25 BRBS 362 (DOL Ben.Rev.Bd.), 1992 WL 105815

Benefits Review Board

United States Department of Labor

BENNY J. FELT, Claimant-Petitioner
v.
SAN PEDRO TOMCO
and
STATE COMPENSATION INSURANCE FUND, Employer/Carrier-Respondents
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, Respondent

BRB No. 90-2298
April 23, 1992

DECISION and ORDER

***1** Appeal of the Decision and Order of Ellin M. O'Shea, Administrative Law Judge, United States Department of Labor.

Richard Mark Baker (Cantrell, Green & Pekich), Long Beach, California, for claimant.
William J. Lewis and William J. Landsiedel, Cerritos, California, for employer/carrier.
Laura Stomski (Marshall J. Breger, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

Claimant appeals the Decision and Order (89-LHC-2396) of Administrative Law Judge Ellin M. O'Shea 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 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). The Board held oral argument in this case in Los Angeles, California, on May 22, 1991.

The administrative law judge found and the evidence of record supports the following: claimant began working for employer part-time in September 1987 and full-time commencing in January 1988, as a warehouseman/truck driver, the job in which he was injured at 100 West First Street, San Pedro, California; on February 9, 1988, claimant was in employer's warehouse yard on a forklift moving some pallets in the presence of employer's owner, Tom Anast; while trying to center the pallets they fell and landed on claimant's right foot; he suffered a contusion of his right foot with severe pain; a right big toe subungual (beneath nail) hematoma required a drill hole in the nail. The administrative law judge also found that in March 1988, claimant was diagnosed with causally-related right calf phlebitis with medication-related gastrointestinal symptoms.

Claimant had an extensive gastrointestinal surgical history dating to the 1970's. In June 1988 claimant reported he had been seen at the VA for anxiety, and anxiety and depression were diagnosed by the Jefferson Medical Group in October 1988. The administrative law judge found, however, that there is significant medical disagreement between examining and evaluating physicians as to the 1988 phlebitis occurrence, the February 9, 1988, injury's causality of claimant's gastrointestinal and psychological conditions and the effect of the post-February 1988 gastrointestinal and psychological symptoms including on the claimant's ability to work. Employer paid California state workers' compensation benefits from February 10, 1988 to March 27, 1988 at a rate of $224 per week. Claimant filed his claim for permanent total disability benefits under the Act on February 23, 1988.

***2** The administrative law judge found that the exclusion from the Act's coverage contained in Section 2(3)(D) of the Act, 33

U.S.C. § 902(3)(D)(Supp. V 1987), did not apply. The administrative law judge found, however, that claimant was not a maritime employee as defined by Section 2(3) of the Act, 33 U.S.C. § 902(3), and that claimant was not injured on a situs covered under Section 3(a) of the Act, 33 U.S.C. § 903(a). Thus, the administrative law judge dismissed the claim, without addressing the other issues.

On appeal, claimant contends that the administrative law judge erred in not finding him to be a covered maritime employee, as his job involved the regular performance of maritime activity. Claimant also maintains that the administrative law judge's finding that he was not injured on a covered situs is in error. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief in the instant appeal, also arguing that claimant's employment meets the status requirement of Section 2(3) and that the injury occurred on a maritime situs which is covered under Section 3(a). Employer responds, asserting that claimant is excluded from the Act's coverage under Section 2(3)(D). Employer further urges affirmance of the administrative law judge's findings that claimant is not a covered employee under Section 2(3) and that he was not injured on a situs covered under Section 3(a). In his reply to employer's brief, claimant asserts that employer may not raise the issue of Section 2(3)(D) in its response to the Petition for Review, as the administrative law judge found this provision did not apply and employer failed to file a timely cross-appeal of the administrative law judge's decision. Claimant, in addition, has submitted a petition for an attorney's fee for work performed before the Board, to which employer has objected.

I. Status

The first issue presented by this appeal is whether the administrative law judge properly determined that claimant is not an employee who is covered by Section 2(3) of the Act, 33 U.S.C. § 902(3).

Tom Anast, the owner of San Pedro Tomco (employer), also owns the warehouse located at 100 West 1st Street where claimant was injured. At the time of the injury, employer was in the business of delivering consumable stores used on board ships and had an exclusive contract with Drew Chemical Company to receive, warehouse, and deliver Drew's product to its customers. Drew supplied maintenance and cleaning chemicals used aboard ships, as well as equipment such as welding rods, hoses, gloves, masks, goggles, tile, and joining material. Predominantly all of employer's business was based on its contract with Drew, and nearly all of employer's deliveries were to commercial vessels, water taxis, and cruise ships berthed at the Long Beach/San Pedro Harbor and the Los Angeles Harbor.

As employer's sole employee, claimant had numerous responsibilities. He was in charge of maintaining the warehouse, emptying the trash, cleaning the bathrooms, and mopping the floors. When deliveries were made at the warehouse, he received and unloaded the inventory and stored it in the warehouse. Claimant was also responsible for delivering the product to Drew's customers. Claimant testified at the hearing before the administrative law judge that he would make deliveries to commercial vessels three or four times a day and 10 or 15 times a week.[1]

***3** With regard to claimant's activities in making deliveries to these vessels, when claimant arrived at the harbor, he first would park his truck with its flashers on and then contact the dock boss to see where he wanted the material dropped and whether it would be loaded on board with the shoreside crane, the ship's crane, or by hand. Next, claimant would go on board the vessel to locate the chief engineer or the first mate, who would check the invoice against the commodities. Then, the chief engineer or first mate would discuss with the dock boss how the material was to be loaded. If the shoreside crane was used, claimant would take the merchandise off the truck with a forklift and dolly, put it on the dock, and then leave after the invoice was signed. If the ship's crane was used, claimant would help put the merchandise in the net and tie it, and direct the ship's crew to clear the net from the truck. Claimant testified that it was typically necessary for him to hand-carry on board small items, such as boxes of welding rods, gloves, and test tubes, in order to prevent pilferage. At his deposition, claimant testified that this occurred 15 times during his six months of employment.

Claimant also testified that on numerous occassions, the dock boss told him to drive aboard a vessel in order to make a delivery if the ship's crane was tied down and shoreside cranes were not available. Claimant would drive on board and help unload the merchandise at the elevator. He testified that this occurred between zero and two times per week.[2] He also stated that Tom Anast had told him that, if he had to drive the truck on board a vessel, to do it, but not to tell Mr. Anast about it because he was not sure if his insurance covered this activity. Mr. Anast testified that claimant was not authorized to drive the truck on board ships, that claimant never told him about it, and that, if he had, he would have forbidden claimant from doing so. Finally, claimant testified that he occassionally was required to pick up test tubes from the chief engineer and return them to Drew representatives to be analyzed.

As an initial matter, we must consider whether the applicability of Section 2(3)(D) of the Act, 33 U.S.C. § 902(3)(D) (Supp. V 1987), which excludes certain types of workers from the Act's coverage, is properly before us. It is well-settled that the Board generally will not consider issues raised by a respondent who has not filed a cross-appeal. The Board will consider such issues only if the relevant arguments are offered in support of the administrative law judge's final order. See, e.g., Shoemaker v. Schiavone and Sons, Inc., 20 BRBS 214, 217 n.1 (1988); Del Vacchio v. Sun Shipbuilding & Dry Dock Co., 16 BRBS 190, 193 (1984). In the instant case, claimant correctly points out that employer has failed to file a cross-appeal. However, employer's argument in its response brief that claimant is excluded from coverage under Section 2(3)(D) does support the administrative law judge's determination that claimant is not a covered employee under Section 2(3), and her ultimate denial of benefits. Accordingly, we hold that the issue of whether claimant is excluded from the Act's coverage pursuant to Section 2(3)(D) is properly before us.

***4** Added to the Act by the 1984 Amendments, Section 2(3)(D) excludes the following from the meaning of the term "employee":

> individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of [a covered employer] and (iii) are not engaged in work normally performed by employees of that employer under this chapter. . . .

