BRB No. 11-0130

IVAN RAMOS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONTAINER MAINTENANCE OF FLORIDA	)	DATE ISSUED: 10/18/2011
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and the Order on Reconsideration of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Gregg J. Anderson (Camerlengo Law Group, P.L.), Jacksonville, Florida, for claimant.

Michael C. Crumpler, Jacksonville, Florida, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and the Order on Reconsideration (2008-LHC-1444) of Administrative Law Judge Stuart A. Levin 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant works for employer as a dual mechanic, repairing and maintaining containers and chassis brought to employer's facility by shipping companies. Claimant injured his left wrist on August 15, 2007, when he was closing a container door while working at employer's Alta Drive facility ("The Depot") in Jacksonville, Florida.[1] Employer paid claimant benefits under the Florida workers' compensation statute; claimant filed a claim seeking benefits under the Act. Employer controverted the claim on the grounds that claimant was neither a maritime employee nor was he injured on a maritime situs.

With regard to the status element, 33 U.S.C. §902(3), the administrative law judge found that claimant's work on chassis and containers from Jacksonville area facilities is "maritime employment."[2] Decision and Order at 20-23. With regard to the situs element, 33 U.S.C. §903(a), the administrative law judge applied the functional and geographical factors, *see Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978), and concluded that: 1) linear distance from navigable waters is insufficient, alone, to deny coverage; 2) the property surrounding the Depot is mixed-use and none is used for maritime purposes; 3) the Depot is as close as feasible to navigable water and to the port operations; and 4) the Depot's work on containers and chassis from the Jacksonville area was functionally related to the maritime work at the Jacksonville ports. Decision and Order at 27-37. Thus, the administrative law judge found that claimant was injured on a covered situs. Consequently, the administrative law judge also found that claimant's injury is covered by the Act. On reconsideration, the administrative law judge awarded claimant temporary total and permanent partial disability benefits pursuant to the parties' stipulations.

[1]Employer has operations at four separate facilities in the Jacksonville area: APM Terminals on Blount Island on the St. Johns River, "Talleyrand" on Talleyrand Avenue, "BTT Yard" at Bridge Terminal Transport on Eastport Road, and the "Depot" on Alta Drive. These facilities provide places for shipping companies to have their chassis and containers stored and/or repaired while waiting to be used in commerce. At the time of the hearing, claimant was working at BTT.

[2]The administrative law judge found that the Section 20(a), 33 U.S.C. §920(a), presumption was rebutted such that work on containers and chassis that traveled over the roads from greater distances, such as Charleston and Savannah, was not maritime.

Employer appeals the administrative law judge's decision, contending the administrative law judge erred in applying the Section 20(a) presumption to the coverage issues and that claimant has not satisfied either the status or situs element.[3] Claimant responds, urging affirmance of the award of benefits.

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or that it occurred on a landward area covered by Section 3(a), and that his work is maritime in nature pursuant to Section 2(3) and is not specifically excluded by any provision in the Act. 33 U.S.C. §§902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Thus, in order to demonstrate that coverage exists, a claimant must separately satisfy both the "situs" and the "status" requirements of the Act. *Cunningham v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42(CRT) (1st Cir. 2004); *S.W. [Wallace] v. Atlantic Container Service*, 43 BRBS 118 (2009); *Stratton v. Weedon Engineering Co*, 35 BRBS 1 (2001) (*en banc*).

Status

Employer contends the administrative law judge erred in finding that claimant is a maritime employee as his work was performed on containers and chassis that were used in overland transportation, and any work he may have performed on containers and chassis from local ports, if that work is maritime work, was episodic. Section 2(3) of the Act provides:

[3]We agree with employer that the administrative law judge erred in applying Section 20(a) to the coverage issues as the facts are not disputed and this case involves legal issues. Section 20(a) does not apply to the legal issues involved with coverage. *Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied*, 525 U.S. 981 (1998); *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 4 BRBS 156 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Stockman v. John T. Clark & Son of Boston, Inc*., 539 F.2d 264, 4 BRBS 304 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); *Hough v. Vimas Painting Co., Inc.*, 45 BRBS 9 (2011); *Stone v. Ingalls Shipbuilding, Inc*., 30 BRBS 209 (1996); *George v. Lucas Marine Constr.*, 28 BRBS 230 (1994), *aff'd mem. sub nom. George v. Director*, OWCP, 86 F.3d 1162 (9th Cir. 1996) (table); *see Bowman v. Riceland Foods*, 13 BRBS 747 (1981).

