BRB No. 88-4207

HARRY HURSTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
McGRAY CONSTRUCTION COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
BEAVER INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER on REMAND

On remand from the United States Court of Appeals for the Ninth Circuit.

John R. Hillsman (McGuinn, Hillsman & Palefsky), San Francisco, California, for claimant.

Roger A. Levy and Judith A. Leichtnam (Laughlin, Falbo, Levy & Moresi), San Francisco, California, for employer/carrier.

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

PER CURIAM:

This case is on remand from the United States Court of Appeals for the Ninth Circuit. *Hurston v. Director, OWCP*, 989 F.2d 1547, 26 BRBS 180 (CRT) (9th Cir. 1993), *rev'g Hurston v. McGray Construction Co.*, 24 BRBS 94 (1990), *recon. en banc denied*, BRB No. 88-4207 (Aug. 13, 1991). In the proceedings before the Board, employer/carrier appealed the Decision and Order (87-LHC-34) of Administrative Law Judge Thomas Schneider awarding 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).[1] The administrative law judge's findings of fact and conclusions of law must be affirmed 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).

[1]This case was consolidated with *Olson v. McGray Construction Co.*, BRB No. 88-4208, in the initial proceedings before the Board. *See* 24 BRBS 94 (1990). This case was not appealed to the court of appeals, and is not before us on remand.

Claimant was injured on March 22, 1985 when he was struck by a falling 1000-pound sheet pile.[2] Claimant was hired as a pile driver to repair and maintain a structure known as "Elwood Pier No. 1." The structure on which the accident occurred was described as a rectangular structure which is entirely on the beach at low tide and which extends partly into the ocean at high tide. Oil well fluids produced on a nearby structure, Elwood Pier No. 2, are piped to Pier No. 1, where automated equipment separates the well fluids into gas, water, and crude oil, and where the processed crude oil is stored in a tank located on the structure. The stored crude oil is pumped in a pipeline, on a weekly basis, to the Elwood Marine Terminal for later shipment to Los Angeles or Benicia for refining.

Employer voluntarily paid claimant benefits under state law, but controverted liability under the Longshore Act. The administrative law judge found that claimant's work on Pier No. 1 was not maritime in nature, but that he satisfied the status test of Section 2(3), 33 U.S.C. §902(3), based on the overall nature of his employment. Addressing the situs requirement of Section 3(a), 33 U.S.C. §903(a), the administrative law judge found that Pier No. 1 rested on pilings, was over water at high tide, had a connection to land suitable for vehicles, looked like a pier, and adjoined navigable waters. He concluded that there is no requirement under the Act that a "pier" be customarily used for loading, unloading or shipbuilding in order to constitute a covered situs, and he found that Pier No. 1 is a covered situs. The administrative law judge awarded claimant temporary and permanent total disability benefits.

Employer/carrier appealed the administrative law judge's decision to the Board. The Board reversed the administrative law judge's finding that Pier No. 1 is a covered situs. *Hurston v. McGray Construction Co.*, 24 BRBS 94 (1990), *recon. en banc denied*, BRB No. 88-4207 (Aug. 13, 1991).

The Board first held that the site was not an adjoining area under Section 3(a), as it was not used for loading, unloading, building, dismantling or repairing a vessel.[3] *Id.*, 24 BRBS at 97. The Board further stated that as the site was used exclusively for oil production, Pier No. 1 had no maritime use, citing the Supreme Court's decision in *Herb's Welding Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78 (CRT) (1985). The Board thus addressed the novel issue of whether a structure used solely for oil production and with no connection to navigation and commerce over navigable waters may be considered a "pier" under Section 3(a) based solely on its appearance and location. The Board concluded that a facility must have a maritime nexus in order to be a "pier," *Hurston*, 24 BRBS at 98, and finding this nexus lacking, reversed the administrative law judge's finding that claimant was injured on a covered situs. *Id.* at 99.

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[2]Claimant suffered a fractured left fibula and tibial plateau, a knee injury, three fractured ribs and a pneumothorax as a result of the accident. The administrative law judge found he could not return to his usual work and that suitable alternate employment was not established.

[3]Section 3(a) provides that the disability or death of the employee must result "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)(1988).