33 U.S.C. § 902(3)(D) (Supp. V 1987) (emphasis added). On appeal, employer contends that claimant was a vendor who brought supplies to ships and therefore should be excluded from coverage by Section 2(3)(D).

The administrative law judge found that employer cited no authority holding that claimant is excluded as a maritime employer/employee under Section 2(3)(D). Her remaining comments, while not completely clear, reflect her belief that this exclusion does not apply in the case at bar. The plain meaning of Section 2(3)(D) excludes from coverage those employees who are employed by suppliers, transporters, or vendors who are temporarily doing business on the premises of a covered employer and are not engaged in work normally performed by employees of the covered employer. While claimant was clearly employed by a supplier, transporter and/or a vendor, he was injured on the premises of Tomco, which in no way involved a temporary business presence and which the administrative law judge found not to be a covered employer. In addition, the evidence of record is unclear as to the status of control of the various premises where claimant made his deliveries. In view of the foregoing and in view of the following determinations in this opinion concerning the absence of both status and situs, we affirm the administrative law judge's findings on this issue.

Section 2(3) of the Act defines an "employee" for purposes of coverage under the Act as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker . . . ." 33 U.S.C. § 902(3). The United States Supreme Court has held that the status requirement is satisfied where a person spends "at least some of [his] time in indisputably longshoring operations." Northeast Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249, 273, 6 BRBS 150, 165 (1977). Truck drivers, "whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation," are not covered. Id., 432 U.S. at 267, 6 BRBS at 161.

The United States Court of Appeals for the Ninth Circuit, in which this case arises, has held that Section 2(3) requires that the employee's job "have a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters.'" Weyerhaeuser Co. v. Gilmore, 528 F.2d 957, 961, 3 BRBS 140, 144 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976). The court has also held that the regular performance of maritime operations by an employee, even though such work occupies less than a "substantial portion" of an employee's time, may satisfy the status requirement of Section 2(3). Schwabenland v. Sanger Boats, 683 F.2d 309, 16 BRBS 78 (CRT) (9th Cir. 1982).

***5** The administrative law judge's decision establishes that the only portion of claimant's work which is potentially covered by the Act involved driving a truck and making deliveries to vessels. In Dorris v. Director, OWCP, 808 F.2d 1362, 19 BRBS 82 (CRT) (9th Cir. 1987), the court held that a truck driver was not a covered maritime employee. There, the claimant's regular duties consisted of driving his truck onto the dock, where containers were placed on the vehicle's chassis, and driving to the consignee's delivery place. He also delivered containers from the consignee's delivery place to the harbor, and on occasion, transported containers between steamship lines located in different harbors. With regard to the latter, the court held that truck drivers transporting cargo are not engaged in longshore work "when the goods are unloaded from a ship and loaded aboard another by other workers." 808 F.2d at 1365, 19 BRBS at 84 (CRT). In reaching its holding in Dorris, the court distinguished Boudloche v. Howard Trucking Co. Inc., 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981),

where a claimant who spent 2.5 to 5 percent of his time loading and unloading cargo at unequipped docks, where he had to board vessels, was found to be a covered maritime employee; claimant also was expected to assist in the loading and unloading process at fully-equipped docks to develop good will for his employer. The Ninth Circuit noted that, unlike Mr. Boudloche, Mr. Dorris was neither expected to nor assigned to perform longshoring work. Id. 808 F.2d at 1365, 19 BRBS at 84 (CRT).