> 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. . . .

33 U.S.C. §902(3). A claimant satisfies the "status" requirement if he is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). To satisfy this requirement, he need only "spend at least some of [his] time in indisputably [covered] operations." *Caputo*, 432 U.S. at 273, 6 BRBS at 165; *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). Although an employee is covered if some portion of his activities constitutes covered employment, those activities must be more than momentary or incidental to maritime work. *Id.*; *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990).

Claimant's duties at Alta Drive involved maintaining and repairing chassis and containers that are used by ship lines in both maritime transportation and overland transportation. The administrative law judge credited testimony that the containers at the Alta Drive facility come from both distant and local ports by trucks, and he determined that work on the "local" containers constitutes maritime work whereas work on the containers from Savannah and Charleston does not.[4] He found that claimant's work on the local containers was not momentary or episodic but was a regular portion of his assigned work. Decision and Order at 34-36; Tr. at 154, 176.

The United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, has held that container repair is essential to the containers' continued use, is integral to the loading/unloading process and, consequently, is covered work. *Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990). As claimant's regular work involved keeping the containers in good repair for use in maritime commerce, as well as overland transportation, his regular work as a container and chassis mechanic satisfies the status requirement. *Id.*; *Arjona v. Interport Maintenance Co., Inc.*, 31 BRBS 86 (1997). Accordingly, we affirm the administrative law judge's finding that claimant was a maritime employee pursuant to Section 2(3) at the time of his injury.

[4]The administrative law judge applied the Section 20(a) presumption to this issue but provided no discussion as to why he made this legal distinction. However, any error is harmless in this instance.

Situs

Employer contends the administrative law judge erred in finding that the Alta Drive facility is a covered situs. Section 3(a) of the Act states:

> Except as otherwise provided in this section, compensation 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).

33 U.S.C. §903(a). To be considered a covered situs, a site must have a maritime nexus, but it need not be used exclusively or primarily for maritime purposes. *See Winchester*, 632 F.2d 504, 12 BRBS 719; *Melerine v. Harbor Constr. Co.*, 26 BRBS 197 (1992). An area can be considered an "adjoining area" within the meaning of the Act if it is in the vicinity of navigable waters, or in a neighboring area, and it is customarily used for maritime activity. *Winchester*, 632 F.2d 504, 12 BRBS 719; *see Herron*, 568 F.2d 137, 7 BRBS 409.[5] The United States Court of Appeals for the Fifth Circuit, and thus the Eleventh Circuit, takes a broad view of "adjoining area," refusing to restrict it by fence lines or other boundaries; however, the area must have a functional nexus with maritime activities and a geographical nexus with navigable waters.[6] *Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002); *Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31 BRBS 199(CRT) (5th Cir. 1998); *Winchester*, 632 F.2d 504, 12 BRBS 719; *Stratton*, 35 BRBS 1. The geographical and the functional nexus must be with the

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[5]*Herron*, 568 F.2d at 141, 7 BRBS at 411, states:

> Consideration should be given to the following factors, among others, in determining whether or not a site is an "adjoining area" under Section 903(a): the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case.

[6]The Eleventh Circuit adopted all Fifth Circuit decisions prior to October 1, 1981. Those decisions remain binding precedent unless specifically overruled by the Eleventh Circuit. *Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002); *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*).

same body of water. *Cunningham v. Bath Iron Works Corp.*, 37 BRBS 76 (2003) (Hall, J., concurring and dissenting), *aff'd sub nom. Cunningham v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42(CRT) (1st Cir. 2004).

In addressing the situs requirement, the administrative law judge found that the Alta Drive facility is over three miles from the Blount Island facility and that the neighboring properties were of mixed use and none was maritime; however, he stated that, alone, neither of these factors is determinative. Decision and Order at 28-29. The administrative law judge also addressed whether the property was as close as feasible to navigable waters. After summarizing Mr. Nelson's real estate search in the Jacksonville area,[7] the administrative law judge concluded that the Alta Drive facility "was as close to the maritime operations at Blount Island as feasible considering price, suitability, financial constraints, and Employer's site demands." Decision and Order at 30. Although the administrative law judge found that servicing its out-of-town customers was one of employer's considerations in purchasing the Alta Drive property, he rejected employer's assertion that it did not take the future expansion of the Jacksonville ports into consideration. Rather, he relied on employer's knowledge of the then-under-construction JaxPort facility on Dames Point, known as "TraPac," and concluded that employer positioned itself to obtain contracts with the shipping lines at TraPac when it opened.[8] *Id.* He factored this "motive" into his feasibility assessment, and he determined that the development at Dames Point established that the ports were expanding in the direction of the Alta Drive facility, and TraPac had to have been a consideration of employer's. Decision and Order at 30-31. The administrative law judge concluded that employer selected the property for its "size, price, improvements, and location in proximity to maritime activity. No property was available closer to Blount Island that met the company's needs at a price Employer was willing to pay." Decision and Order at 31. Thus, the Depot was "as close as feasible" to navigable waters and the port facilities that

[7]The administrative law judge found that employer focused on four quadrants in searching for a viable property for its new facility. The testimony was that most of the land was unavailable because it was owned by JaxPort and also may have been marshland or because it was owned by others. The land that was available, even the property that was closer to Blount Island, was too small, too expensive, or would need too much additional money and work to make it business-ready. Tr. at 220-222.

[8]TraPac is on Dames Point which abuts the St. Johns River, and its gate is just over one mile from the Depot gate. Cl. Ex. 9 at 37. Although a shipping company had a contract with JaxPort in place and construction on TraPac had begun before employer purchased the Alta Drive property, Decision and Order at 4-5, 30; Cl. Ex. 14, TraPac did not open for business until 2009. Thus, employer did not have any business with TraPac at the time of claimant's injury.

existed in 2007, and the property was particularly well-suited for container repair and storage.[9] Decision and Order at 30-31. In light of the property's being "as close as feasible" to the Blount Island facility and in the direction of port expansion, the administrative law judge found that the Alta Drive facility satisfied the geographic requirement of the situs inquiry. Decision and Order at 32. The administrative law judge also found that the facility had a functional nexus with the ports on navigable waters because maritime containers are repaired at the Depot.

The Depot is not an enumerated situs and therefore must be an "adjoining area" within the meaning of Section 3(a) in order for claimant's injury to be covered. The Alta Drive facility is not adjacent to any water; the inquiry, therefore, concerns whether it is within the "vicinity" of navigable water, or in a neighboring area, and customarily used for maritime activities. As the administrative law judge found, the Depot is 3.2 miles across a bridge and inland from the gate of the Blount Island facility, the nearest deep-water port at the time of claimant's injury, and it is 1.25 miles, as the crow flies, from the navigable St. Johns River. Emp. Ex. 13; Tr. at 140-142. The closest body of water to the facility is the Dunn Creek. Dunn Creek was described by employer's investigator:

> Examination of commercially available maritime charts disclosed Dunn Creek maintains a depth of 3 to 5 feet, and is deepest at the fixed bridge at Hecksher Drive, at a depth of 7 feet. The fixed bridge at Hecksher Drive, governing all maritime traffic on Dunn Creek, is listed with a horizontal clearance of 30 feet and a vertical clearance of 8 feet. Physical examination of Dunn Creek by boat, from the fixed bridge at Hecksher Drive and to just north of Terrapin Creek, disclosed no apparent commercial access to the creek.

Emp. Ex. 13 and exhibits (internal citations omitted). Pursuant to Section 3(a), Dunn Creek is not navigable near the Alta Drive facility. *See Cunningham*, 377 F.3d 98, 38 BRBS 42(CRT); *George v. Lucas Marine Constr.*, 28 BRBS 230 (1994), *aff'd mem. sub nom. George v. Director,* OWCP, 86 F.3d 1162 (9th Cir. 1996) (table). Consequently, any geographic nexus with Dunn Creek is irrelevant. *Id.* In order to be a covered site, the Alta Drive facility must have a geographic connection with the Blount Island terminal on the St. Johns River.

