

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 02 October 2009

CASE NO.: 2008-LHC-02108

OWCP NO.: 06-197344

IN THE MATTER OF

J.Z.,¹

Claimant

v.

**NEW ORLEANS DEPOT SERVICES, INC.,
Employer**

**NEW ORLEANS MARINE CONTRACTORS,
Employer**

**SIGNAL MUTUAL INDEMNITY ASSN., LTD.,
Carrier**

APPEARANCES:

**ROBERT E. THOMAS, ESQ.,
On Behalf of Claimant**

**ANNE D. WITTMAN, ESQ.,
On Behalf of Employer NODSI**

**DOUGLAS P. MATTHEWS, ESQ.,
On Behalf of Employer NOMC/Carrier**

**Before: CLEMENT J. KENNINGTON,
Administrative Law Judge**

¹ Pursuant to a policy decision of the Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq.*, brought by J.Z., (Claimant), against New Orleans Depot Services, Inc., (NODSI), New Orleans Marine Contractors, (NOMC) and Signal Mutual Indemnity Association, LTD., (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. A formal hearing on the matter was held on July 28, 2009, in Covington, Louisiana.

At hearing, Claimant testified, and introduced four exhibits, which were admitted, including: Prior Deposition of Claimant taken November 3, 2008; NOMC/Carrier Responses to Request for Admissions; Wage Records from Waterfront Employers of New Orleans, NODSI, and Social Security; and Audiological Evaluations of Claimant by Daniel Bode and David Mulnick.²

At hearing, NODSI introduced the testimony of Thomas Brooks, and introduced five exhibits, which were admitted, including: Bridgefield Casualty Insurance Company Policies of Workers Compensation Insurance Issued to NODSI for the Period of August 31, 2000 through August 31, 2004; Portions from the Lamorte Burns File relating to Claim produced during the Deposition of Thomas Brooks; Affidavit of an Employee of Evergreen Shipping Agency Corporation; and Two Maps of the NODSI Locations used at hearing.

At hearing NOMC/Carrier introduced the testimony of Kirk Williams, and introduced eight exhibits, which were admitted, including: Waterfront Employers of New Orleans' Abstract dated March 3, 2009; Satellite Photographs of NODSI Facilities; Exhibit # 4 of Deposition of Kirk Williams; Deposition of Claimant's Son taken July 14, 2009; Deposition of Wayne Williams taken July 14, 2009; Deposition of Kirk Williams taken February 18, 2009; Deposition of Eric Jupiter taken July 16, 2009; and a Container Yard Agreement between NODSI and Evergreen Shipping Agency Corporation. Post-hearing, NOMC introduced one exhibit, the Deposition Transcript of Dominic Obrigkeit, which was admitted.³

Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor, and the arguments presented, the undersigned makes the following Findings of Fact, Conclusions of Law, and Order.

² Based on the stipulations of the parties, Claimant agreed to withdraw five exhibits, as they were not pertinent to the remaining issues for hearing.

³ Based on the stipulations of the parties, NOMC agreed to withdraw two exhibits, as they were not pertinent to the remaining issues for hearing. References to the exhibits are as follows: Trial Transcript – Tr. ____, p.____; Claimant's Exhibit - CX-____, p.____; NODSI's Exhibit – NODSIX-____, p.____; NOMC/Carrier's Exhibit – NOMCX-____, p.____; ALJ Exhibit – ALJX-____.

I. STIPULATIONS⁴

The parties stipulated and the undersigned finds:

1. Claimant's last work/exposure date with NOMC was September 2, 1996.
2. Claimant's last work/exposure date with NODSI was December 19, 2002.
3. Claimant was injured in the course and scope of his employment.
4. An employer/employee relationship existed at the time of Claimant's injury.
5. Claimant's injury was caused by injurious exposure to workplace noise.
6. NOMC was advised of the claim on September 20, 2007.
7. NODSI was advised of the claim on October 14, 2007.
8. An informal conference was held on August 5, 2008.
9. Claimant's average weekly wage while working for NODSI was \$606.15.
10. Claimant is permanently disabled with an 11.3% binaural impairment rating.
11. Medical benefits have not been paid, but the parties have reached an agreement on reasonable and customary charges.
12. Claimant's date of maximum medical improvement was the date of his retirement.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Timely Notice of Injury⁵
2. Last Responsible Employer
3. Jurisdiction as to NODSI
4. Average Weekly Wage for NOMC

⁴ Due to an apparent oversight, Claimant was not sworn in before testifying at the formal hearing on July 28, 2009. After due notification and consultation with all counsel of record and considering that Claimant's trial testimony was corroborated by previous deposition testimony, the parties have agreed to stipulate that Claimant's formal hearing testimony should be given the full force and effect as if it had been taken under oath.

⁵ The undersigned notes that no argument in support or opposition of this affirmative defense was presented at hearing or in post-hearing briefs.

5. Interest and Attorney's Fees.⁶

III. STATEMENT OF THE CASE

A. Facts of the Case

Claimant was employed by NODSI as a mechanic from 1996 until 2002, when he was forced to quit because of a bone spur injury.(Tr. 31). At the time of his injury, Claimant was a member of the ILA Union, which provided medical care and disability compensation to Claimant for his injury. (Tr. 31). Claimant remained disabled from 2002 until his retirement in 2007. (Tr. 19-20, 31).

Prior to his employment with NODSI, Claimant was employed by NOMC. Claimant worked for NOMC as a mechanic for approximately five months. (Tr. 21). Claimant performed the same employment duties with both NODSI and NOMC, repairing and maintaining chassis and containers. (Tr. 19-23). During his employment, Claimant was subjected to loud noises on a continuous basis. While working for NODSI and NOMC, Claimant failed to use hearing protection. (Tr. 24-25). As a result of Claimant's employment and subsequent failure to use hearing protection, Claimant suffered a hearing loss, which constitutes the basis of this instant claim.

NODSI is an in-land depot company started by Kirk Williams in 1996, in order to provide services to the Evergreen Shipping Agency Corporation (Evergreen). NODSI currently has two facilities in New Orleans, Louisiana: one along Chef Menteur Highway near the Industrial Canal waterway (Chef Yard); and one on Terminal Road (Terminal Yard), adjacent to the Mississippi River Gulf Outlet (MRGO). (Tr. 43, 49). NOMC was a terminal operator in New Orleans, with a facility on France Road along the Industrial Canal waterway. NOMC was owned by a parent company, Gulf Services, who sold NOMC to P&O Ports around 1999. (NOMCX-9, p. 7). In 2001, P&O Ports consolidated their operations and closed the former NOMC terminal at France Road. (NOMCX-9, p. 8). In 2005, P&O Ports was purchased by High Star Capital and re-named Ports America. (NOMCX-9, p. 7).

B. Testimony and Prior Deposition of Claimant⁷

Claimant was employed by Puerto Rico Marine as a truck and forklift mechanic from December 1977, to March 1996. (CX-1, p. 5). Claimant was stationed at Puerto Rico Marine's France Road terminal, along the Industrial Canal waterway in New Orleans, Louisiana for the extent of his employment.⁸ In 1982, Claimant joined the ILA Union, Local # 2036. (CX-1, p. 5). In 1996, he left Puerto Rico Marine and found employment at NOMC's France Road terminal as

⁶ Issues were entered as part of the record as a joint exhibit, marked as ALJX-1. Timely Notice was listed as an issue for hearing on ALJX-1, but this affirmative defense was not made an issue at hearing or in post-hearing briefs.

⁷ Claimant was deposed on November 3, 2008, prior to the hearing in this matter. In lieu of a repetitious summary of his deposition, select portions of Claimant's deposition will be summarized to supplement Claimant's testimony at hearing..

⁸ The Puerto Rico Marine Terminal that Claimant worked at is no longer in operation in New Orleans, closing before NODSI began its business operations in 1996. (Tr. 32).

a mechanic. He worked at NOMC for approximately five months before joining NODSI as a mechanic. (Tr. 21). At NOMC and NODSI, Claimant repaired and maintained chassis and containers, performing the same employment duties at both locations. (Tr. 20, 23). Claimant remained a member of the ILA during his time at NOMC. However, while retaining his ILA membership, Claimant switched to non-union employment sometime during his employment with NODSI. (Tr. 33). During his employment with NOMC and NODSI, Claimant despite the presence of loud noises did not wear hearing protection. (Tr. 24-25).

On a normal workday during his employment with NODSI, Claimant would arrive at the Chef Yard for the start of the day. Containers would arrive to the Chef Yard by truck or chassis in order to be inspected by NODSI surveyors. (Tr. 34). Claimant would receive various work orders from the surveyors, which would direct him on the repairs that needed to be made that day on various containers and chassis. (Tr. 29). He would then use a company-owned truck to drive to the containers and chassis marked for repair, and perform the necessary maintenance required by the work order. Claimant testified that he was never told where the container and chassis had previously been prior to the equipment showing up at NODSI for repair. (Tr. 29-30). Claimant did not know if the containers that he made repairs on for NODSI came to the Chef Yard after being unloaded from a ship. (Tr. 37). He further did not know where the containers or chassis would be sent after he made the necessary repairs. (Tr. 37).

Claimant testified that both of the yards maintained by NODSI did not have any decks, piers, or wharfs on the property. (Tr. 35-36). He further testified that neither yard had any way of servicing ships or unloading cargo. (Tr. 35-36). Claimant did not repair ships while employed by NODSI. (Tr. 35). Claimant did not access or use a waterway while working for NODSI. (Tr. 36).

While at the Chef Yard, Claimant would work predominately on Evergreen containers. (Tr. 25-26). Claimant believed that he also worked on Evergreen containers while working for NOMC. While at NOMC, the Evergreen containers that Claimant worked on would come into the terminal after being taken off of a vessel. (Tr. 26). Claimant also worked on Evergreen containers while working for Puerto Rico Marine.