Claimant appealed the Board's decision to the Ninth Circuit. The Director, Office of Workers' Compensation Programs, agreed with claimant's contention that the Board's decision was in error, and the court found the statute easily susceptible to the Director's position that "a pier is a pier." The court noted that Congress had not chosen to restrict the term "pier" with any qualifying or modifying language, as it had done with the phrase "other adjoining area." *Hurston*, 989 F.2d at 1549-1550, 26 BRBS at 184 (CRT). The court concluded that the Board's inclusion of a maritime nexus requirement was erroneous, and that

> a structure built on pilings extending from land to navigable water is an "adjoining pier" within the meaning of 33 U.S.C. §903(a). This is an essentially factual test which depends upon the structure's appearance and location. Elwood Pier No. 1 meets this factual criteria, and consequently it is a "pier" under the LHWCA.

989 F.2d at 1553, 26 BRBS at 190-191 (CRT). The Ninth Circuit thus reversed the Board's holding that claimant was not injured on a covered situs, and remanded the case for consideration of the status issue, which the Board did not address given its holding regarding situs. *See Hurston*, 24 BRBS at 96 n. 2.

The administrative law judge made the following findings regarding the status issue. The administrative law judge found that Pier No. 1 does not have a nexus to navigation or maritime commerce because its purpose is related to the production of oil and is similar to the process used on land, and that claimant, engaged as a pile butt in the repair of the pier, therefore is not afforded status on this basis. The administrative law judge likened the pier to the oil platform in *Herb's Welding*, 470 U.S. 414, 17 BRBS 78 (CRT), wherein the Supreme Court held that a welder on a fixed oil platform is not a maritime employee under Section 2(3) as there is nothing inherently maritime about building and maintaining pipelines and platforms.

The administrative law judge went on to consider the overall nature of employer's business and claimant's employment. One of employer's representatives testified that half of employer's pile driving operations is over water and half is on shore. Of the half on water, 95 percent is on the open ocean. On cross-examination, he used a figure of 15 to 20 percent maritime work. Claimant testified he had spent 90 percent of his time since 1958 as a marine diver and 10 percent as a pile butt. The administrative law judge concluded that since claimant and employer regularly perform some of their work on indisputably maritime projects, claimant satisfied the status test, consistent with the holding of the Supreme Court in *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 248, 6 BRBS 150 (1977).

In its appeal on the status issue, employer first states its agreement with the administrative law judge's conclusion that claimant's employment as a pile butt on Pier No. 1 was not maritime employment by virtue of the holding in *Herb's Welding*. Employer contends, however, that the administrative law judge erred in finding that the status test is satisfied by virtue of the nature of claimant's overall employment. Employer contends that the administrative law judge erred in not

focusing on claimant's work at the particular job site at issue in this case, asserting that the fact that claimant may have engaged in maritime employment in his overall career does not confer status on this particular employment on a site which the administrative law judge found had no maritime function.[4] Claimant responds that the administrative law judge's finding should be affirmed.

We affirm the administrative law judge's finding that the status test is satisfied in this case. We first address the administrative law judge's conclusion that claimant is not afforded status by virtue of his employment on the Elwood Pier No. 1 project.[5] Section 2(3) provides that:

> 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)(1988). The administrative law judge's finding that claimant's work on the Elwood Pier project was not maritime in nature was premised on his finding that the pier itself did not have a maritime purpose as it was built to facilitate an oil drilling operation. In *Herb's Welding*, the Supreme Court held that a welder on a fixed oil platform is not a maritime employee under Section 2(3) as there is nothing inherently maritime about building and maintaining pipelines and platforms. The platforms, pursuant to *Rodriguez v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), are artificial islands, and the claimant's tasks on the platform are not "significantly altered by the marine environment." *Herb's Welding*, 470 U.S. at 425, 17 BRBS at 83 (CRT). Similarly, in *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 27 BRBS 103 (CRT) (5th Cir. 1993), *reh'g denied*, 8 F.3d 24 (5th Cir. 1994), *aff'g on other grounds* 23 BRBS 180 (1990) and 25 BRBS 336 (1992) (*en banc*), *cert. denied*, 114 S.Ct. 1839 (1994), the Fifth Circuit held that a pumper-gauger who serviced and maintained fixed platform wells was not a maritime employee under the *Herb's Welding* rationale. That this claimant also unloaded from a small boat supplies necessary for this employment did not bring him within the ambit of the Act as this function furthered the non-maritime purpose of maintaining the wells. *Munguia*, 999 F.2d at 813, 27 BRBS at 107 (CRT).

The instant case is distinguishable from *Herb's Welding* and *Munguia*, in that claimant's injury occurred while he was engaged to repair a pier, which the Ninth Circuit held is an enumerated situs regardless of its function, rather than a fixed oil platform. The Board has held that the term "harbor-worker" in Section 2(3) encompasses

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[4]Employer's and claimant's motions for oral argument on the status issue are denied. 20 C.F.R. §802.306.