We hold that the instant case is similar to Dorris. The administrative law judge in this case found that when claimant performed such activities as hand-loading merchandise onto commercial vessels and driving his truck on board to make deliveries, claimant was engaged in covered maritime activity. The administrative law judge concluded, however, that these activities were "episodic" and not a regular part of claimant's duties and did not constitute some time regularly spent in indisputably longshoring operations. See Caputo, supra. See also the recent case of Sea-Land Service, Inc. v. Rock, 953 F.2d 56, 67 (3d Cir. 1992), in which the court referred to certain occasional activities of the claimant that might have involved status but held that, "We cannot provide coverage for such infrequent activity undertaken by the employee." This finding is supported by substantial evidence. Claimant's main responsibilities in the instant case were to maintain the warehouse and to deliver Drew Chemical's merchandise to the docks, where it would normally be loaded onto the vessels by other workers. For example, claimant testified that during his six months of employment, he hand-carried items on board vessels only 15 times. Hand carrying items constitutes delivery, not loading. He further stated that he drove his truck on board vessels an average of zero to two times a week; however, Mr. Anast testified that claimant did not have authorization to drive the truck on board vessels. Clearly, the time claimant spent personally loading merchandise onto vessels was minimal compared to his other responsibilities, and incidental to his employment. As in Dorris, claimant was neither expected to, nor assigned to, perform longshoring work. Furthermore, in Dorris, where the administrative law judge found that if Dorris engaged in any longshoring type of work it was only on an episodic basis, the court found that when substantial evidence supports such a finding of fact, that finding will not be disturbed on review. In the case at bar, substantial evidence supports the administrative law judge's status determination. Petitioner, Felt, was in fact an employee of a vendor, a truck driver and warehouse employee. Accordingly, we hereby affirm the administrative law judge's finding that claimant is not a maritime employee under Section 2(3) of the Act.[3]

II. Situs

***6** Employer's warehouse was located approximately 200 to 250 yards from the Los Angeles Main Channel and was approximately a five-minute drive from the Long Beach/San Pedro Harbor and the Los Angeles Harbor. Mr. Anast inherited this property from his father, who operated a ship chandlering business. Part of employer's warehouse was occupied by an antique shop; previously, that space was used by a patio furniture company, for which claimant worked immediately before coming to work for employer. Numerous other non-maritime enterprises were located within the surrounding area. However, Mr. Anast testified that there were two other maritime businesses in the immediate area and that three of his competitors were within a few blocks of his site. He also testified that he could still maintain his business if he was 20 to 30 minutes away from where he was located, but that his present location was "very convenient." See Transcript of the Hearing at 249. Based on these facts, the administrative law judge held that claimant's injury at employer's warehouse did not occur on a covered situs.

Section 3(a) of the Act provides, in pertinent part, that:

. . . compensation shall be payable under this chapter . . . 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).

33 U.S.C. § 903(a) (Supp. V 1987) (emphasis added). The Ninth Circuit has held that the phrase "adjoining area" should be read to describe a site which has a functional relationship with maritime commerce. Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). Factors to be considered in determining whether a site is an "adjoining area" under this test include: 1) the particular suitability of the site for the maritime uses referred to in the Act; 2) whether adjoining properties are devoted primarily to uses in maritime commerce; 3) the proximity of the site to the waterway; and 4) whether the site is as close to the waterway as is feasible given all the circumstances of the case. Id., 568 F.2d at 141, 7 BRBS at 411. In Davis v. Doran Company of California, 20 BRBS 121 (1987), aff'd mem., 22 BRBS 3 (CRT) (4th Cir. 1989), the Board applied the analysis set forth in Brady-Hamilton Stevedore Co. v. Herron, supra, and other cases and held that the place of business of the employer, engaged in the business of repairing marine propellers, did not meet the situs test. The facility did not front on water, was one mile away by air and two miles by street from water, and was in an area not essentially maritime as indicated by a bottling company, a linen service, an autobody shop, a public park, office buildings and residential houses. The Board noted that the site was not chosen for its proximity to navigable waters and that such was merely fortuitous. The decision of the Board was affirmed by the Court of Appeals for the Fourth Circuit on January 4, 1989, in an unpublished

opinion. See also Anastasio v. A.G. Ship Maintenance, 24 BRBS 6, 10 (1990).

***7** Applying the "functional relationship" criteria, the administrative law judge in this case found that the warehouse at 100 West 1st Street, where claimant was injured, was not an "adjoining area." She noted that it was within 250 feet[4] of a waterway, but found that neither the adjoining properties nor the character of the surrounding area were primarily devoted to maritime commerce use, and that businesses similar to employer's were located farther inland. In addition, she stated that employer's business site was selected not for its proximity and closeness to the waterway, but because the property was inherited. She found that although the site of employer's warehouse was well-suited for its maritime business, it was not particularly suitable for maritime uses.

On appeal, claimant and the Director argue that employer's warehouse is a covered situs under the factors set forth in Herron. We disagree. While employer's site was in close proximity to a waterway, the location was not chosen out of maritime concerns but simply because Mr. Anast inherited the property from his father. See Palma v. California Cartage Co., 18 BRBS 119 (1986). Moreover, the properties surrounding employer's location were not devoted primarily to uses in maritime commerce. These enterprises included retail shops, a restaurant, a motel, a church, a car dealership, a grocery store, a housing project, a donut shop, a UPS station, and a post office. Thus, inasmuch as two critical elements in determining whether employer's location was an "adjoining area," and thus a maritime situs under the Act, have not been satisfied, we affirm the administrative law judge's finding that claimant's injury did not occur on a situs covered under Section 3(a) of the Act.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.[5]

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

I concur:

JAMES F. BROWN
Administrative Appeals Judge

***8** STAGE, Chief Administrative Appeals Judge, concurring and dissenting:

While I concur with my colleagues that claimant is not excluded from coverage under Section 2(3)(D) of the Act, I disagree with their affirmance of the administrative law judge's findings that claimant was not a maritime employee covered under Section 2(3) of the Act, and that his injury did not occur upon a covered maritime situs under Section 3(a).

With regard to the issue of status, I believe the instant case is distinguishable from Dorris v. Director, OWCP, 808 F.2d 1362, 19 BRBS 82 (CRT) (9th Cir. 1987), and is in fact similar to Boudloche v. Howard Trucking Co., Inc., 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981). The administrative law judge found that claimant performed some loading activities. In particular, she found that claimant was required to hand-carry material onto commercial vessels and that this was covered activity. She also found that claimant regularly went on board to locate needed personnel to make the deliveries and that this too was covered activity. Moreover, the administrative law judge credited claimant's testimony that when, on occasion, the ship's crane was used to unload his truck, he participated in moving merchandise from the truck to the ship. She stated that this work involved loading the vessel, which would constitute covered maritime employment, and that it was "very unclear as to how often the claimant would be so involved" in this type of work. Decision and Order at 18. Nonetheless, the administrative law judge clearly identified at least three functions performed by claimant which would constitute covered employment under the Act.

Despite this identification, the administrative law judge held that claimant was not a covered employee under Section 2(3) because such work was "episodic" and not a regular or sufficient part of his overall employment activities.[1] In so holding, the administrative law judge did not follow the Supreme Court's decision that a claimant is covered if he spends "some" of his time in covered employment. See Northeast Marine Terminal Co. Inc. v. Caputo, 432 U.S. 249, 6 BRBS 150 (1977). It is clear that this decision does not require that a claimant have spent a substantial amount of his time in covered work or that he

demonstrate with specificity exactly how much time was spent in such activity. See Levins v. Benefits Review Board, United States Department of Labor, 724 F.2d 4, 16 BRBS 24 (CRT) (1st Cir.1984); Schwabenland v. Sanger Boats, 683 F.2d 309, 16 BRBS 78 (CRT) (9th Cir.1982). Thus, the administrative law judge's conclusion that it is not clear exactly how much time claimant was employed in covered work is not dispositive.

It is clear from the administrative law judge's findings in this case that claimant spent more than a de minimis amount of time in covered activity. While the administrative law judge noted the discrepancy between claimant's deposition and hearing testimony regarding the frequency of his deliveries to commercial vessels, she did not discredit his hearing testimony that he made these deliveries three or four times a day and that he drove on board ships zero to two times a week, and she never discredited his deposition testimony that he hand-delivered items onto ships approximately 15 times during his six months of employment. The administrative law judge stated that claimant was unresponsive and unclear when asked whether carrying items on board was typical. However, Mr. Anast corroborated claimant's testimony that he regularly hand-carried items onto commercial vessels. Thus, the undisputed evidence of record indicates that the time claimant spent in covered maritime activity was greater than the 2.5 to 5 percent spent in Boudloche.