Claimant testified that at times, he would be required to go work at NODSI's Terminal Yard. He testified that he rarely worked at the Terminal Yard, spending approximately ninety-five (95) percent of his time at the Chef Yard. (Tr. 34; CX-1, p. 8). When Claimant was required to work at the Terminal Yard, he would only perform work on chassis for the Flexi-Van Leasing Corporation (Flexi-Van). (Tr. 28). Claimant did not work on any containers at the Terminal Yard. (CX-1, p. 13).

Claimant was exposed to loud noises as a result of his employment. (CX-1, pp. 7-8). He testified that while straightening containers and removing rivets, he would be exposed to loud noises. (CX-1, pp. 7-8). He further testified that his work at both NOMC and NODSI would equally subject him to loud noises. (Tr. 30). Claimant did not recall when he first developed hearing problems. (CX-1, p. 6). He knew that he currently had a problem because of the loud volume of his television at home. (CX-1, p. 6).

Claimant testified that he was first provided with hearing protection while working for Puerto Rico Marine. (CX-1, p. 6). He admitted that he did not wear hearing protection regularly, and did not use hearing protection at all while working for NODSI. (CX-1, p. 7). He further testified that NOMC and NODSI did not provide him with any form of hearing protection. (CX-1, p. 6).

C. Testimony and Prior Deposition of Kirk Williams⁹

Kirk Williams is the owner of NODSI, which he started in 1996. (Tr. 38-39). Prior to starting NODSI, Mr. Williams worked for Atlantic Technical Services (ATS), where he was employed as a terminal supervisor. (Tr. 43). At ATS, Mr. Williams coordinated repairs and maintenance on containers and chassis owned by Evergreen. (Tr. 41). Mr. Williams also worked for Ceres-Gulf Incorporated (Ceres) prior to founding NODSI.¹⁰ At Ceres, Mr. Williams was the manager of maintenance and repair. (Tr. 40). During his employment at Ceres, Mr. Williams was contacted by representatives of Evergreen, who expressed their dissatisfaction with services provided at ATS after Mr. Williams had left. (Tr. 42). Evergreen approached Mr. Williams about operating a hub for them in New Orleans to allow for repairs and maintenance in an honest manner. (Tr. 86). Mr. Williams soon thereafter entered into an agreement with Evergreen to start NODSI to primarily serve Evergreen's container needs. (Tr. 44). He was under the direction of Ed Garman and Monica Clary, two employees of Evergreen that worked in Evergreen's New Orleans office. Evergreen's New Orleans office was consolidated and moved to Dallas, Texas in 1998. (Tr. 47-48). Mr. Williams considers NODSI to be an in-land depot that houses containers and chassis for various companies, predominately Evergreen. (Tr. 49-50).

Mr. Williams testified that Evergreen did not request him to set up NODSI at any specific location. (Tr. 42). He testified that they ideally wanted NODSI to be set up near the Union Pacific Railroad line in Westwego, Louisiana, as the Union Pacific was the main rail inlet used by Evergreen in New Orleans. (Tr. 87). However, Mr. Williams was unable to acquire land in that area due to the land's high cost. (Tr. 87). NODSI was eventually set up on eight acres of land along Chef Menteur Highway, which was acquired through a lease with Entergy New Orleans. (Tr. 88). Mr. Williams testified that the Chef Yard was chosen based on the land's hard, aggregate ground, which would allow for the operation of heavy machinery without sinking problems. (Tr. 88). Mr. Williams further testified that at no time during his search for land did he consider access to a waterway necessary for his business operations. (Tr. 88-89). Mr. Williams testified that NODSI serviced Evergreen exclusively until 2002, when NODSI entered into a contract for services with Mitsui O.S.K. (Mitsui). (Tr. 113). Mr. Williams explained that the services provided to Mitsui are similar to those provided to Evergreen.

In 2002, NODSI acquired land along Terminal Road through a lease with the Board of Commissioners for the Port of New Orleans (Board of Commissioners). (NOMCX-8, p. 10). Mr. Williams testified that he acquired the Terminal Yard to accommodate Flexi-Van. (Tr. 94). At the Terminal Yard, NODSI provided blasting, painting, and repair services for Flexi-Van's

⁹ Mr. Williams was deposed prior to the hearing in this matter. In lieu of a repetitious summary of his deposition, select portions of Mr. Williams' deposition will be summarized to supplement his testimony at hearing.

¹⁰ The Ceres terminal where Mr. Williams worked is no longer in operation, as the company moved its operations in New Orleans to a different terminal in 1995 prior to NODSI starting its operations. (Tr. 89-90). The terminal was left empty and no current company operates at that location.

chassis. These services cannot be performed near residential areas or near the interstate, which was the main reason Mr. Williams leased the Terminal Yard. (Tr. 94-96). He testified that the Terminal Yard being near the MRGO did not influence his decision on leasing that area of land. (Tr. 95). He explained the only work performed at that Terminal Yard is for Flexi-Van, and that no container repair operations were performed at any time at that yard. (Tr. 93, 96). Mr. Williams testified that the only containers used at the Terminal Yard are for the storage of parts and tires. (Tr. 92).

Currently, NODSI's two yards do not have any docks, piers, or wharfs, and NODSI's employees do not utilize a waterway in their daily employment duties. (Tr. 88-89). NODSI does not utilize the abandoned Ceres terminal.

While NODSI was created to service Evergreen, Mr. Williams explained NODSI was not the only company to provide repairs and maintenance services to Evergreen. (Tr. 44). A yard maintained by Jim Ortega performed work on Evergreen containers from 1996 through 2003, based on NODSI's inability to provide road services during that time. (Tr. 45). NODSI hired ILA employees at Evergreen's direction. Mr. Williams testified that these union employees worked exclusively on Evergreen containers. (Tr. 46). Mr. Williams kept the work at the Chef Yard segregated, with ILA employees working on Evergreen containers and chassis, and non-union employees working on other customers' containers and chassis. In 2002, Evergreen requested that ILA employees stop working on their containers and chassis. (NOMCX-8, p. 24). At that time, NODSI stopped hiring ILA union employment. Mr. Williams explained that Claimant switched from union to non-union labor to keep working at NODSI. (Tr. 94). However, Claimant's employment duties did not change upon his switch from union to non-union labor.

Mr. Williams testified that he was never told by Evergreen that their containers were brought into the Port of New Orleans by ships. (Tr. 46). Evergreen would not provide NODSI with any information as to where the containers being repaired had come from. (Tr. 97). He further testified that he was not aware if the containers repaired by NODSI for Evergreen initially came in on ships, and he did not know where the Evergreen containers actually came from. (Tr. 51; NOMCX-8, p. 21). Mr. Williams explained Evergreen and Mitsui chassis did not pick up containers from the waterfront and neither company had a ship come into the Port of New Orleans. (NOMCX-8, p. 20). To his knowledge, Mr. Williams believed that NODSI had not repaired any container coming directly or indirectly from a maritime vessel. (NOMCX-8, p. 29-30). Mr. Williams further believed that the containers sent in by Evergreen came in to New Orleans through the use of the Union Pacific Railroad and Evergreen's chassis or a truck line. (Tr. 110; NOMCX-8, p. 21, 30). Both Evergreen and Mitsui would store chassis at NODSI when the chassis were not in use. (NOMCX-8, p. 22).

Mr. Williams testified that Claimant was never sent over to work at the Terminal Yard during his employment at NODSI. (Tr. 93). Mr. Williams believed Claimant possibly was called over to the Terminal Yard to advise how to fix a chassis, but he was unaware of Claimant actually performing any work at that yard. (Tr. 93).

NODSI first acquired insurance from Eustis Insurance (Eustis). (Tr. 98). Mr. Williams testified that during the initial consultation, he informed Eustis that he did not have any wharf at

the Chef Yard; NODSI would not be performing any work on ships; and NODSI would only work on chassis and containers in their yard. (Tr. 98). Soon thereafter, NODSI switched its insurance agency to Louisiana Insurance Services (LIS). (Tr. 99). Mr. Williams testified he was advised by LIS to only obtain Louisiana state workers' compensation coverage due to the work that NODSI performed. (Tr. 99). Mr. Williams never sought any insurance policy for coverage under the Longshore act. (NOMCX-8, p. 28).

Mr. Williams testified that NODSI's Chef Yard had no direct access to any waterfront. (Tr. 90). He further explained the yard was surrounded by a car wash, a radiator shop, an automotive shop, a corrugated box company, and the Nestlé's beverage facility.¹¹ (Tr. 90). Regarding the Terminal Yard, the facility is next to New Orleans Cold Storage (NOCS) and a desolate area where MacFrugal's warehouse used to be maintained.¹² (Tr. 91). Mr. Williams was unaware of any marine operations along Terminal Road near NODSI's yard. (Tr. 92). While NODSI's Terminal Yard has access to a waterway by using a road to go over a levee to the former Ceres terminal, NODSI does not utilize that waterway or that terminal.

D. Testimony of Thomas Brooks

Thomas Brooks is a claims adjuster for Lamorte Burns & Co., for whom he's been employed for over twenty years. (Tr. 54). His basic employment duties include the evaluation, investigation, and adjustment of maritime claims. (Tr. 54-55). Mr. Brooks was assigned to Claimant's case by Ports America, the successor corporation of NOMC. (Tr. 55). Upon assignment of the claim, Mr. Brooks reviewed social security and WENO records for Claimant.¹³ (Tr. 57). On October 1, 2007, Mr. Brooks determined that NOMC was not Claimant's last maritime employer. (Tr. 61-62). Mr. Brooks believed NODSI was in fact Claimant's last maritime employer based on Claimant's employment with the company from 1996 through 2002. (Tr. 62). Mr. Brooks based his determination on several factors: WENO records for Claimant showed that Claimant received a pension credit from ILA during his time with NODSI; Claimant's social security itemized statements showed Claimant receiving pay from NODSI; and Mr. Brooks' conversations with a Mr. Felger¹⁴ regarding how Claimant's contract would probably be used. (Tr. 62-63; EX-2, pp. 7-8).