[5]Although employer does not appeal the administrative law judge's favorable finding that claimant's employment on Pier No. 1 is not maritime employment, this legal conclusion must be reviewed in light of the Ninth Circuit's decision on the situs issue and employer's reliance upon it in asserting that claimant's overall employment is not covered because claimant's employment at the site was "non-maritime."

at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, *piers*, wharves, and adjacent areas used on the loading, unloading, repair or construction of ships)....

Stewart v. Brown & Root, Inc., 7 BRBS 356, 365 (1978), *aff'd sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980) (emphasis added). *See also Ripley v. Century Concrete Services*, 23 BRBS 336 (1990); *Olson v. Healy Tibbitts Construction Co.*, 22 BRBS 221 (1989) (Brown, J., dissenting). Pile drivers involved in the construction and repair of piers are harbor workers. *Ripley*, 23 BRBS at 336; *Olson*, 22 BRBS at 221; *Maher v. Horn, Sand, Slattery Associates*, 14 BRBS 767 (1978); *Bakke v. Duncanson-Harrelson Co.*, 8 BRBS 36 (1978). Moreover, unlike the claimant's employment in *Herb's Welding*, the nature of claimant's work in this case was affected by the marine environment. *See also Olson*, 22 BRBS at 221. Claimant was hired to replace sheet piling on the sides of the pier that had become worn and rusted due to the beating of the waves as the tide comes in around the base of the pier. *See* Emp. Ex. JJ; Tr. at 49, 70. Claimant also testified that spray from the ocean often makes the deck of the pier slippery, and that the method of driving the sheet pile was affected by the waves. Tr. at 103, 107-108. Inasmuch as Elwood Pier No. 1 is an enumerated situs regardless of its function, and claimant's employment subjected him to the marine environment, we hold that claimant is covered under the Act as a harbor worker. *Ripley*, 23 BRBS at 336; *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

We also hold that the administrative law judge properly found claimant covered under the Act by virtue of his overall employment history. Claimant testified he spent 90 percent of his time since 1958 as a marine diver and 10 percent as a pile butt; he is hired by companies out of a union hiring hall representing both trades. He testified that 90 to 95 percent of his diving work has been in various oceans, and that all but one of his pile driving jobs has been marine-related. Tr. at 92, 96. The Supreme Court has held that coverage is conferred under Section 2(3) if the person spends "at least some of [his] time in indisputably longshoring operations and who, without the [1972] amendments, would be covered for only part of [his] activity." *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 248, 273, 6 BRBS 150, 165 (1977). *See also Schwabenland v. Sanger Boats*, 683 F.2d 309, 16 BRBS 78 (CRT) (9th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983). Thus, employer's argument that the administrative law judge erred in focusing on claimant's work other than that at this particular job site is rejected.

In a case in which the issue was whether a diver was a seaman under the Jones Act, the Fifth Circuit stated, "[a] diver's work necessarily involves exposure to numerous marine perils, and is *inherently maritime* because it cannot be done on land." *Wallace v. Oceaneering International*, 727 F.2d 427 (5th Cir. 1984) (emphasis added). Within the confines of the Act, the issue in cases involving divers is whether they were injured on a covered situs, not whether they were engaged in maritime employment. *See Williams v. Director, OWCP*, 825 F.2d 246, 20 BRBS 25 (CRT) (9th Cir. 1987), *aff'g Williams v. Pan Marine Construction Co.*, 18 BRBS 98 (1986); *Rizzi v. Underwater Construction Co.*, 27 BRBS 273 (1994), *aff'd on recon.*, 28 BRBS 360 (1994); *Sharp v. Pacific Gas & Electric Co.*, 2 BRBS 381 (1975). Employer's reliance on *Williams* in making its status argument

is thus misplaced, as that case did not address claimant's status as a maritime employee under Section 2(3). As claimant testified that 90 percent of his employment since 1958 involved diving, the administrative law judge properly found that claimant spent "at least some of his time in indisputably" maritime employment, and is entitled to coverage under the Act on this basis. *Odom Construction Co., Inc. v. United States Department of Labor*, 622 F.2d 110, 12 BRBS 396 (5th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981).

Accordingly, the administrative law judge's finding that claimant is entitled to coverage under Section 2(3) is affirmed. The award of benefits is also affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge