U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 19-0177

PAUL B. HARRIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VIRGINIA INTERNATIONAL TERMINALS, LLC	)	
	)	DATE ISSUED: 11/20/2019
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

R. John Barrett and Megan B. Caramore (Vandeventer Black LLP), Norfolk, Virginia, for employer/carrier.

William M. Bush and Jennifer L. Feldman (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and GRESH, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2017-LHC-01712) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed pursuant to 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 rational, supported by substantial evidence, and 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 sustained a knee injury while working as a forklift operator for Hampton Roads Chassis Pool, a subsidiary of employer, on August 4, 2017. CX 8, Dep. at 5. He pursued claims under both the Act and the Virginia Workers' Compensation Act (VWCA). Employer paid claimant disability benefits under the VWCA from August 5 to December 26, 2017, when his knee injury reached maximum medical improvement and he returned to his usual job with employer. The parties agreed claimant is entitled to benefits, but disagreed on the source of those benefits with the dispute focused solely on whether claimant was injured on a covered situs pursuant to Section 3(a) of the Act, 33 U.S.C. §903(a).[1]

Claimant's injury occurred at the Portsmouth Chassis Yard ("chassis yard"), an approximately 20-acre, fenced-in area located at the western edge of the Portsmouth Marine Terminal ("the terminal"), which abuts the Elizabeth River. Employer operates the terminal on behalf of the Virginia Port Authority (VPA). Most of claimant's work occurs within the chassis yard, where he regularly uses a forklift to stack and unstack chassis. Chassis are attached to trucks that bring containers into the terminal for loading onto vessels and take unloaded containers to inland destinations. Claimant occasionally performs this task in other areas of the terminal and, at times, uses a hustler to move chassis between the chassis yard and the terminal. To move chassis from the chassis yard to the terminal, claimant must exit the chassis yard, drive along Lee Avenue, and enter the terminal through its main gate. Ingress and egress at both facilities is restricted, albeit at different security levels.

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[1]The parties also agreed that if employer is liable under the Act, it is entitled to a credit pursuant to 33 U.S.C. §903(e) for disability benefits paid under the VWCA.

The terminal, including the chassis yard, was closed from 2010 to 2014. Prior to its closing in 2010, the chassis yard was not fenced off from the rest of the terminal. When the facility reopened in 2014, new fences were installed and as of the date of claimant's 2017 injury, fencing totally enclosed the chassis yard, including where it adjoins the terminal. In addition to the entrance gate on Lee Avenue and an exit gate on Wesley Street, the chassis yard fence has a third gate approximately 25 to 30 feet wide, known as Gate 22, which directly connects the chassis yard to the terminal, and is secured by a padlock. It is used to move heavy equipment stored in the chassis yard that is too large to fit through the terminal main gate, such as reach stackers and large forklifts.[2] The VPA Police are responsible for opening, manning, and locking Gate 22 when it is utilized. There are also gates at the southern and northern ends of the chassis yard that accommodate a railroad track which runs directly through the chassis yard to the terminal. The VPA Police must open the southern gate, which gives the train access to the chassis yard, and the northern gate, which gives the train access to the terminal. Trains go through the chassis yard and into the terminal a minimum of one or two times per day. There are no fences separating the railroad track from the rest of the chassis yard.

The administrative law judge found the chassis yard is a covered situs under Section 3(a) because it is part of the terminal, which adjoins navigable waters and is where vessels are loaded and unloaded. The administrative law judge found the fence surrounding the chassis yard and separating it from the terminal "does not meaningfully sever the contiguity" between those areas, so that claimant's injury in the chassis yard occurred on an area adjoining navigable waters customarily used in loading and unloading ships. Decision and Order at 13. As the parties stipulated to the remaining elements of the claim, the administrative law judge awarded claimant benefits under the Act.

On appeal, employer challenges the administrative law judge's finding that the chassis yard is geographically and functionally part of the terminal and, thus, a covered situs under the Act. The Director, Office of Workers' Compensation Programs (the Director), and claimant each respond, urging affirmance of the administrative law judge's decision.

To obtain benefits under the Act, an injury must occur on 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

[2]This equipment is used for handling intermodal cargo containers.

> 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). This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit which has defined "adjoining area" as a discrete shoreside structure or facility that is similar to the enumerated areas, actually contiguous with navigable waters, and customarily used for maritime activity. *Sidwell v. Express Container Services, Inc*., 71 F.3d 1134, 29 BRBS 138(CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996); *accord Parker v. Director, OWCP*, 75 F.3d 929, 30 BRBS 10(CRT) (4th Cir.), *cert. denied*, 519 U.S. 812 (1996); *Kerby v. Se. Pub. Serv. Auth.*, 31 BRBS 6 (1997), *aff'd mem.*, 135 F.3d 770 (4th Cir.), *cert. denied*, 525 U.S. 816 (1998). In *Sidwell*, the Fourth Circuit stated:

> [I]t is not unusual for marine terminals to cover many hundreds of acres. Such terminals are covered in their entirety. It is not necessary that the precise location of an injury be used for loading and unloading operations . . . ; it suffices that the overall area which includes the location is part of a terminal adjoining water.

Sidwell, 71 F.3d at 1140 n.11, 29 BRBS at 144 n.11 (CRT). Nevertheless, the court also stated that, "if there are other areas between the navigable waters and the area in question, the latter area is simply not 'adjoining' the waters under any reasonable definition of that term." *Id.*, 71 F.3d at 1139, 29 BRBS at 143(CRT).

Employer contends the chassis yard does not fall within any of the areas specifically enumerated in Section 3(a) of the Act, nor is it an "other adjoining area" under that section. Employer maintains the administrative law judge erroneously created a new legal standard for determining situs, i.e., a "servient relationship" test, rather than the standard the Fourth Circuit adopted in *Sidwell*, which requires an analysis of whether the chassis yard has the necessary geographic and functional connection with navigable water. Employer avers the facts in this case are akin to those in *Kerby*, 31 BRBS 6, in which the claimants were injured at a power plant that was separate and distinct from the shipyard, otherwise not contiguous with navigable waters, and thus, did not constitute an adjoining area.

Based on *Sidwell's* holding, the Board has addressed cases similar to this one involving injuries occurring on employers' properties where fences, roads, or other boundaries separate the properties from a covered situs. *Williams v. Northrop Grumman Shipbuilding*, 45 BRBS 57 (2011) (parking lot within the premises of employer's shipyard but separated from the production areas by a fence and a security turnstile covered);

McCormick v. Newport News Shipbuilding & Dry Dock Co., 32 BRBS 207 (1998) (warehouse separated from shipyard by public roads and security fence not covered); *Griffin v. Newport News Shipbuilding & Dry Dock Co.*, 32 BRBS 87 (1998) (parking lot separated from shipyard by public road and security fence not covered); *see also Church v. Huntington Ingalls, Inc., Pascagoula Operations*, 53 BRBS 1 (2019) (parking lot within the shipyard's boundaries but separated from the production areas by a fence covered); *Spain v. Expeditors & Prod. Serv. Co., Inc.*, 52 BRBS 73 (2018), *aff'd mem. sub nom. Expeditors & Prod. Serv. Co., Inc. v. Director, OWCP*, No. 18-60895, 2019 WL 5699966 (5th Cir. Nov. 5, 2019) (living quarters at a marine terminal separated from maritime operations by a fence covered). The salient fact distinguishing those cases where the claimant's injury is covered from those where it is not is that the site of the injury is considered geographically and functionally part of a contiguous covered area adjoining navigable waters, notwithstanding the existence of barriers such as fencing, which may otherwise divide the two locations.

Employer's "other adjoining area" contention misconstrues the actual underlying premise of the administrative law judge's situs finding. As discussed at greater length below, employer does not acknowledge the administrative law judge's dispositive and uncontested factual findings as to the functional and geographic relationship that the chassis yard has to the rest of the terminal. Contrary to employer's contention, the administrative law judge did not create a new "servient relationship" test to find the chassis yard covered, but permissibly determined that the functional and geographic relationship between the chassis yard and the terminal was such that "the chassis yard is a part of the terminal." Decision and Order at 12. Due to this relationship, and because the terminal is an enumerated situs, he concluded that claimant's injury occurred on a covered situs. 33 USC §903(a).

More specifically, the administrative law judge examined the evidence regarding the functional and geographic relationship between the chassis yard and the terminal and found it significant that: trains loaded with cargo pass through the chassis yard into the terminal daily and then depart the facility; Gate 22, located on the eastern fence line of the chassis yard, is routinely used to move equipment essential to the handling of intermodal cargo containers into and out of the terminal; the VPA Police, though not responsible for guarding the main entrance to the chassis yard on Lee Avenue, is responsible for opening the gates which provide access for trains to move through the chassis yard to the terminal and for opening Gate 22 to enable heavy equipment to move between the chassis yard and the terminal; and employer's movement of the fence line separating the chassis yard and terminal to create an express lane for outbound trucks establishes the "fluidity" of the area and that the chassis yard "is not a discrete parcel, independent from the remainder of the terminal." Decision and Order at 13. Based on this evidence, the administrative law judge

rationally concluded that "the chassis yard is a part of the terminal," *id.* at 12, and that the terminal "includes the chassis yard." *Id.* at 13.

Moreover, the administrative law judge explicitly addressed the significance of the fence separating the chassis yard and the terminal in accordance with the applicable case law. As was the case in *Williams*, 45 BRBS 57, the presence of the fence in this case does not alter the fact that claimant's injury occurred within the boundaries of employer's terminal, an area adjacent to navigable waters used to load and unload ships. *See also Church*, 53 BRBS 1; *Spain*, 52 BRBS 73. Unlike the fenced-in areas in *Kerby*, *Griffin*, and *McCormick*, there are no roads or railroad tracks unrelated to maritime commerce severing the "contiguity" between the chassis yard, the terminal, and navigable waters. *See* CXs 5, 11; EX 1. Rather, the chassis yard abuts the terminal and, as the administrative law judge found and employer does not dispute, the railroad track connects rather than separates the two properties employer owns.[3] Decision and Order at 12-13. Additionally, the administrative law judge found that the terminal "could not function properly" without the ability to move large equipment "integral to maritime activities performed at the terminal" through the chassis yard via Gate 22. *Id.* at 13. The administrative law judge thus permissibly found that at the time of injury, although a fence and security gates separated the chassis yard from the terminal, the chassis yard was located within the overall perimeter of the marine terminal that adjoins navigable waters. The fence does not sever the contiguity between the chassis yard and the terminal.[4] Consequently, we affirm the administrative law judge's finding that the chassis yard is a part of the terminal as it is

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[3]The administrative law judge's situs conclusion does not rest on the finding that the railroad is a "marine railway," which, as employer correctly notes, this railroad is not. Emp. Br. at 9, n.2; *see St. Louis Shipbuilding Co. v. Director, OWCP*, 551 F.2d 1119, 5 BRBS 787 (8th Cir. 1977). Nevertheless, employer does not contest the finding that the railway runs through both the chassis yard and the terminal for the purpose of moving containers to and from vessels.

[4]The maps in the record show that only a fence-line separates the chassis yard and the terminal, and that the terminal is adjacent to the Elizabeth River. CX 11; EX 1. Claimant's testimony, HT at 27-32, and the testimony of Mr. Griffin, *id.* at 69-70, confirms this. The evidence also supports the administrative law judge's findings regarding the integral relationship between the chassis yard and the terminal, in terms of the railway and Gate 22. Claimant stated that trains run through the chassis yard "a minimum of 1 or 2 times a day to load and then leave." *Id.* at 30. Mr. Hall and Mr. Griffin confirmed the use of the railway in this manner. *Id.* at 51 (Hall) and 65, 71 (Griffin). Claimant, Mr. Hall, and Mr. Griffin also agreed as to the purpose of Gate 22. *Id.* at 28-29 (claimant), 48-50 (Hall), and 61-62, 71 (Griffin).

supported by substantial evidence.[5] *See Spain*, 52 BRBS 73. Because the terminal is an enumerated site, we affirm the administrative law judge's conclusion that claimant's injury at the chassis yard occurred on a covered situs pursuant to Section 3(a) of the Act. 33 U.S.C. §903(a); *Williams*, 45 BRBS 57; *see also Church*, 53 BRBS 1; *Spain*, 52 BRBS 73.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

[5]Employer accurately asserts the administrative law judge's decision contains conflicting statements regarding the process claimant would use to move chassis between the chassis yard and the terminal. *Compare* Decision and Order at 4 and 9. Nevertheless, the administrative law judge's decision exhibits a correct understanding of this process, *id.* at 4, and any subsequent mischaracterization in describing it, *id.* at 9, constitutes harmless error. The administrative law judge's situs conclusion does not depend upon this factual finding and substantial evidence supports his conclusion that the chassis yard is part of the terminal, and thus, a covered situs under Section 3(a) of the Act. *See* discussion, *supra*. We therefore reject employer's contention that any conflicting statements on this particular fact by the administrative law judge requires that his decision be "set aside." Emp. Br. at 8.