vessel.

An area must satisfy both the geographic and functional component to be an "other adjoining area" under Section 903(a).

On April 29, 2013, the 5th Circuit (which covers Louisiana, Mississippi, and Texas) changed its longstanding interpretation of the geographic component of "other adjoining area" to require that the site "border on" or "be contiguous with" navigable waters to be a covered situs. *New Orleans Depot Services, Inc. v. Director, OWCP (Zepeda)*, 718 F.3d 384, (5th Cir. 2013) (en banc). This decision overruled a longstanding and more expansive definition of "adjoining" previously established by *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980 (en banc) (holding that "adjoining" means "close to," "near," or "neighboring").

In *Zepeda*, the 5th Circuit aligned itself with the 4th Circuit, endorsing the 4th Circuit's analysis that the ordinary meaning of "adjoin" is to "lie next to," "be in contact with," or "be touching or bounding at some point." *Sidwell v. Container Serv., Inc.*, 71 F. 3d 1134 (4th Cir. 1995)

As more fully described below, the view of the 4th and 5th Circuits contrasts sharply with the approach of the other courts of appeals, which have not required strict contiguity with navigable waters in order to satisfy the geographic component.

**Purpose:** Each Office of Workers' Compensation Program's (OWCP), Division of Longshore and Harbor Workers' Compensation (DLHWC), District Director must apply his/her circuit's particular test to correctly determine whether the claimant has satisfied the geographic element of the Section 903(a) situs test.

This guidance clarifies the Director's position on the situs requirement in circuits without governing judicial precedent, and describes the proper legal standard to be applied by the DLHWC District Offices where there is judicial precedent in making the determination whether a Longshore claimant has established the geographic element of the situs requirement under Section 903(a).

**Applicability:** All DLHWC Federal Staff

**Actions:**

**A. Application of *Sidwell* and *Zepeda***

**Actions in the 4th Circuit:** For injuries occurring in Maryland, Virginia, West Virginia, North Carolina, and South Carolina, pursuant to *Sidwell*, the claimant's injury must occur in an area that borders on or is contiguous with navigable waters.

**Actions in the 5th Circuit:** For injuries occurring in Texas, Louisiana, and Mississippi, pursuant to the Court's analysis in *Zepeda*, the claimant's injury must occur in an area that borders on or is contiguous with navigable waters.

**B. Application of *Herron* and *Winchester***

**Actions in the 9th Circuit:** For injuries occurring in California, Oregon, Washington, Hawaii, Alaska, Idaho, Montana, Nevada, and Arizona, the meaning of "other adjoining area" is set out in *Brady Hamilton Stevedore Co. v. Herron*, 568 F.2d 137 (9th Cir. 1978). The 9th Circuit found that the phrase "adjoining area" is not dependent on physical contiguity and should be read to describe a functional relationship. The Court outlined four non-exclusive factors for consideration:

- (1) The particular suitability of the site for the maritime uses referred to in the statute;
- (2) Whether adjoining properties are devoted primarily to maritime use;
- (3) The proximity of the site to navigable waters; and
- (4) Whether the site is as close to the waterway as feasible given all the circumstances in the case.

Therefore, in the 9th Circuit, physical contact with navigable water is not required, and proximity to the water is only one factor to be considered.

For additional examples of the application of the *Herron* geographic test in the 9th Circuit, see *Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982) and *Vallodolid v. Pac Operations Offshore, LLP.*, 604 F.3d 1126 (9th Cir. 2010).

**Actions in the 1st Circuit:** For injuries occurring in Maine, Massachusetts, Rhode Island, and New Hampshire, the Court has relied on *Herron*. See, for example, *Cunningham v. Director, OWCP*, 377 F.3d 98 (1st Cir. 2004).

**Actions in the 2nd Circuit:** For injuries occurring in Connecticut, New York, and Vermont, the Court has also applied *Herron*. See, for example, *Triguero v. Consolidated Rail Corp.*, 932 F.2d 95, 100 (2nd Cir. 1991).

**Actions in the 3rd Circuit:** For injuries occurring in New Jersey, Pennsylvania, and Delaware, the Court has approved of both *Herron* and *Winchester*. See, *Consolidation*

*Coal Co. v. Ben. Rev. Bd.*, 629 F.3d 322 (3d Cir. 2010) and *Nelson v. Am. Dredging Co.*, 143 F.3d 789 (3d Cir. 1998).

**Actions in the 11th Circuit:** For injuries occurring in Florida, Alabama, and Georgia, the Court is obligated to continue to apply **Winchester**. Thus, in the 11th Circuit an adjoining area satisfies the geographic requirement when it is “close to or in the vicinity of navigable waters or in a neighboring area.” *Ramos v. Director, OWCP*, 486 Fed. Appx. 775, 2012 WL 3237816 (11th Cir. 2012) (unpublished).

**C. Director’s Position in Circuits without Precedent**

**Actions in the 6th, 7th, 8th, and 10th Circuits:** For injuries occurring in Michigan, Ohio, Kentucky, Tennessee, Wisconsin, Illinois, Indiana, Kansas, Oklahoma, North Dakota, South Dakota, Minnesota, Nebraska, Iowa, Missouri, Arkansas, Utah, Colorado, Wyoming, and New Mexico, the Circuit courts have not addressed the meaning of “adjoining.”

In these circuits, the DLHWC Director has determined that the legal standard in **Herron** best effectuates Congress’s goal for providing uniform coverage for land-based maritime workers and therefore directs the DLHWC District Directors to use this standard for situs determinations.

**Disposition:** This bulletin is to be retained until the DLHWC Procedure Manual, Chapter 0-300, paragraph 5 has been updated.

A handwritten signature in black ink, appearing to read 'A. Rios', with a stylized flourish at the end.

Antonio A. Rios  
Director, Division of  
Longshore and Harbor Workers’ Compensation