***9** Moreover, I would hold that the administrative law judge erred in her analysis regarding the regularity of claimant's work. The administrative law judge placed significance on evidence that claimant worked as necessary to perform his job. Mr. Anast testified that claimant "worked the hours until we finished with our work," and stated: "We have some deliveries one day and another day we may not have any deliveries. The following day we might have four or five deliveries. We have deliveries on Saturday and Sundays. We have deliveries on Christmas Day." Transcript of the Hearing at 250.[2] The fact that claimant may have performed delivery duties at varying times does not detract from this work as a regular part of his duties. The requirement that a job be a regular part of a claimant's overall work does not mean that it must be done every day at a specific time. In reversing the Board in Levins, the United States Court of Appeals for the First Circuit addressed coverage of an employee similar to claimant. In Levins, claimant worked as a book clerk, which involved clerical duties, but was required to work as a runner when ships weighing less than 300 tons came in, and to go to the container yard to resolve some discrepancies. Reversing the Board's characterization of this work as "non-routine and irregular," the court stated that the Board had erred in its determination regarding claimant's "regularly assigned duties as a whole," and that these tasks were not "discretionary or extraordinary occurrences, but rather a regular portion of the overall tasks to which petitioner could have been assigned as a matter of course." 724 F.2d at 9, 16 BRBS at 33 (CRT). Similarly, the nature of claimant's job in the instant case required that, upon occasion, he personally hand-carry deliveries aboard ship and perform the other typically longshoring duties found by the administrative law judge. Such work was not extraordinary, but a part of his normal duties.

As the administrative law judge found that claimant performed duties during his deliveries which were clearly maritime and as this work occupied "at least some of [his] time," I would hold that claimant was a maritime employee covered under Section 2(3). Further, although, I agree with my colleagues that claimant is not excluded from coverage by Section 2(3)(D), my decision rests on a different rationale. Clearly, claimant was employed by a supplier or vendor and did temporarily perform work on the premises of covered employers when he made deliveries to ships, thus satisfying Section 2(3)(D)(i) and (ii). When doing so, however, he was engaged in loading activities of a type normally performed by that employer's employees. Thus, as he did not satisfy the third criterion of the exclusion, I would affirm the finding that claimant is not excluded by Section 2(3)(D).

With regard to the issue of situs, I disagree with the majority's holding that two critical elements in determining whether employer's location was an "adjoining area," under the standard set forth in Brady-Hamilton Stevedore Co. v. Herron, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978), have not been met. Employer's site, which is a mere 250 yards from the Main Channel, Port of Los Angeles, was as close to the waterway as is feasible, and contrary to the administrative law judge's finding, this site was suitable for maritime uses. Although Mr. Anast testified that he could be out of the harbor area and still maintain his business, he also stated that the location was convenient for his business and that 95 percent of claimant's deliveries were made to ships in San Pedro, Wilmington, and Long Beach, and to water taxis in San Pedro and Long Beach. He further stated that two of his competitors were about four blocks away, and that a third competitor was about eight blocks away. Claimant testified that the San Pedro Harbor in Long Beach was only a five-minute drive and that employer's facility was across the street from a cruise line terminal and yard. Moreover, while Mr. Anast inherited employer's building from his father, the property had been partially used in a ship chandlering business, i.e., for the purpose of delivering supplies to ships, since his father owned it, even during a six-year period when employer was out of business. Thus, the relevant evidence demonstrates that this location facilitated employer's operations because of its proximity to the San Pedro Harbor.[3] Given these facts, it is apparent that a functional relationship existed between the situs and navigable waters.

***10** In addition, in this case many of the properties adjoining employer's warehouse were primarily devoted to uses in maritime commerce. Mr. Anast stated that there were many companies in Long Beach/San Pedro which delivered items to ships. Although claimant stated that the surrounding area consisted of a "mixed bag" of businesses, a map of the area admitted into evidence indicates that located on the other side of Harbor Boulevard from employer's warehouse and adjacent to the water were the Catalina Air and Sea Terminal, the Los Angeles World Cruise Terminal, and the Los Angeles Maritime Museum. On the other side of the Los Angeles Main Channel were the Overseas Shipping Company Terminal, Marine Terminals Corporation, and the Evergreen Marine Corporation Terminal. It is clear that this area is similar to that in Herron, supra, in which the Ninth Circuit found that a gear locker located 2,600 feet from the Columbia River and 2,050 feet outside of the entrance gate of the Port of Longview was a covered situs under the Act. Accord Texports Stevedore Co. v. Winchester, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980), cert. denied, 452 U.S. 905 (1981). In light of these considerations, I would reverse the administrative law judge's finding that claimant's injury did not occur upon a maritime situs under Section 3(a) of the Act.

In summary, in contrast to my colleagues, I would reverse the administrative law judge's finding that claimant is not covered by the Act and would remand for consideration of the merits of the claim.

BETTY J. STAGE, Chief
Administrative Appeals Judge

Footnotes

[1] At claimant's deposition, he testified that he made deliveries to commercial ships three or four times a week. Deposition at 45. At the hearing, however, he stated that he was confused while being deposed and really meant three or four times a day. Transcript of the Hearing at 67.

[2] At claimant's deposition, he testified that it occurred approximately two out of every 10 deliveries.

[3] In addressing the issue of status, claimant argues that he should be covered under the Act because if his injury had occurred upon navigable waters, he would be subject to the Act's jurisdiction. In Director, OWCP v. Perini North River Associates, 459 U.S. 297, 15 BRBS 62 (CRT) (1983), the Supreme Court held that workers traditionally covered by the Act prior to the 1972 Amendments to the Act, by virtue of an injury occurring while on navigable waters, remain covered by the Act following the 1972 Amendments. Claimant also relies on the Supreme Court's explanation in Caputo, supra, that Congress intended to resolve the problem existing under the pre-1972 Act regarding employees who would "walk in and out of coverage" by providing continuous coverage to workers who spend at least some of their time in longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity. Claimant argues that since a worker's status follows him ashore, he has met the status requirement pursuant to Caputo. However, since claimant was not, in fact, injured upon navigable waters, this argument is without merit.

[4] The administrative law judge stated "250 feet" on page 22 of her Decision and Order, but in all probability meant 250 yards, as stated on page 4 of the Decision.

[5] As the administrative law judge's denial of benefits is affirmed, we need not address claimant's attorney's fee request, since claimant's attorney is not entitled to a fee for work performed before the Board.

1 The administrative law judge also noted the conflict between claimant's testimony and that of Mr. Anast regarding whether claimant drove on board vessels to deliver merchandise, and held that resolution of this conflict was not determinative since this activity was similarly episodic and not a regular part of claimant's duties.

2 To the extent that the administrative law judge suggested that claimant may not have been a full-time employee, it appears that she mischaracterized Mr. Anast's testimony. While claimant's hours might have been irregular, the relevant evidence of record establishes that he was a full-time employee.

3 I believe that the instant case is distinguishable from Palma v. California Cartage Co., 18 BRBS 119 (1986), cited by my colleagues in support of their holding that the situs requirement is not met in this case. There, the Board affirmed the administrative law judge's finding that the employer's site was not particularly suited to or primarily used for maritime commerce, was not as close as was feasible to the Los Angeles Harbor, and that a favorable lease, rather than maritime concerns, dictated employer's choice of location. In that case, the employer was located 1.3 miles from the nearest navigable waters, and approximately five to eight miles from both the Los Angeles and Long Beach port facilities, in a highly industrialized area. In the instant case, the proximity of employer's warehouse to the San Pedro Harbor, and the fact that competitors were nearby, demonstrate that employer's location was based on

maritime concerns.

25 BRBS 362 (DOL Ben.Rev.Bd.), 1992 WL 105815