Mr. Brooks testified he was informed by Claimant's Counsel that NODSI may not qualify as having proper maritime situs under the Act to allow for coverage of Claimant. (Tr. 64; NOMCX-02, p. 5). Claimant's Counsel further explained to Mr. Brooks that a claim should rightfully be filed against NOMC. (Tr. 64). Claimant's Counsel provided research to Mr. Brooks regarding maritime situs, but this research only pertained to NODSI's Chef Yard. After reviewing Counsel's research and performing a further investigation into the matter, Mr. Brooks determined Claimant's Counsel's argument with respect to NODSI may not be valid, based on NODSI's Terminal Yard. (Tr. 66). Mr. Brooks admitted that he did not make a maritime situs

¹¹ It appears from Mr. Williams' testimony that Nestlé's no longer operates at that facility next to NODSI. No testimony was provided to the undersigned to allow him to determine what business currently resides at the Nestlé's location.

¹² NOCS did not start its operations at that location until 2001. A waterworks and various pumping stations are located to the East of NODSI's Terminal Yard, but it is unclear from the evidence provided as to their vicinity in relation to the Terminal Yard.

¹³ WENO provides payroll services for most of the stevedoring companies on the waterfront of New Orleans. (Tr. 57). WENO records are also typically used to determine last maritime employer status. (Tr. 59).

¹⁴ Mr. Felger was never properly identified during the course of these proceedings.

determination with respect to NODSI's Chef Yard, and rather only determined that NODSI would satisfy maritime situs coverage based on the Terminal Yard facility. (Tr. 65-67).

Mr. Brooks testified that he believed NODSI satisfied maritime status under the Act, due to the work performed on containers at the respective yards and his experience with other similar mechanics' claims. (Tr. 68). Mr. Brooks admitted he did not have any information regarding whether NODSI employees ever went to any port, terminal, or waterfront area in New Orleans to perform work for NODSI. (Tr. 70). Mr. Brooks further admitted he did not have any information that NODSI had any pier, wharf, or dock on their respective properties. (Tr. 70). Mr. Brooks also admitted he had no knowledge of whether NODSI used any terminal or waterfront in connection with the work performed at its respective yards. (Tr. 70-71). Mr. Brooks had no knowledge regarding whether any employee of NODSI performed any work on a dock or wharf; participated in the unloading and loading of cargo onto vessels; or participated in the building or repairing of a ship. (Tr. 72-73).

Mr. Brooks explained that NODSI's Terminal Yard is right next to a waterway that could be accessed by a road going over a levee separating the yard from the waterway. (Tr. 71-72). Mr. Brooks further explained that the waterway could be directly accessed through the former Ceres terminal at the end of the road. (Tr. 84). Mr. Brooks did not have any knowledge of NODSI employees utilizing that road in their employment duties. (Tr. 72). Mr. Brooks did determine that Claimant performed some employment duties at the Terminal Yard. (Tr. 73).

According to Mr. Brooks, near NODSI's Chef Yard there are several trucking and industrial yards, a coffee roasting plant, and several marine facilities down France Road.¹⁵ (Tr. 77). Down Jordan Road, there are other terminals that have marine containers and trucks stationed on them.¹⁶ (Tr. 77). According to Mr. Brooks, near the Terminal Yard there is NOCS and the former Ceres terminal, along with tank storage facilities and areas which appear to be used by companies for loading operations. (Tr. 78-79). Mr. Brooks further observed a large trucking facility next to the Terminal Yard along Almonaster Boulevard, with large marine containers stationed in that facility. (Tr. 80). Most of the area to the east of NODSI's Terminal Yard is vacant. (Tr. 80). Mr. Brooks further explained that the Terminal Yard was one-hundred-and-fifty feet MRGO, separated only by a fence. (Tr. 81).

E. Deposition of Claimant's Son

Claimant's son was deposed on July 14, 2009. He has been employed by NODSI for the past eleven years, and is currently NODSI's terminal supervisor. (NOMCX-6, p. 4). As the terminal supervisor, he acts as the primary surveyor of all the containers and chassis that enter NODSI's yards. (NOMCX-6, pp. 4-5). Claimant's son has surveyed containers and chassis for NODSI's Chef Yard, but only has surveyed chassis for the Terminal Yard, as Flexi-Van being the only customer to have its business handled by the Terminal Yard. (NOMCX-6, pp. 5-6). The Terminal Yard was not purchased by NODSI until the Spring of 2000. (NOMCX-6, p. 6).

¹⁵ During the hearing, both Mr. Williams and Mr. Brooks looked at satellite maps of NODSI's yards and the surrounding areas. Both maps were marked with various locations, and entered into evidence as NODSIX-4 and NODSIX-5.

¹⁶ At the hearing, Mr. Brooks explained the visual makeup of a marine container, and confirmed that these containers appeared were present at the facilities he located near the Chef Yard.

Claimant's son testified that the containers that come into NODSI's yards are not loaded with cargo. (NOMCX-6, p. 7). He further testified that there is rarely any prior notification before the containers and chassis arrive at the yards. (NOMCX-6, p. 7). NODSI is further not provided with any documentation for the containers and chassis when they arrive at the yard. (NOMCX-6, p. 8). Claimant's son explained the containers are often not labeled to designate which customer owns the container. In these cases, he views the decal numbers provided on the sides of the containers, and then searches a website to match up the decal numbers with the respective customers. (NOMCX-6, p. 8). He testified these containers normally have CSC numbers provided with them. Claimant's son stated that he did not know where the containers would come from before they were placed on the trucks and chassis and sent to the NODSI yards. (NOMCX-6, p. 9). He testified that he had no idea if the containers that were repaired by NODSI came into the Port of New Orleans by ship. (NOMCX-6, p. 15). He further testified that no other type of work was performed by NODSI besides repair and storage of containers and chassis. (NOMCX-6, p. 12).

According to Claimant's son, the Chef Yard currently has several customers: Evergreen, Mitsui, Container Providers, International Equipment Services, Hamburg Sud, Gulf Consolidated Chassis Pool, and O.K. Logistics. (NOMCX-6, p. 7). He explained most of these customers require predominately container repair and maintenance. (NOMCX-6, p. 8).

Claimant's son testified that Claimant mostly worked at the Chef Yard while employed by NODSI. (NOMCX-6, p. 13). He explained Claimant did very little work at the Terminal Yard, as the Chef Yard had much more work that needed to be done. He further explained that the Chef Yard had over one thousand containers going in and out of the yard each year. (NOMCX-6, p. 14).

According to Claimant's son, the neighboring business of the Chef Yard include: a Folgers/Smuckers warehouse; Corrugated Industries; Dupre Storage; and a Luzianne factory. (NOMCX-6, p. 16). He further explained that the neighboring business of the Terminal Yard included: Transporting Consultants, Incorporated; Crescent Crown Beverage; and NOCS. (NOMCX-6, p. 17).

Claimant's son testified that NODSI did not utilize a waterway in its business operations. (NOMCX-6, p. 17). He further testified that NODSI's yards did not have any direct access to a waterway. (NOMCX-6, p. 17). He also testified that NODSI had no reason to try and access a waterway for its business. (NOMCX-6, p. 18).

F. Deposition of Wayne Williams

Wayne Williams was deposed on July 14, 2009. Mr. Williams is the general manager of NODSI. (NOMCX-7, p. 7). Mr. Williams was first employed as NODSI's terminal manager before being promoted to general manager in 1998. Mr. Williams explained that NODSI was started as a storage lot for containers and chassis, with the capability to make repairs to containers and chassis that were stored at the yard. (NOMCX-7, p. 9). Mr. Williams testified containers would come to the NODSI yard by truck or chassis. (NOMCX-7, p. 29). All containers that were brought to NODSI were empty. He further explained when a container

would come into NODSI, there would be no documentation associated with the container stating how the container was damaged. As such, he was unable to say if damage to the containers that NODSI repaired had actually occurred on a ship. (NOMCX-7, p. 13). Mr. Williams was further unable to testify as to where the containers came from before there entered NODSI's yards. (NOMCX-7, p. 9). Mr. Williams did not know if containers were last aboard a ship prior to being brought to NODSI for storage and repair. (NOMCX-7, p. 10). Mr. Williams assumed that all marine equipment had to hit a ship at some point or another, but could not definitively state that the containers that NODSI worked on came directly or indirectly from a ship. (NOMCX-7, pp. 9-10).

Mr. Williams explained the Terminal Yard was exclusively used for chassis repair for Flexi-Van. (NOMCX-7, pp. 20-21). No container work was performed at the Terminal Yard. He did not recall Claimant ever working over at the Terminal Yard. (NOMCX-7, p. 21).

Besides working in the yards, Mr. Williams sent NODSI employees to work on all major railroad lines except the CSX and KCS rail lines. (NOMCX-7, pp. 25, 27). He also sent NODSI employees to work on interstate and highway work, along with repair work in trucking yards. (NOMCX-7, p. 25). Regarding railways, he explained most railroads in the New Orleans area were not near major waterways or wharfs. (NOMCX-7, pp. 27-28). He highlighted the Union Pacific and the KCS railroad lines as being the only major rail lines close to a waterway. (NOMCX-7, p. 27). Regarding trucking facilities, Mr. Williams explained the only facilities that were close to a waterway were the ones on Chef Menteur Highway and Almonaster Boulevard. (NOMCX-7, p. 28). He stated that NODSI was not involved in the movement of cargo from ships, and did not utilize any waterway in its operations. (NOMCX-7, p. 30).

Mr. Williams admitted NODSI had lost a bulk of company data from its computers during Hurricane Katrina. (NOMCX-7, p. 19). NODSI lost interchanges and work orders, along with virtually all information from 1999 through 2003. The company further lost all its backup tapes for its data drives. (NOMCX-7, p. 20).

G. Deposition of Eric Jupiter

Eric Jupiter was deposed on July 16, 2009. Mr. Jupiter is currently the Marine Manager for the New Orleans, Louisiana terminal of Ports America. (NOMCX-9, p. 5). He oversees the stevedoring container operations for the New Orleans terminal. Ports America (Ports) is the successor company of P&O Ports, the company that NOMC was consolidated with around 2001. (NOMCX-9, p. 8). Mr. Jupiter has been employed with Ports since 1997. He was a marine superintendent for NOMC during the time that NOMC was still in existence. (NOMCX-9, p. 9).

According to Mr. Jupiter, NOMC created the entity Port Partners Industries (PPI), which handled the repair of containers and chassis for NOMC. (NOMCX-9, pp. 9-10). Due to the creation of PPI, he was unaware if outside vendors were allowed to come to the NOMC terminal and make repairs on containers. (NOMCX-9, p. 10). Mr. Jupiter was also unaware if container repairs were made offsite by outside vendors. He acknowledged numerous ship lines used NOMC and these lines made the decision of which vendor to use to repair its containers. (NOMCX-9, p. 10). He further explained that Ports generally did not allow any other vendor

except PPI to perform container repairs unless the steamship line specifically requests an outside vendor. (NOMCX-9, pp. 12-13).

Mr. Jupiter was unaware of any NODSI employees performing repairs at the former NOMC terminal on France Road. (NOMCX-9, p. 17). He further did not know if NODSI's yards had direct access to the waterfront or if NODSI utilized a waterway in their business operations. (NOMCX-9, p. 18). He explained in-land depots were normally used to relieve congestion at port facilities by allowing storage of empty equipment at the depots rather than the marine terminals. (NOMCX-9, pp. 18-19). He further explained depot areas could be used for off-site repairs. (NOMCX-9, p. 19). Mr. Jupiter was unaware of any in-land depot facility that only repaired containers and chassis that were transported by truck or rail. (NOMCX-9, p. 24). He was further unaware of any steamship lines that were in business with NOMC sending damaged containers offsite for repairs. (NOMCX-9, p. 25).

Mr. Jupiter did not know if Evergreen or Mitsui had a steamship line that would port in the Port of New Orleans. (NOMCX-9, p. 19). However, he had personally seen Evergreen and Mitsui containers being loaded and unloaded off of ships at the Port of New Orleans. (NOMCX-9, p. 26). He had not seen Evergreen containers shipped out of the Port of New Orleans since approximately 2000. (NOMCX-9, p. 27).

Mr. Jupiter explained that a CSC tag is a tag from the Container Safety Council. (NOMCX-9, p. 28). This tag meant that a container met certain international standards for strength and safety. Mr. Jupiter was unsure if a CSC tag was needed in order for a container to be placed on a vessel. (NOMCX-9, p. 28).

Mr. Jupiter also testified to the existence of the "Grand Alliance" of shippers that would utilize the services of NOMC. (NOMCX-9, p. 26). The "Grand Alliance" was a group of steamship companies that shared space on participating vessels in the Port of New Orleans. Several companies participated in the "Grand Alliance" in different percentages at one point in time, including: Lykes Steamship Company (Lykes), Hapag-Lloyd, Evergreen, Deppy, Mitsui, Yang-Ming, and K-Line.¹⁷ (NOMCX-9, p. 26). With the involvement of the "Grand Alliance," it was not an oddity to see several different steamship companies' containers being loaded or unloaded onto a vessel owned by one of the "Grand Alliance" companies. (NOMCX-9, p. 26). The "Grand Alliance" still exists as of the date of Mr. Jupiter's deposition, and utilizes the services of Ports America. (NOMCX-9, p. 26).

Mr. Jupiter testified that PPI performed repair services for some of the lines of the "Grand Alliance," including Lykes and Hapag-Lloyd. (NOMCX-9, p. 29). He further testified that if Evergreen and Mitsui sent containers to the Port of New Orleans, those containers would have been on the Lykes and Hapag-Lloyd ships. (NOMCX-9, p. 29). However, he explained that PPI would not necessarily perform the repairs on Evergreen and Mitsui containers, as the "Grand Alliance" was a ship-sharing agreement and all repairs of containers were done at the direction of the steamship company that owned the damaged containers. (NOMCX-9, p. 29). A member of the "Grand Alliance" was not allowed to make the repair decisions for containers that were owned by another member. (NOMCX-9, p. 31). Mr. Jupiter was positive that owners of

¹⁷ Mr. Jupiter testified to the involvement of these shippers, but did not provide the full names of these companies at deposition.

containers were made aware of the damages to their containers due to the constant communication between the companies and NOMC, along with the on-site surveying that was performed at the NOMC terminal. (NOMCX-9, pp. 32-33).

Mr. Jupiter was unaware if Evergreen and Mitsui containers were sent off-site for another vendor to repair. (NOMCX-9, p. 30). He was further unaware of Evergreen's and Mitsui's repair requests. (NOMCX-9, p. 34). He did state empty containers would be loaded and unloaded from these ships in the Port of New Orleans, but he did not know if Evergreen brought in or sent out empty containers from the Port. (NOMCX-9, pp. 30-31).

H. Deposition of Dominic Obrigkeit

Dominic Obrigkeit is currently the senior vice-president of the international business division in the business coordination department of Evergreen Shipping Corporation America. (NOMCX-11, p. 7). Mr. Obrigkeit has worked for Evergreen for approximately twenty-six (26) years, beginning as a junior vice-president and then being promoted to the head of Evergreen Norfolk prior to his current position. Mr. Obrigkeit described Evergreen as a company that specialized in the transporting of oceangoing cargo in a fully containerized atmosphere. (NOMCX-11, p. 8).

According to Mr. Obrigkeit, Evergreen had oceangoing containers entering and exiting the Port of New Orleans by ship during the period of 1995 through 2001. (NOMCX-11, p. 8). While no Evergreen vessels traveled to New Orleans, Evergreen containers came to the Port of New Orleans by a share-space arrangement with Lykes. (NOMCX-11, p. 9). As set out in the share-space arrangement, Evergreen containers would come aboard Lykes ships to New Orleans, and in return, Lykes containers were placed on Evergreen ships that would leave from the Eastern Seaboard of the United States. (NOMCX-11, pp. 8-9). The share-space arrangement with Lykes allowed for Evergreen to have 150 TCUs on a Lykes ship in exchange for 150 TCUs of Lykes containers to be placed on Evergreen ships. (NOMCX-11, p. 10). Mr. Obrigkeit explained if Evergreen need more space for containers, it could go over the allotted space on Lykes ship for a premium paid for the extra space. (NOMCX-11, p. 11). The share-space arrangement between Evergreen and Lykes was filed with the Federal Maritime Commission in 1995. (NOMCX-11, p. 11). While Lykes was purchased by CP Ships in 1997, Mr. Obrigkeit stated the space-sharing arrangement remained intact. (NOMCX-11, p. 12).

Mr. Obrigkeit testified that Evergreen had an office in New Orleans to allow for oversight of the day-to-day transfer of containers through the Port of New Orleans. This office remained in New Orleans until 1998, when the office was consolidated and moved to Dallas, Texas. (NOMCX-11, p. 14). The New Orleans office was responsible for arranging container movement in and out the Port of New Orleans and local railroads, along with the movement of all containers in Louisiana, Alabama, and the surrounding areas. (NOMCX-11, p. 14). Any dealing with local contractors would have been handled in the New Orleans office by Ed Garman. (NOMCX-11, p. 14).

Mr. Obrigkeit also testified as to Evergreen's policy regarding container and equipment repair. If Evergreen's container or equipment was damaged while in the possession of a contract

vendor, Evergreen would pursue that company in possession at the time of damage to accomplish all repairs needed to bring the container or equipment back to operational standards. (NOMCX-11, p. 15). While Evergreen did not have surveyors on site at the Port of New Orleans, the company would arrange for a damaged container to be isolated and have an off-site surveyor to inspect the container and make repair recommendations. (NOMCX-11, pp. 15-16). Evergreen would receive this recommendation and then file a claim with its insurance underwriter, unless it was determined that an off-loading stevedoring company had caused the damage. If the off-loading stevedoring company was responsible, Evergreen would hold that company liable for the repairs. (NOMCX-11, p. 16). After necessary repairs were made, an equipment interchange inspection form would be created and provided to Evergreen, whereby the container would then be returned to service.

Mr. Obrigkeit testified that any damage to a container prior to the discharge of the container by the off-loading stevedore, would cause Evergreen to look to the loading stevedoring company for liability for the damage. (NOMCX-11, p. 17). In these cases, Evergreen would send the container to a local contractor near the offload site to have repairs done, and Evergreen would charge these repairs to the responsible stevedoring company. (NOMCX-11, p. 17). If damage was noticed prior to the commencing of stevedoring operations, the container would be repaired at a facility on the port. (NOMCX-11, p. 23). Evergreen did not have any leased terminal space at the Port of New Orleans. Mr. Obrigkeit was unaware of the geographical extent of the Port of New Orleans.

According to Mr. Obrigkeit, local contractors were responsible for having ILA labor employees at their facilities to make repairs on Evergreen containers, pursuant to the ILA master contract. (NOMCX-11, p. 18). Mr. Obrigkeit testified that Evergreen had contractors in the Port of New Orleans that would perform repairs on containers coming from both ships and rail. (NOMCX-11, p. 19). He knew of no division between ship and rail containers at local contractors. He further testified that any containers coming off of a ship would have to be worked on by ILA labor pursuant to Evergreen's strict following of the ILA master contract. (NOMCX-11, p. 19).

Mr. Obrigkeit explained that a container yard agreement was a standard form agreement that would be signed by all container contractors, establishing the contractor's rates and services to be performed. (NOMCX-11, p. 20).

IV. DISCUSSION

A. Contention of the Parties

Claimant contends that he suffered hearing loss in the course and scope of his employment with NOMC, and that he has provided evidence to establish the existence of situs and status to allow for jurisdictional coverage of NOMC under the Act. He further contends that if NOMC is successful in pleading its affirmative defense of a subsequent maritime employer, NODSI falls under the jurisdictional coverage of the Act and is responsible for his benefits. Claimant also contends that his average weekly wage with NOMC should be calculated under

10(c) of the Act, providing for an average weekly wage of \$1,001.25, and a corresponding compensation rate of \$667.50.

NOMC/Carrier contend that, while NOMC falls under the jurisdictional coverage of the Act and Claimant has suffered a compensable injury under the Act, NOMC has an affirmative defense to liability. NOMC/Carrier argue that NODSI satisfies the situs and status requirements to allow for jurisdictional coverage under Section 3 of the Act. NOMC/Carrier contend that NODSI was a subsequent maritime employer after Claimant left his employment at NOMC, and NODSI should be held liable for benefits as a result of Claimant's compensable injury. Should NOMC be found to be the last maritime employer and liable for benefits under the Act, NOMC/Carrier contend that Claimant's average weekly wage should be calculated under 10(c) of the Act, providing for an average weekly wage of \$187.01 and allow for the national minimum compensation rate.

NODSI contends that it is not a covered maritime situs under the Act. NODSI further contends that Claimant was not engaged in maritime employment while working for NODSI to satisfy maritime status under the Act. NODSI also contends that it is not a maritime employer under the Act. NODSI contends that it does not come under the jurisdictional coverage of the Act, and therefore cannot be held liable for benefits under the Act as Claimant's last maritime employer.

B. Credibility of the Parties

It is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc., v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

The undersigned finds Claimant to be credible regarding the work he performed with NOMC and NODSI, his status with his union, and his injury. The undersigned finds Mr. Randy Williams, Claimant's son, and Mr. Wayne Williams to be generally credible.¹⁸ The undersigned gives weight to the testimony of Claimant's son regarding the yard where Claimant did the bulk of his employment duties for NODSI and how NODSI would survey a container brought into

¹⁸ It should be noted that due to extenuating circumstances, the undersigned is unable to completely validate certain statements of the representatives of NODSI. At the outset, Mr. Randy Williams, as owner of NODSI, did not acquire insurance coverage, and the possibility of a large penalty for lack of insurance coverage under the Act must be taken into account when viewing his respective testimony. NODSI lost most of its records that dealt with the employment of Claimant and the work performed during his period of employment due to Hurricane Katrina and a preceding computer failure. As such, NODSI was unable to produce any documents to support the testimony of its representatives regarding their awareness of where Evergreen containers were coming from and the following destinations of these containers. It should further be mentioned that the testimony of Mr. Randy Williams, with respect to his selection of the Chef Yard as NODSI's first place of operation, should be viewed against the fact that he set up in an area where Evergreen's former contractor, ATS, was also stationed.

their yard. The undersigned notes that the testimonies of Mr. Wayne Williams and Claimant's son supported the testimony of Mr. Randy Williams regarding the nature of NODSI's business.¹⁹

The undersigned further finds Mr. Brooks to be generally credible based on his experience with maritime compensation claims and his research performed in this matter. However, the undersigned notes the numerous discrepancies between his testimony and the testimony of Mr. Randy Williams that do not allow for either testimony to be given great deferential weight.²⁰ The undersigned credits Mr. Jupiter with respect to his testimony regarding the presence of Evergreen containers in the Port of New Orleans and the repair decisions made by steamship lines, but is unable to give Mr. Jupiter's testimony any weight regarding to the work performed by NODSI or the repairs performed on Evergreen containers, as he was unaware of many of the circumstances surrounding Evergreen's container operations. The undersigned gives great weight to the testimony of Mr. Obrigkeit, as he presented the most credible testimony regarding Evergreen's presence in the Port of New Orleans during the time of Claimant's employment with NODSI. His testimony regarding the presence of Evergreen's containers in the Port of New Orleans supported the prior testimony of Mr. Jupiter. Mr. Obrigkeit also provided the most complete description of Evergreen's container operations and their relationship with respect to local contractors and the repairs that would need to be made on various marine containers. His testimony, along with the testimony of Mr. Randy Williams, provided convincing evidence of the relationship between Evergreen and ILA workers, and the fact that Claimant, as an ILA worker, worked solely on Evergreen containers at NODSI. Claimant's testimony further supports the overall nature of his ILA employment.

C. Jurisdiction

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 his injury occurred on a landward area covered by Section 3(a) and that his work is maritime in nature and not specifically excluded by 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 jurisdiction exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id.* In *Perini*, the Supreme Court held that when a worker is injured on actual navigable waters while in the course of his employment on those waters, he is a maritime employee under Section 2(3). Regardless of the nature of the work being performed, such a claimant satisfied both the situs and status requirements and is covered under the Act, unless he is specifically excluded from coverage by another statutory provision. *Perini*, 459 U.S. at 323-324, 15 BRBS at 80-81 (CRT). *See also Crapanzano v. Rice Mohawk, U.S. Construction Company, Ltd.*, 30 BRBS 81 (1996); *Nelson v. Guy F. Atkinson Construction Co.*,

¹⁹ The undersigned notes that both Mr. Randy Williams and Mr. Wayne Williams testified to NODSI losing its records on two different occasions. No contradicting testimony has been submitted to dispute that NODSI lost its records pertaining to Claimant's employment due to a computer malfunction and Hurricane Katrina.

²⁰ It should be noted that Mr. Brooks' testimony contained assumptions regarding the types of containers that NODSI worked on and access to the Ceres terminal that the undersigned is unable to rely on to reach a decision. Further, at hearing, both Mr. Brooks' and Mr. Randy Williams' respective testimonies were in dispute regarding the nature of the facilities in the areas surrounding NODSI's yards. While the testimony of Claimant's son somewhat supports the testimony of Mr. Randy Williams in this regard, Mr. Brooks testified that he personally had driven out to the area in the few days prior to trial and observed facilities with maritime containers near NODSI's Chef Yard. As such, the undersigned shall consider both of their testimonies regarding the nature of the businesses surrounding NODSI's yards as providing equal weight, and will not rely solely on one as guidance.

29 BRBS 39 (1995) *aff'd mem. sub nom. Nelson v. Director, OWCP*, No 95-70333 (9th Cir. 1996); *Johnson v. Orfanos Contractors, Inc.*, 25 BRBS 239 (1992).

The situs test limits the geographic coverage of the Act, while the status test is an occupational concept that focuses on the nature of the worker's activities. *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999) (*en banc*).

Generally, the Act only covers a claimant who establishes: (1) that his or her injury occurred upon the navigable waters of the United States, including any dry dock, or that his or her injury occurred on a landward area covered by Section 3(a), and (2) that his or her work is maritime in nature and not specifically excluded by the Act. 33 U.S.C. §§ 902(3), 903(a). Therefore, for coverage to exist, a claimant must satisfy both the "situs" and "status" requirements of the Act. *See generally Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983).

SITUS

The situs test refers to the place where the employee worked or was injured. The definition of situs in the Act includes navigable waters, and "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." *Bienvenu v. Texaco, Inc.*, 164 F.3d at 904. Situs is to be determined at the time of the injury under Section 3(a). Thus, an area not yet used for maritime purposes cannot satisfy the situs requirements under the Act. *Bazor v. Boomtown Belle Casino*, 313 F.3d 300, 36 BRBS 79 (CRT) (5th Cir. 2002), *cert. denied* 540 U.S. 814 (2003). The situs test is satisfied for the entire facility if part of the area is "customarily used" for loading and unloading vessels. *Caputo*, 432 U.S. at 249.

The Circuit Courts are split on the issue of situs under the Act. The Fourth Circuit has expressed a restrictive limitation of the landward extension of situs under the Act by following a strict construction of the Act's language. *See Sidwell v. Express Container Services*, 71 F.3d 1134 (4th Cir. 1996), *cert. denied* 518 U.S. 1028 (1996); *Parker v. Director, OWCP*, 75 F.3d 929 (4th Cir. 1996), *cert. denied* 519 U.S. 812 (1996). In *Sidwell*, the Court held that an injury to a worker at a container repair facility eight-tenths of a mile from a marine terminal was not a covered situs under the Act. As the facility where the claimant was injured was surrounded by various business and residential developments, it could not be considered an "adjoining area" to a navigable body of water for purposes of situs requirements under the Act. *Id.* The Fourth Circuit has determined that the situs test is generally a geographic test that should be limited to the area specified by the Act. *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 222 (4th Cir. 1998) ("The situs test, in sum, is a geographical one, and even though a longshoreman may be performing maritime work, if he is not injured within the land area specified by the statute, he is not covered by the Act").

Other circuit courts have taken a more expansive view of situs. In *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978), the Ninth Circuit stated:

In order to further Congress's goal of uniform coverage, the phrase "adjoining area" should be read to describe a functional relationship that does not in all cases depend upon physical contiguity. 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.

568 F.2d at 141, 7 BRBS at 411.

The Fifth Circuit has taken a more expansive view of what constitutes an "adjoining area" to provide situs under the Act. In *Texports Stevedore Co. v. Winchester*, the Fifth Circuit held that an adjoining area need not be contiguous to navigable water, as long as there was some form of a maritime nexus between the area and the navigable water. *Texports Stevedore Co. v. Winchester*, 632 F.2d 504 (5th Cir. 1980), *cert. denied*, 452 U.S. 905 (1981). *See also Bazor*, 313 F.3d 300 ("adjoining area" is determined not only by geographic proximity to navigable water, but also the nature of work performed there.); *Thibodeaux v. Grasso Prod. Mgmt., Inc.*, 370 F.3d 486, 493 (5th Cir. 2004). In *Winchester*, the claimant was injured one-half mile away from the Port of Houston, which was fenced and separated from other businesses. The Court reasoned that "as long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, an employee's injury can come within the LHWCA. To require absolute contiguity would be to reenact the hard lines that cause longshoremen to move continually in and out of coverage." *Id.* at 514. As long as a site is close to or in the vicinity of navigable waters or in a neighboring area, the court in *Winchester* believed it could come within the situs requirement of the Act. Further, under *Winchester*, the perimeter of an "area" is defined by its function. Thus, *Winchester* required that the overall area be customarily used in loading, unloading, building or repairing a vessel. An area's exclusive use, however, need not be maritime, and it is sufficient if it is customarily used by any maritime employer. *Id.*

Winchester thereby set out two requirements that needed to be met for a determination of an "adjoining area" to qualify as situs under the Act: a geographical nexus and a functional nexus.

In determining that absolute contiguity with a navigable body of water was not necessary, the Fifth Circuit relied on the congressional purpose of the 1972 amendments to the Act, which was to expand coverage, apply uniform standards, cover on-shore maritime duties, and reduced the number of employees walking in and out of coverage. *See P.C. Pfeiffer Co.*, 444 U.S. at 69; *Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 557 (5th Cir. 1998). As stated in *Winchester*:

Although "adjoin" can be defined as "contiguous to" or "to border upon," it also is defined as "to be close to" or "to be near." "Adjoining" can mean "neighboring." To instill in the term its

broader meaning is in keeping with the spirit of the congressional purposes. So long as the site is close to or in the vicinity of navigable waters, or in a neighboring area, an employee's injury can come within the LHWCA.

Winchester, 632 F.2d at 513-14. See also *Palmer v. Delta Marine Industries*, 12 BRBS 957 (1980); *Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002). To the extent that *Jacksonville Shipyards, Inc. v. Perdue*, 539 F.2d 533, 4 BRBS 482 (5th Cir. 1976), *vacated and remanded*, 433 U.S. 904 (1977), *reaff'd*, 575 F.2d 79, 8 BRBS 468 (5th Cir. 1978), was inconsistent with this broad view of the covered adjoining "area," it was overruled.

In *Winchester*, the Fifth Circuit openly rejected the position that the presence or absence of non-maritime buildings between the point of injury and the water is an absolute test for whether an injury is covered by the LHWCA. The fact that the place of injury is surrounded by non-maritime and residential properties does not conclusively establish that a site is not an "adjoining area" under the Act. *Stratton*, 35 BRBS 1 (quoting *Winchester*).

As stated above, *Winchester* provided that along with a geographical nexus, the area where the injury occurs must have a maritime nexus, which dictates that the area be one that is "customarily used for significant maritime activity." *Director, OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d 303, 305 (5th Cir. 1997). However, the Fifth Circuit has held that the fact that "the specific locus of injury is not customarily used for maritime purposes even though the general area is so used" is not fatal to a finding of maritime status. *Winchester*, 632 F.2d at 516. The Fifth Circuit discussed the scope of *Winchester* with regard to areas "customarily used" in *Coastal Prod. Serv. Inc. v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009), *aff'g* 40 BRBS 19 (2006). In *Hudson*, the court stated that the situs inquiry as set out in *Winchester* involves "a simple functional inquiry." The "area" that adjoins navigable waters is that area "customarily used by an employer is loading, unloading, repairing, or building a vessel." The "area" is not an uncovered site simply because a vessel cannot dock for loading and unloading at the precise location. Rather, "if a particular area is associated with items used as part of the loading process, the area need not itself be directly involved in loading or unloading a vessel or physically connected to the point of loading or unloading." *Id.* at 434. The *Hudson* court further held that the area where the injury occurred need only be "customarily" used for maritime activity, not exclusively or predominately so. *Id.* at 437.

The Board has found that a site adjacent to navigable waters, or in a neighboring area customarily used in loading or unloading a vessel, satisfies the situs test even though it may not be used exclusively for maritime purposes. *Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998); *Gavronic v. Mobil Mining and Minerals*, 33 BRBS 1 (1999). See also *Turner v. Seattle Crescent Container Service*, 5 BRBS 172 (1976) (claimant was injured on an area that fell under the "customarily used" requirement of situs, where the container storage terminal in which claimant was injured was two miles from the terminal where the containers were loaded aboard vessels, even though it had no access to the neighboring waterway, as the site adjoined a navigable waterway and was an essential part of employer's operation).

In several cases, the Benefits Review Board has followed the precedence set forth by *Winchester*. See *Uresti v. Port Container Industries, Inc.*, 34 BRBS 127 (2000); *Melerine v. Harbor Construction Co.*, 26 BRBS 97 (1992); *Anastasio v. A.G. Ship Repair*, 24 BRBS 6 (1990); *Brown v. Bath Iron Works Corp.*, 22 BRBS 384 (1984); *Stratton v. Weedon Engineering Co.*, 35 BRBS 1 (2001); *Davenport v. Daytona Marine & Boat Works*, 16 BRBS 196 (1984); *Thornton v. Brown & Root, Inc.*, 16 BRBS 311 (1984). The Board has also declined to follow the Fourth Circuit's precedence in *Sidwell* for cases that fall out of the scope of the Fourth Circuit's jurisdiction. See *Arjona v. Interport Maintenance Company, Inc.*, 31 BRBS 86, n. 4 (1997) ("We decline to adopt [the *Sidwell* holding] in cases arising outside the Fourth Circuit, in the view of the Board's longstanding application of the criteria outline in ... and *Winchester*....").

In the present matter, NOMC contends that the undersigned should adopt the broad Fifth Circuit interpretation of situs as set forth by *Winchester*. In contrast, NODSI contends that it does not satisfy the *Winchester* test. Further, NODSI offers that Ninth Circuit precedent, provided by *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 141 (9th Cir. 1978), should be considered in determining the functional relationship between NODSI's Chef Yard and the adjacent Industrial Canal waterway. At the outset, the undersigned notes that while *Winchester* cited *Herron* in its opinion, it specifically did so to bolster its finding of the congressional purposes of the 1972 amendments to the Act, not to adopt the "functional relationship" test that the Ninth Circuit currently follows to determine situs under the Act. The undersigned will determine this matter based on the law of the controlling circuit court, as thus is inclined to follow Fifth Circuit precedence.

The undersigned finds that NODSI satisfies the situs requirement of the Act. Under *Winchester*, a site must have both a geographical and a functional nexus to be covered under situs. One of NODSI's yards, the Chef Yard satisfies both criteria.

With regards to the geographical nexus, NODSI's Chef Yard, where Claimant predominately performed his employment duties, is approximately three hundred (300) yards from the Industrial Canal. While it does not directly adjoin the waterfront, the waterfront is accessible by road. The Terminal Yard is located approximately one hundred (100) yards from the waterfront, which is accessible to the facility through a road and use of the former Ceres terminal. Certainly both yards qualify as neighboring or being close by the waterfront, as both are closer than the area held as situs under *Winchester*. Based on the expansive interpretation of an "adjoining area" under Fifth Circuit precedent, the undersigned finds that both the Chef Yard and the Terminal Yard satisfy the geographical nexus requirement required by *Winchester*.

With regards to the functional nexus requirement set forth by *Winchester*, the NODSI's Chef Yard was used to repair and store containers for Evergreen. The weight of the evidence shows that some of these containers, regardless of NODSI's absence of knowledge to the fact, were used for marine transportation, or had previously been used in marine transportation. Based on the lack of documented evidence, the undersigned relies on testimonial evidence to reach this conclusion.

Mr. Obrigkeit testified that Evergreen, which had containers come in and out of the Port of New Orleans during the time of Claimant's employment with NODSI, would under certain

circumstances send damaged containers to local contractors for repair. According to Mr. Jupiter, shipping lines that owned the damaged containers would receive notice of these damages and make the choice of which vendor made the necessary repairs. Mr. Obrigkeit explained Evergreen had no leased space at the Port of New Orleans upon which it could perform necessary repairs to its containers, as no Evergreen ship came to the Port of New Orleans and containers reached the Port based on a share-space arrangement. Evergreen thus utilized local contractors for repairs. Mr. Obrigkeit also testified that local contractors would work on both rail and marine containers, but ILA labor would work solely on marine containers.

Mr. Randy Williams testified that NODSI was created initially to serve Evergreen as an in-land depot. Mr. Jupiter testified that depot areas could be used for off-site repairs, but was unaware of any in-land depot facility that only repaired containers and chassis transported by truck and rail. Mr. Randy Williams testified to being instructed by Evergreen to hire ILA employees.²¹ He also testified that Claimant was an ILA worker who worked solely on Evergreen containers at the Chef Yard. This testimony was supported by the respective testimonies of Claimant and Claimant's son. Claimant's son testified to over a thousand containers entering the Chef Yard on an annual basis. Even with this many containers coming into the Chef Yard, no representative of NODSI could provide affirmative statements regarding the berth or ultimate destination of these containers.²² Mr. Obrigkeit testified that, depending on when the damage was caused, damaged Evergreen containers in the Port of New Orleans were sent to a local contractor for repair.

NODSI would argue that it did not take containers from off of a ship, or take containers that were loaded with cargo, and thus did not repair maritime containers. However, the fact that the containers were delivered to NODSI by truck and rail does not negate the possibility that those containers were used in maritime commerce. Further, the fact that these containers were not loaded with cargo does not negate the possibility that the containers came off of ships or were used in maritime commerce.²³ While NODSI representatives did not know where these containers that they repaired came from, this lack of knowledge does not destroy any possibility that the containers they were repairing came did not come from ships. Weighing all testimony, the evidence provides that Claimant, as an ILA employee, repaired marine containers during a portion of his employment with NODSI.

The weight of the evidence provides that NODSI were a local contractor under the guidance of Evergreen that received both rail and marine containers for repair. Evidence further provides that the marine containers were to be worked on solely by ILA employees as part of Evergreen's ILA master contract. Claimant was an ILA employee for a portion of his time with NODSI, and worked solely on Evergreen containers for the time he worked union employment.²⁴ Without more evidence to disprove that NODSI did not repair marine containers for Evergreen,

²¹ Mr. Randy Williams admitted to having at least three ILA employees working at NODSI at one time.

²² Mr. Randy Williams further testified that NODSI repaired Evergreen containers, but received these containers from rail and truck and had no knowledge of whether they came off of a ship prior to being on the rail or truck. Both the testimonies of Claimant's son and Mr. Wayne Williams concurred in this assertion.

²³ Mr. Jupiter testified that it was quite common to have empty containers placed on ships and come off of ships. No testimony has been presented to contradict the matter. Mr. Randy Williams and Mr. Wayne Williams' testimonies regarding empty cargo are not given weight towards this matter, as they are based on pure assumption.

²⁴ Claimant and Mr. Randy Williams' respective testimonies support this statement.

the undersigned finds that, considering all evidence provided, marine containers for Evergreen were repaired by NODSI's ILA employees, including Claimant, and stored at the Chef Yard.

Under *Winchester* and *Hudson*, the Fifth Circuit has determined that if a particular area is associated with items used as part of the loading process, the area need not itself be directly involved in loading or unloading a vessel, or physically connected to the point of loading or unloading, to be considered an area "customarily used for significant maritime activity" in satisfaction of *Winchester*'s functional nexus requirement. In this case, containers are certainly items that are used as part of the loading process. While the Chef Yard is not connected to a point of loading or unloading, or directly involved in loading or unloading, it is involved in the repair and storage of items that are used for the loading and unloading of cargo. The loading and unloading of cargo is undoubtedly a significant maritime activity. Further, even if Evergreen containers are not the only containers that are repaired at NODSI's Chef Yard, this does not amount to the Chef Yard lacking situs. Under Fifth Circuit precedent, the area where the injury occurred need only be "customarily" used for maritime activity, not exclusively or predominately so. NODSI customarily repaired Evergreen marine containers, a process which was a significant maritime activity necessary for the process of loading and unloading cargo. As such, the undersigned finds that NODSI's Chef Yard satisfies the functional nexus required under *Winchester* as an area "customarily used for significant maritime activity."

With respect to NODSI's Terminal Yard, the weight of the evidence shows that no container repair was conducted at that yard. No work for Evergreen was ever conducted at the Terminal Yard. The only client served by the Terminal Yard is Flexi-Van, a non-maritime company. As such, the Terminal Yard is not an area "customarily used for significant maritime activity" and thus does not have a functional nexus to qualify as situs under *Winchester*.

The undersigned notes that NODSI has argued that several Board cases dealing with container repair facilities were found to not qualify as situs under the Act and are analogous to the instant matter.²⁵ However, the undersigned finds that the *Herron* test, used by the Board in all three of the cited cases, is not controlling in this matter, as this matter falls directly under the control of the Fifth Circuit. As Fifth Circuit precedent has held, to not rely on *Winchester* in this matter would allow for shifting and fortuitous coverage, problems which congressional policy sought to eliminate with the Amendments to the Act.

Further, the undersigned finds that NODSI would inevitably satisfy most of the factors set out in the *Herron* "functional relationship" test. NODSI chose the Chef Yard based on the hard ground that would allow the company to run its repair operations and store containers. Thus, the area was suitable for its repair operations, which is in support of a significant maritime activity. The yard was three hundred (300) yards from a neighboring waterway, thus satisfying the proximity to a waterway element. The neighboring business, according to the testimonies of Mr. Brooks, Mr. Randy Williams, and Claimant's son, were a mixture of warehouses, facilities with marine containers upon them, marine facilities and automotive shops. Even if one were to find that these businesses were not adjoining properties devoted primarily to uses in maritime

²⁵ NODSI submits *Arjona v. Interport Maintenance Co., Inc.*, 34 BRBS 15 (2000); *Bennett v. Matson Terminals, Inc.*, 14 BRBS 526 (1981), *aff'd sub nom. Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982); and *Lasofsky v. Arthur J. Tickle Engineering Works, Inc.*, 20 BRBS 58 (1987), *aff'd mem.*, 853 F.2d 919 (3rd Cir. 1998) are all analogous to the instant matter.

commerce, the Fifth Circuit and the Board have held that the fact that the place of injury is surrounded by non-maritime and residential properties does not conclusively establish that a site is not an “adjoining area” under the Act. Circuit and Board precedence seem to diminish the importance, at least in the circuit jurisdiction where this case falls, of having adjoining businesses be devoted to maritime commerce to qualify as an “adjoining area” under Section 3 of the Act.

Finally, while *Herron* requires consideration into whether the site in question is as close to the waterway as is feasible, given all of the circumstances in the case, NODSI had no need to be close to the waterway to conduct its marine activity. Rather, when the Chef Yard was founded, NODSI needed hard ground for operations and to be close in vicinity to where Evergreen’s containers would offload. When it was unable to find an area near the Union Pacific Railway²⁶ to facilitate Evergreen’s rail operations, NODSI set up the Chef Yard in the area near Evergreen’s former local contractor, ATS. It appears that NODSI was directed by Evergreen in all phases of its start up, and found an area which would facilitate not only the need for hard ground for operations, but also would facilitate the repair of Evergreen containers being loaded and unloaded at the Port of New Orleans. Regardless of the representatives of NODSI’s actual knowledge, the weight of the evidence shows that Evergreen used the Chef Yard to repair its marine containers that were offloaded at the Port of New Orleans, and NODSI was as close as feasibly possible, given its operational needs, to facilitate Evergreen’s marine container repairs.

No matter the determination of situs with respect to *Herron* and Ninth Circuit precedent, the undersigned finds that NODSI’s Chef Yard has a geographical nexus to a waterway and a functional nexus as an area “customarily used for significant maritime activity,” to warrant the determination of NODSI’s Chef Yard as an “adjoining area” under *Winchester* and Fifth Circuit precedent. As NODSI’s Chef Yard satisfies the *Winchester* requirements, the undersigned finds NODSI’s Chef Yard to be an “adjoining area” as designated by Section 3(a), allowing for the Chef Yard to satisfy situs requirement for coverage under the Act.

STATUS

The status requirement insures that the Act only covers those people who spend at least some of their time in indisputably maritime operations. *Caputo*, 432 U.S. at 273. Status is an occupational test requiring an examination of the character of the work to see whether the employee’s activities bear a significant relationship to traditional maritime activity. In *Chesapeake & Ohio Railway Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989), the Supreme Court held that land-based claimants at a relevant situs, engaged in activity that is an integral or essential part of loading or unloading a vessel, are covered under the Act. The Court also held that workers “who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act,” even though they were not performing work essential to the loading process when they were actually injured. *Id.* at 47. The activity being performed must be integral or essential; Section 2(3) cannot be read to eliminate any requirement of a connection with the loading and unloading, or the construction of ships. *Herb’s*

²⁶ Testimony does show that Mr. Randy Williams was under the complete direction of Evergreen representatives but only Mr. Williams testified that Evergreen wanted him to set up near the Union Pacific Railroad. No other testimony has been provided to credit this statement, and the undersigned, given the parameters of this case, is disinclined to provide this portion of testimony with great weight.

Welding v. Gray, 470 U.S. 414 (1985) (the Amendments were not meant “to cover employees who are not engaged in loading, unloading, repairing, or building a vessel just because they are injured in an area adjoining navigable waters used for such activity.”).

Status may be determined either upon the maritime nature of claimant’s activity at the time of his injury or upon the maritime nature of his employment as a whole. *Miller v. Central Dispatch, Inc.*, 673 F.2d 773, 781(1982); *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841 (5th Cir 1978). The first status alternative is referred to as the “moment of injury” test, while the second status alternative requires only that the claimant spend “some” portion of his overall employment performing maritime activities. *Caputo*, 432 U.S. at 273; *P.C. Pfeiffer Co.*, 444 U.S. at 812; *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346 (5th Cir. 1980); *Lennon v. Waterfront Transport*, 20 F.3d 658 (5th Cir. 1994). The Fifth Circuit has held that a worker who performs maritime work at least some of the time will be covered, even if he or she is not performing maritime work at the moment of the injury. *Smith v. Universal Fabricators, Inc.*, 878 F.2d 843 (5th Cir. 1989); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). *See also Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 8 BRBS 787 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979) (could be covered if he met the coverage requirements based either on his occupation or on his activity at the moment of injury).