[9]The administrative law judge specifically distinguished between "as close as possible" and "as close as feasible," stating that feasibility included many factors businesses consider in purchasing property. Decision and Order at 31 n.17, n.18.

As stated previously, the administrative law judge found that the Alta Drive facility is over three miles from, but is as close as feasible to, the Blount Island terminal, and it is in the direction of port expansion.[10] Based on the undisputed facts of record, the administrative law judge's findings, and Board precedent, we conclude that the administrative law judge's finding of coverage cannot be affirmed, as to be "as close as feasible" is, alone, insufficient to mandate the conclusion that a facility is an adjoining area under the Act. *Cunningham*, 377 F.3d 98, 38 BRBS 42(CRT). A property that is "as close as feasible" still must lie within the general geographic perimeter of sites involved in maritime commerce, *id.*, and the record does not support the administrative law judge's finding that claimant was injured on a covered situs as a matter of law.

Substantial evidence supports the administrative law judge's findings that no constructing, repairing, unloading, or loading of vessels occurs at Alta Drive, no railway or conveyor belt connects it with Blount Island or any deep-water port, and the Depot is not located in an area of maritime commerce as it is surrounded by heavy-industrial and mixed-use properties, as well as residences.[11] Decision and Order at 26-29; Emp. Exs. 11, 13; Tr. at 124, 129-130, 140-143, 167-168. Although he concluded that, individually, they lack determinative force, the administrative law judge erred in not giving any weight to these factors when assessing whether the Alta Drive facility is within the vicinity of the St. Johns River and the Blount Island facility.

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[10]The administrative law judge properly stated that construction of TraPac at Dames Point did not render the Alta Drive property a maritime status in 2007. Decision and Order at 30-31 (citing *Tarver v. Bo-Mac Contractors, Inc.*, 37 BRBS 120 (2003), *aff'd*, 384 F.3d 180, 38 BRBS 71(CRT) (5th Cir. 2004), *cert. denied*, 544 U.S. 948 (2005); *Boomtown Belle Casino v. Bazor*, 313 F.2d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003); *Nelson v. Guy F. Atkinson Constr. Co.*, 29 BRBS 39 (1995), *aff'd mem. sub nom. Nelson v. Director, OWCP*, 101 F.3d 706 (9th Cir. 1996) (table)). However, although he acknowledged that situs must be determined as of the time of the injury, his conclusion appears to be skewed by his determination that the property's proximity with TraPac was a factor in determining that the Alta Drive facility was in an area of port expansion. While the administrative law judge may have made a reasonable inference in finding that future business with TraPac was considered in making employer's business decision, TraPac was not operational at the time employer purchased the property or at the time of claimant's injury. Thus, there was no geographic nexus with TraPac on the St. Johns River at the time of claimant's injury.

[11]For example, other Alta Drive businesses include a self-storage facility, a fast-food restaurant, a road construction company, a hotel, a concrete plant, and a trucking company. Emp. Ex. 13. Prior to employer's purchase, the Depot property was used by an automobile parts recycling and storage company. Emp. Ex. 13; Tr. at 170.

Rather, the administrative law judge gave conclusive weight to his finding that the property is as close as feasible to Blount Island. He found that "the Depot was as close to the maritime operations at Blount Island as feasible considering price, suitability, financial constraints, and Employer's site demands." Decision and Order at 30. The record confirms these were indeed factors in Mr. Nelson's search. Moreover, while Mr. Nelson acknowledged that it would have been "one of [their] ideas" to consider the distance from Blount Island, he also repeatedly stated that the lot was chosen for its size, cost, and business-readiness, that the proximity to Blount Island was not important as the container trucks arrive over land, that employer's operations in Jacksonville were independent of each other, and that the Depot was not needed for expansion of its operations or to accommodate overflow from any of its other facilities. Cl. Ex. 9; Tr. at 163-169, 171-172, 217-218. Mr. Nelson also stated that parcels of land closer to Blount Island cost more per acre, were not large enough, and were not ready for immediate occupancy and use, requiring additional capital expenditures to become business-ready. Cl. Ex. 9 at 33-34, 36; Tr. at 163-165, 173-174, 217. Despite Mr. Nelson's denial, the administrative law judge inferred that employer's motive for selecting the site was, in addition to servicing its out-of-town customers, to be in a position to provide service to shipping companies using local ports, including Blount Island and the future TraPac terminal. Decision and Order at 30.