In *Hullingshorst Industries, Inc., v. Carroll*, 650 F.2d 750, 755 (5th Cir. 1981), the Fifth Circuit noted that it was clear that the maintenance and repair of tools, equipment, and facilities used in indisputably maritime activities lied within the scope of “maritime employment” as that term was used in the Act. *See also Peterson v. General Dynamics Corp.*, 25 BRBS 71 (1991). Specifically, container repair has been held to be covered employment satisfying the status test due to it being an essential service to the containers’ continued use in maritime commerce. *Arjona v. Interport Maintenance Co., Inc.*, 31 BRBS 86 (1997) (claimant met the status requirement as it was undisputed that claimant repaired intermodal containers, some of which were used for maritime purposes); *Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101 (CRT) (11th 1990) (essential maintenance is the last step necessary to complete the loading process); *Insinna v. Sea-Land Service, Inc.*, 12 BRBS 772 (1980). In *Winchester*, claimant’s job repairing and maintaining the gear used by longshoremen was a continuous, direct involvement with maritime activities. *Winchester*, 632 F.2d at 504.

Here, the undersigned finds that Claimant’s employment as a marine container mechanic qualifies as maritime employment to satisfy status under the Act. As with determining situs above, the undersigned must rely on the fact-pattern as portrayed by the relevant testimony submitted in this case. Mr. Obrigkeit testified to Evergreen having marine containers coming into the Port of New Orleans during the time of Claimant’s employment with NODSI. Mr. Jupiter testified to seeing Evergreen containers come into the Port of New Orleans. Mr. Obrigkeit further testified to Evergreen, in certain situations, sending containers to local contractors to be repaired once they were received into the Port of New Orleans. Mr. Randy Williams explained that NODSI was an Evergreen contractor, as NODSI was created initially to serve primarily Evergreen with its container repair and storage needs. All of NODSI’s representatives concurred that NODSI was in the business of receiving and repairing Evergreen containers. While he also stated he had no idea where Evergreen’s containers would come from, this testimony is not conclusive enough to show that NODSI never repair marine containers at their Chef Yard.

At the time he began working at NODSI, Claimant was an ILA employee. He testified that, for the first few years of his employment with NODSI, he worked solely on Evergreen containers while he was a member of the ILA. Testimonial evidence of Mr. Randy Williams and Mr. Obrigkeit provides that Evergreen required NODSI to hire ILA to work solely on Evergreen containers during the pendency of Evergreen's ILA master contract. While Mr. Obrigkeit testified that Evergreen's local contractors often worked on both marine and rail containers, he also testified that Evergreen had ILA workers repair marine containers only in a strict following of the ILA master contract. When Evergreen ended its ILA master contract, Claimant was forced to switch to non-union work to keep his employment. The fact that officials at NODSI did not know they were repairing marine containers does not dispute the testimony of Mr. Obrigkeit that local contractors of Evergreen would repair marine containers coming from the Port of New Orleans using solely ILA workers until the end of the ILA master contract.

The weight of the evidence affords the determination that Claimant, as an ILA employee, worked on Evergreen marine containers while employed by NODSI.²⁷ Testimony provides that Evergreen had containers come into the Port of New Orleans and that these containers would be sent to local contractors for repair by ILA workers only. Testimony further provides that NODSI was a local contractor of Evergreen with no explicit knowledge of the birth of the containers that came into their yard. However, undisputed testimony provides that NODSI was required to use ILA workers to repair Evergreen containers, and Claimant was an ILA worker for a portion of his employment with NODSI, working solely on Evergreen containers.

As such, Claimant repaired marine containers at least some of the time during his employment with NODSI. Fifth Circuit precedence only requires Claimant to spend some of his time performing maritime employment to satisfy the status requirement of the Act. Case precedent has also held that marine container repair is an essential function to the loading and unloading process as to qualify as maritime employment. According to his testimony, Claimant predominately repaired Evergreen containers while working for NODSI as an ILA employee. Based on the evidence provided, Claimant's employment satisfies the status test for jurisdiction under the Act.

Due to the NODSI's Chef Yard satisfying the situs and status requirements for coverage under the Act, the undersigned finds that NODSI falls under the jurisdiction of the LHWCA and can be held liable for benefits to Claimant. The undersigned shall proceed to determine the further merits of the matter.

D. Last Responsible Employer

The last maritime employer rules applies in situations where two or more maritime employers may be responsible for a work-related injury or disease. In such situations, the rule requires that the last maritime employer be completely liable. *See Travelers Insurance Co. v. Cardillo*, 225 F.2d 137, 145 (2nd Cir. 1955) (stating, "the employer during the last employment

²⁷ It should be noted that the undersigned does not find that Claimant stopped working on marine containers when he stopped working ILA employment. However, the weight of the evidence concludes that he worked on marine containers as an ILA employee. The evidence is not conclusive in showing that he predominately worked on marine containers after ending his ILA employment, even though that possibility remains.

in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award.”). The last maritime employer rule, therefore, “imposes full liability on the final maritime employer even though prior maritime employers might have contributed to the claimant’s disease or injury.” *Newport News Shipbuilding and Dry Dock Co. v. Stillely*, 243 F.3d 179, 182 (4th Cir. 2001). *See also Fulks v. Avondale Shipyards, Inc.*, 637 F.2d 1008, 1012 (5th Cir. 1981). A last maritime employer will be completely liable for a claimant’s injury or disease even if the length of claimant’s employment “was so slight that, medically, the injury would, in all probability, not be attributable” to that employer. *Travelers Insurance Company v. Cardillo*, 225 F. 2d at 145.

The Fifth Circuit has treated hearing loss as an occupational disease and applied the *Cardillo* rule. *Avondale Industries v. Director, OWCP*, 977 F.2d 186, 190 (5th Cir. 1992)

However, the Supreme Court has determined that hearing loss, unlike occupational diseases that develop over time, is the result of an immediate injury in that it occurs when an employee is exposed to excessive noise. *Bath Iron Works v. Director, OWCP*, 506 U.S. 153, 113 S.Ct. 692, 121 L.Ed.2d 619, 1993 A.M.C. 832 (1993). It is a scheduled injury and is presumed to be disabling upon exposure. *Id.* The responsible employer is liable for the entire hearing loss, including presbycusis, the portion due to aging. *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986) (en banc), *aff’g* 751 F.2d 1460 (5th Cir. 1985), *aff’g* 15 BRBS 386 (1983).

Once a claimant has made a *prima facie* case for entitlement to benefits for hearing loss under the Act, the burden shifts to the employer to prove that either: (1) that exposure to injurious stimuli did not cause the employee’s occupational disease; or (2) that the employee was performing work covered under the LHWCA for a subsequent employer when he was exposed to injurious stimuli. *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 485 (5th Cir. 2003); *Avondale Indus., Inc.*, 977 F.2d at 190.

In the present case, it has been stipulated that Claimant suffered hearing loss during the course and scope of employment. The undersigned has previously held that NODSI is subject to coverage under the Act. NOMC has not disputed that it falls under the coverage of the Act, but contends that it has an affirmative defense to coverage based on NODSI being a subsequent maritime employer. Claimant testified that he worked at NOMC for five months in 1996 before taking a job at NODSI, where he worked until being placed on disability in 2002, and retired in 2006. Claimant further testified that he was subjected to the same level of noise while working at both NOMC and NODSI, and he performed the same job duties at both employers. NOMC and NODSI did not provide hearing protection to Claimant and Claimant did not wear hearing protection while working for either NOMC or NODSI.

As such, under the last employer rule, the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. Claimant has met his burden of showing that one employer, NOMC, exposed him to injurious stimuli during the course and scope of his employment. NOMC has met its burden of showing that a subsequent maritime

employer, NODSI, exposed Claimant to injurious stimuli during the course and scope of his employment. Thus, according to the evidence presented in this case, NODSI was the last employer that exposed Claimant to injurious stimuli prior to Claimant realizing that he had suffered hearing loss. Therefore, NODSI is the employer responsible for Claimant's compensation and medical benefits as a result of his loss of hearing that occurred during the course and scope of his employment.

Based on the finding that NODSI is responsible for Claimant's hearing loss compensation and medical benefits as Claimant's last maritime employer, the undersigned finds no reason to address NOMC's affirmative defense of timely notice or NOMC's contentions regarding Claimant's average weekly wage.

E. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . ." *Grant v. Portland Stevedoring Company, et al.*, 16 BRBS 267 (1984).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

As Claimant is owed past compensation benefits, the undersigned finds he is further owed interest on these unpaid compensation benefits until such time benefits are fully paid. The rate and amount of interest shall be determined by the District Director.

F. Attorney's Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. As Counsel has obtained benefits for Claimant, as stipulated by the parties, Counsel is entitled to a reasonable attorney's fee. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. NODSI shall pay Claimant permanent partial disability benefits for Claimant's hearing loss, resulting in a stipulated binaural impairment rating of 11.3%, which equals 22.6 weeks of compensation based on Claimant's stipulated average weekly wage of \$606.15, in accordance with the provisions of Section 8(c)(13) of the Act. 33 § 908(c)(13).
2. NODSI shall pay all reasonable, appropriate, and necessary medical expenses and audiological expenses arising from Claimant's hearing loss, pursuant to the provisions of Section 7 of the Act, including the cost of hearing aids.
3. NODSI shall receive a credit for all compensation heretofore paid, if any, as and when paid.
4. NODSI shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); *Grant v. Portland Stevedoring Co., et al.*, 16 BRBS 267 (1984).
5. Claimant's attorney shall have thirty (30) days from the date of service of this decision by the District Director to file a fully supported fee application with the Office of Administrative Law Judges; a copy must be served by Claimant to opposing counsel who shall then have twenty (20) days to file any objections thereto.

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**CLEMENT J. KENNINGTON,
Administrative Law Judge**