With the exception of the above inference, the reasons for selecting the Alta Drive property are general business-related reasons. Where a property was chosen for economic reasons, was not surrounded by maritime pursuits, was located inland from the waterway, and was found to have not been particularly suitable for maritime commerce, the Board has affirmed the finding that it was not an adjoining area under Section 3(a). *Arjona v. Interport Maintenance Co., Inc.*, 34 BRBS 15 (2000); *Gonzalez v. Ocean Voyage Ship Repair*, 26 BRBS 12 (1992); *Lasofsky v. Arthur J. Tickle Engineering Works, Inc.*, 20 BRBS 58 (1987), *aff'd mem.*, 853 F.2d 919 (3d Cir. 1988); *Bennett v. Matson Terminals, Inc.*, 14 BRBS 526 (1981), *aff'd mem. sub nom. Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982).[12]

In *Lasofsky*, a mechanic was injured while working at a container and chassis repair facility. The injury occurred at the employer's Elizabeth, New Jersey, site, which was located in a diversified industrial area approximately two to three miles from the waterfront in Port Newark and one to one and one-half miles from the Sealand Marine Terminal on the Elizabeth Channel. The nearby industrial employers included a scrap metal company, several trucking companies, a sand company, and a ship-repair company.

[12]Although the Board affirmed the findings of the administrative law judges in those cases, the facts are substantially similar here such that the same result is warranted.

Prior to the employer's purchase, the property was used by a manufacturer of wooden pallets and cinder blocks. *Lasofsky*, 20 BRBS at 59. The administrative law judge found that the facility was not an adjoining area because it was located two to three miles from the water in an area that was not particularly suitable for maritime commerce and was not surrounded by businesses devoted to maritime pursuits and that the employer had chosen the site for economic reasons and had not sought to find a site closer to the water because its concerns were trucking costs. The Board affirmed the administrative law judge's finding that the claimant's injury did not occur on a covered situs, as it was supported by substantial evidence. *Id.* at 61; *see also Arjona*, 34 BRBS at 18-19 (Board affirmed on lack of functional nexus but also affirmed administrative law judge's finding that the employer's 70-acre parcel within the Conrail yard and bound on the north, south and east by Conrail tracks, and on the west by an interstate highway was separate and distinct geographically from Port Newark despite being only one mile away); *Bennett*, 14 BRBS 526 (facility 12 miles from the Oakland Terminal with which it had a functional nexus, was chosen for economic reasons, was not located in an area primarily devoted to maritime pursuits, and was not located as close as feasible to Oakland Terminal; no geographic nexus).

In *Cunningham*, 37 BRBS 76, the claimant worked as a pipefitter at Bath Iron Works' East Brunswick Manufacturing Facility (EBMF), which is located in a mixed-use area 1,400 feet from the New Meadows River in Brunswick, Maine, and four to five miles from the main shipyard on the Kennebec River in Bath, Maine. Applying *Winchester* and *Herron*, and considering the decisions of the United States Court of Appeals for the First Circuit in *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 12 BRBS 808 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981), and *Stockman v. John T. Clark & Son*, 539 F.2d 264, 4 BRBS 304 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977), the Board held that EBMF is not an "adjoining area" within the meaning of Section 3(a). Specifically, EBMF had a geographical relationship with the New Meadows River but had no functional relationship with that river, and it had a functional relationship with the shipyard on the Kennebec River, but it was "not within the perimeter of a general maritime area around the Kennebec River or the main shipyard[,]" so it had no geographical relationship with the Kennebec River. *Cunningham*, 37 BRBS at 82, 84. As a site must have a functional and a geographical nexus with the same body of navigable water, the Board held that EBMF was not a covered situs. *Id.* at 84-85.

The United States Court of Appeals for the First Circuit affirmed the Board's decision. It "assumed without deciding" that the *Herron* approach is the correct one and agreed with the Board that EBMF is not a covered situs, as EBMF and the main shipyard are two separate facilities that do not exist in a common geographical area. The court explicitly stated that, while the Supreme Court advises a broad construction of the Act,

"we are not at liberty to ignore entirely the concept of 'adjoining.'"[13] *Cunningham*, 377 F.3d at 106, 38 BRBS at 47(CRT). The *Cunningham* court declined to require all intervening property to be maritime in nature, and it noted the suitability of the EBMF site for maritime purposes and the unavailability of sites closer to the waterfront – all factors that arguably favored coverage. However, the First Circuit stated:

> even under the flexible *Herron* test, for an area to 'adjoin' navigable waters, there must be some sense of a largely continuous neighborhood of maritime uses, some shape of a perimeter – perhaps broken in spots or irregular in form – that extends out from the water's edge.

Id., 377 F.3d at 107, 38 BRBS at 47(CRT). Thus, "no matter how much maritime activity takes place at EBMF, and how many additional [Bath Iron Works] buildings surround it, the substantial expanse of unrelated land uses between the main shipyard and East Brunswick forecloses a finding that the one 'adjoins' the other." *Id.*, 377 F.3d at 106-107, 38 BRBS at 47(CRT). Additionally, the court agreed with the Board that situs cannot be satisfied by establishing a functional relationship with one body of water and a geographical relationship with another. *Id.*, 377 F.3d at 109-110, 38 BRBS 49(CRT).

As in *Cunningham*, the site of injury in this case is several miles from the port, separated by bridges, highways, residences and businesses, it is inland, and it is surrounded by mixed-use/non-maritime businesses and properties. Even taking into account the motive for the purchase rationally inferred by the administrative law judge, the Alta Drive property was purchased for general business reasons in an area not devoted to maritime pursuits, and other parcels of land closer to Blount Island were rejected. As the facts do not support the administrative law judge's conclusion that the Alta Drive facility is in an area neighboring the Blount Island facility or the St. Johns River, and because there is "a substantial expanse of unrelated land uses" between the two properties, we reverse his decision and hold that the Depot is not in the same geographic area as Blount Island. To hold that it is adjoining would be to extend unreasonably the perimeter of the "common geographical area" several miles inland. *Cunningham*, 377 F.3d at 106-107, 38 BRBS at 47(CRT); *Winchester*, 632 F.2d 504, 12 BRBS 719; *Herron*, 568 F.2d 137, 7 BRBS 409; *see also Arjona*, 34 BRBS 15; *Lasofsky*, 20 BRBS 58; *cf. Wallace*, 43 BRBS at 120-121 (expansion site, one mile from terminal and 200 feet from navigable waterway, was as close as feasible to, and within vicinity of, terminal and was covered); *Ballard v. Newport News Shipbuilding & Dry Dock Co.*, 8

[13]The First Circuit specifically declined to adopt the Fourth Circuit's "actual contiguity" standard enunciated in *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996). *Cunningham*, 377 F.3d at 106, 38 BRBS at 47(CRT).

BRBS 676 (1978) (site 2.5 miles from main gate in area suitable for shipyard expansion and near other maritime businesses was covered).

Consequently, we hold that the Alta Drive facility does not have a geographic nexus with the Blount Island terminal on the St. Johns River: it is not adjacent to or in the vicinity of navigable water; its location was chosen based on general business factors; the Blount Island facility is three miles away; properties closer to Blount Island were rejected as unsuitable for employer's purposes; and the businesses surrounding the Depot are not maritime. The words of the *Cunningham* court are applicable to the instant case: "[N]o matter how much maritime activity takes place at [the Alta Drive facility], . . . the substantial expanse of unrelated land uses between the [Blount Island facility] and [the Alta Drive facility] forecloses a finding that the one 'adjoins' the other." *Cunningham*, 377 F.3d at 106-107, 38 BRBS at 47(CRT). The Alta Drive facility is, therefore, not within the vicinity or a neighboring area of Blount Island and is not in an area customarily used for maritime commerce. *Id.; Lasofsky*, 20 BRBS 58. We reverse the administrative law judge's finding that the geographic nexus has been satisfied.[14] Therefore, we also reverse the administrative law judge's finding that claimant's injury occurred on a covered situs and the award of benefits under the Act.

[14]In light of our decision, we need not address whether the site has a functional nexus with a navigable body of water.

Accordingly, the administrative law judge's Decision and Order and the Order on Reconsideration awarding benefits are reversed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge