



transcript of the deposition of Joseph Brown, a representative of Public Service Electric and Gas (PSEG), taken in February 2012.<sup>1</sup> I denominate this item as Claimant's Exhibit ("CX") 1. The parties submitted closing arguments, and the record is now closed.

In reaching my decision, I have reviewed and considered the entire record pertaining to the claim before me, including all exhibits, the testimony at hearing, and the arguments of the parties.

### ISSUES

As discussed by the parties at the hearing, the issue for resolution is whether the Claimant has established that his claim is covered under the Longshore Act. More specifically, the parties dispute whether the Claimant has established that he is a covered employee, based on the elements of situs and status.

### STIPULATIONS

At the hearing, the parties entered into the following stipulations:

1. The Claimant was injured in the course and scope of his employment;
2. The date of the injury was October 22, 2008;
3. Maximum medical improvement has not been met;
4. Claimant's employer was Linde-Griffith;
5. The Employer was engaged in a pile-driving project at a PSE&G power plant in New Jersey;<sup>2</sup>
6. An informal conference was held on July 8, 2009.

T. at 5-7.

These stipulations have been admitted into evidence and are therefore binding upon the Claimant and Employer. See 20 C.F.R. § 18.51; Warren v. National Steel & Shipbuilding Co., 21 BRBS 149, 151-52 (1988). I have carefully reviewed the foregoing stipulations and find that

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<sup>1</sup> On March 9, 2012, Claimant's counsel submitted an unsigned copy of the deposition transcript and indicated a "signed and corrected copy" would be forthcoming. On March 16, 2012, the Claimant submitted another unsigned copy of the deposition transcript, with an attached Exhibit (a photograph with the deponent's markings). As there was no objection to the copies the Claimant submitted, I will admit them into evidence.

<sup>2</sup> "Public Service Electric and Gas" is variously denominated by witnesses and counsel as "PSEG" or "PSE&G." I will use both terms, following the usage of the participants.

they are reasonable in light of the evidence in the record. As such, they are hereby accepted as findings of fact and conclusions of law.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### Summary of the Testimonial Evidence

#### The Claimant

The Claimant testified under oath at the hearing. He stated that at the time of the accident he was employed by Linde-Griffith, engaged in driving piles for a footing for an extension of the power plant. He stated the pile driving operation involved driving 50 foot piles into the ground with a hammer and a crane; then top pieces needed to be spliced on, because the piles needed to be 100 feet. It was during this latter operation that the accident occurred. The Claimant stated that he lost his right foot in the accident, and his leg needed to be amputated for the prosthesis, about eight inches below the knee. Additionally, he stated, he injured his arms, and he needed surgery on both elbows. The Claimant stated that he also has back problems stemming from walking with the prosthesis. He stated that the prosthesis he has accommodates his activities. T. at 13-16.

The Claimant stated that when the accident occurred he was working in Jersey City at the "Co-Gen Hudson Gen power plant," for PSE&G. He stated the plant is located on the Hackensack River. The Claimant testified that the plant is fueled by coal, which is loaded from barges via conveyor belts into the plant. He also said the area where the barges docked was a "probably a few minute walk" from his worksite. T. at 16-17.

The Claimant identified photographs (JX 6) showing his worksite. He stated that Photograph 1 showed cranes and the conveyor belt "for the cargo" and the work area. Photograph 2 showed the work area, and the Claimant identified his sweatshirt and a piece of his hardhat that were located where he was injured. In the left corner of the photograph the Claimant identified a coal conveyor belt; he also identified structures for power lines. He stated he was injured approximately 15 to 20 feet from the conveyor belt. The Claimant also identified the structures that were supporting the conveyor belt. The Claimant identified Photograph 3, which showed the pile driver and the crane with the hammer and the leads. He identified the conveyor belt overhead, and he stated he was injured to the left of the pile lying on the ground in the photograph. The Claimant stated that Photograph 4 showed the conveyor belt and a barge in the water. T. at 17-25.

Regarding the purpose of the work that he was doing at the jobsite, the Claimant stated that it was for an extension of the power plant. Specifically, he stated, it was "like a filtration system" for the coal, to bring the plant "up to the EPA codes so they could stay open." Claimant agreed that if the filtration system had not been built, the power plant would have to close. T. at 26.

On cross-examination, the Claimant stated that the piles that he was driving were not connected to the coal conveyor and were not connected to the dock to which the barges pulled

up. Claimant identified JX 5 as a photograph of the power plant. He stated there are two conveyor belts, identified them both in the photograph, and stated the shorter conveyor belt was the one that was close to the accident site. He stated this conveyor belt went into the plant, but he did not know where the belt originated. T. at 26-29.

In response to my questions, the parties clarified that all of the photographs in JX 6 were taken from the police investigation of the accident; further, they agreed that all of the photographs in JX 6 were taken roughly contemporaneously (hours or days) from the date of the accident. The Claimant stated he did not recall whether a barge was at the power plant the day the accident occurred. The parties also agreed that the photograph in JX 5, which is dated February 2009, was a rough estimation of the plant's appearance at the time of the Claimant's accident. T. at 30-31.

Michael G. Smith. JX 1.

Mr. Smith, an employee of the Shaw Group, testified by deposition in October 2009. He stated that his position is safety manager, and he detailed his training. He stated he teaches courses in construction safety, and has been involved "a little bit" in crane safety as part of his training. He stated he has not been involved with pile driving safety. JX 1 at 3-10.

The witness stated the he was involved with safety for the "Hudson BET project" commencing in October 2007, and that "BET" stands for "Back-End Technology." Mr. Smith stated the construction involved "big scrubber boxes" to filter the materials that "used to come out of the stack" so that 94% is recycled back to generate electricity. He stated that Linde-Griffith was to drive piles to build the foundations for a structure that was to be built. Mr. Smith confirmed that the existing building was a coal-fueled power plant, located on a river in Jersey City, and that the coal for the plant was delivered by barge. He stated that coal was discharged from the barges via conveyor belts into a pile, and then was moved into the power plant via a different conveyor. He stated he did not know how far coal traveled via conveyor from its place of rest near the pier into the power plant, but that it was less than a mile. JX 1 at 10-19.

The witness identified the location of the accident to the Claimant in a rough sketch he made of the area.<sup>3</sup> He reiterated that the coal got from the barges to the coal pile via conveyor belt, but stated he did not know whether this was the conveyor belt near the accident site. Mr. Smith stated he was at another jobsite when the accident occurred, and as soon as he was notified about it he went to the scene. He stated there were multiple investigations into the cause of the accident, and he discussed the investigatory findings. He also testified regarding corrective actions that were taken after the accident. Mr. Smith stated that Linde-Griffith's operations were shut down for about a week, until after new procedures were put into place. JX 1 at 21-59.

On cross-examination, Mr. Smith stated the construction was designed so that PSEG could continue to operate without interruption during construction. JX 1 at 60.

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<sup>3</sup> Neither the sketch, nor any other exhibits from the deposition, is included in the record before me.

Daniel J. Moran. JX 2.

In June 2010, Mr. Moran, an employee of PSEG Power, testified by deposition.<sup>4</sup> JX 2. He stated he was familiar with the PSEG Hudson BET project, which refers to a coal-burning power plant located on the Hackensack River in Jersey City. Mr. Moran stated the coal for the plant is delivered by barge. He stated the coal is transported via conveyor belt to the coal pile, and then is moved., also by conveyor belt, into the station for consumption. He stated the conveyor from the barge to the coal pile is all above-ground, and that the conveyor from the coal pile to the station feeds from underground and then goes overhead into the station. Mr. Moran testified that “Back-End Technology” is the “controls for improving the emissions of a coal-fired power plant, reducing nitric oxide, sulfur dioxide, mercury, [and] particulates.” Mr. Moran stated that the BET project at the Hudson Station was not yet complete; he acknowledged that the project required construction. JX 2 at 3-14.

Mr. Moran stated he was familiar with the accident in which the Claimant was injured because he was asked to be on the PSEG investigation team. He stated the accident occurred on the south side of the facility, south of the conveyor belt, and east of the location where barges would discharge coal. He stated that the distance between the accident site and the location from which the barges discharged coal was less than a quarter mile. He stated the accident site also was less than a quarter mile from the coal pile. He stated the purpose of the piles that were being driven at the time of the accident was to provide support for structures that were going to be built, but indicated he did not know what the structure was to be. JX 2 at 15-20.

The witness stated that Back-End Technology has “nothing to do with coal handling.” Rather, he said, it has to do with post-combustion emissions. He explained that coal that goes into the plant is distributed to pulverizers that reduce it from rock size to talcum powder size. He went on: “It is then blown by air into the burner and is consumed, producing heat, which produces steam, and the flue gas and all of the gases that go along with it, the particulates and the gaseous emissions go through the current emission control system they have now, and then it goes out the stack.” He stated the emissions go through ductwork, and he agreed that the purpose of the Back-End Technology was to cleanse the emissions. He stated the Back-End Technology was not yet operational at the plant, and he said he did not know whether a malfunction to the Back-End Technology would require the entire plant to shut down. JX 2 at 20-24.

Regarding the accident investigation, Mr. Moran stated the investigation made several conclusions. He stated that corrective actions were taken. These included staging work equipment outside the “area of influence” or “hot zone.” He stated that Linde-Griffith prepared a new pile-driving procedure after the accident, which was a welding procedure for putting tabs on piles. Mr. Moran stated this was lacking before the accident and was one of the recommendations from the investigation team. JX 2 at 25-41.

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<sup>4</sup> The exhibits to this deposition, including photographs that the witness used in his testimony, are not in the record.

On cross-examination, Mr. Moran stated there was no back-up procedure for getting coal from the barges to the coal pile. He stated that any waste generated by the BET would be shipped out by truck. On further re-direct examination, the witness stated that the BET project was necessary in order to keep the facility open, and without the project, it would have to close. JX 2 at 41-48.

Joseph Brown. CX 1.

In February 2012, Joseph Brown, an employee of PSEG and the work controls manager at Hudson Station, testified by deposition. He stated that the facility is on the Hackensack River. It consists of two units, designed to burn coal in order to generate steam, creating electricity for distribution to commercial and residential customers. He stated natural gas is also used as an energy source, but the plant primarily uses coal, and the natural gas is used to start the facility running. He stated the facility does not operate all the time: it runs most of the time in the summer and winter, but in the spring and fall it may operate a couple of weeks in each month. Mr. Brown testified that maintenance on the infrastructure is done during the periods when the plant is not in operation. He stated that the coal to run the plant is brought by barge, and the plant is capable of receiving coal only by barge. CX 1 at 5-11.

Mr. Brown testified that the generating plant's property extends to the river. He stated that coal is scooped up from the barges using an unloader, which then dumps the coal onto a series of conveyor belts, which take the coal to the coal pile. The coal is stored in the coal pile until it is used. He stated the only place the coal from the coal pile goes is to the unit that burns the coal, which is unit two. Mr. Brown stated that unit one, which uses gas, was recently decommissioned and is no longer in use. He stated that unit two can run using gas, but it is more economical to use coal. CX 1 at 12-14.

The witness explained that the conveyor belts that take the coal to the coal pile are on an incline; the belts are in a series, and the top of the coal pile is approximately 40 to 50 feet high. He stated that all of the belts going to the coal pile are above ground. At the bottom of the coal pile, Mr. Brown stated, there is an underground tunnel that pulls the coal from the pile through the tunnel and then on to another conveyor that comes out of the ground at an elevation of approximately 200 feet to the boiler, where it will then be used to combust fuel. The conveyors are powered by the electricity generated by the power plant when the power plant is running. When the plant is not running, the electricity is "taken off the switchyard." CX 1 at 14-17.

The witness was shown photographs that were also used at the hearing.<sup>5</sup> In photograph # 1, he identified the conveyor belt as one of those that was sending coal from the unloader to the coal pile. He stated that the conveyor belt shown is about halfway from the waterfront to the coal pile, and the photograph is from the north looking south. The water is to the right side of the photo, further west. The coal pile would be on the left, further east. He agreed that coal on the conveyor would be traveling from the right of the photograph to the left. CX 1 at 18-19.

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<sup>5</sup> The numbers of the photographs appear to correspond with the numbers used for the photographs in JX 6.

As for photograph # 2, the witness stated that the support structures appear to be part of the coal conveyor that used to go up to unit one (which now is decommissioned). The witness stated that unit one stopped using coal in the 1980s and the conveyor belt remained until it was demolished. He stated he does not believe that conveyor is in existence anymore. CX 1 at 20-21.

In photograph # 3, the witness stated that the conveyor belt shown is the same portion of the conveyor belt shown in photograph # 1. CX 1 at 21.

Mr. Brown identified photograph # 4 as a photograph of the power plant.<sup>6</sup> He stated it was taken before the “fall 2010 outage” because at that time there was a large amount of equipment installed at the back end of the plant, which is not in the photograph. He confirmed this equipment was the “Back-End Technology” and he stated that the location for the equipment is to the south, or right side, of the two stacks (just below and to the left of the coal pile). The witness confirmed the photograph showed a barge, and also confirmed that the “white line” rising to the right of the barge is the coal conveyor belt system. He remarked that there are multiple conveyors, in a step-type system. He stated the conveyor continued on to a transfer tower, above the coal pile, and then continued to the left, terminating at the coal chutes. CX 1 at 22-25.

As to the conveyor belt depicted in photograph # 1 and photograph # 3, Mr. Brown stated that these photos show a temporary ‘ten wide’ trailer, and that trailer can also be seen on photograph # 4 on the right side of the vertical conveyor belt about halfway up. He stated “it’s a large square area.” In terms of the distance from the water, Mr. Brown said that “two football fields” is close, “within 50 percent accuracy.” CX 1 at 25-27.

Mr. Brown stated that the conveyors run even when the plant is not operating, because barges unload coal at those times, to keep up the inventory. He agreed that the operation of keeping the coal pile “up to date and complete” is fairly regular and steady. However, he indicated, from time to time the coal unloader and conveyor system are shut down, so that maintenance can be performed. Mr. Brown stated that such maintenance is scheduled and is usually completed within a couple of days. CX 1 at 28-29.

Regarding the accident to the Claimant, Mr. Brown indicated that its general location was depicted in a photograph.<sup>7</sup> Counsel then described the accident site as “about level with [the location of the ‘ten wide’ trailer] to the left of the conveyor belt.” CX 1 at 29-31.<sup>8</sup>

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<sup>6</sup> From the context of the parties’ discussion at the deposition, I infer that this photograph is the photograph at JX 5. See, e.g., CX 1 at 17. This is not the “photograph # 4” from JX 6.

<sup>7</sup> Mr. Brown did so by marking a photograph. As noted earlier, the Claimant submitted an additional copy of the deposition, with a copy of the photograph showing Mr. Brown’s markings, with his post-hearing brief. I admitted this item. See n. 1, above. I note, however, that the description of this location in the record of the deposition is quite complete, and comports with the location noted in the exhibit to CX 1. CX 1 at 30-31. Thus, it is not necessary to have the exhibit to CX 1 in order to identify the location that Mr. Brown designated as the site of the Claimant’s injury.

On cross-examination, Mr. Brown stated that a crew is on-site during outage periods, in case the plant is called to be ready to start. He also stated that barges of coal are received, whether the unit is operating or not, and he remarked that the “coal pile inventory dictates when we need to receive a barge in order to unload and maintain the inventory on the pile.” On further re-direct examination, Mr. Brown stated that the price of coal also plays a role in when coal is to be delivered. He clarified that, because the plant has the capability to have more than 60 days of coal on the coal pile, they have the ability to load coal when it is cheapest. CX 1 at 31-34.

### Summary of Other Evidence

In addition to the testimonial evidence, the parties submitted the following:

#### Linde-Griffith Immediate Action Plan. JX 3.

This document, dated October 28, 2008, details corrective actions that Linde-Griffith put into place immediately after the accident to the Claimant. Attached is a report about the accident, dated October 22, 2008, with recommendations for changes to procedures to increase safety. Black and white copies of some of the photographs in JX 6 are appended to the Exhibit.

#### Police Report. JX 4.

The police report of the accident, dated October 22, 2008, was prepared by the Jersey City Police Department. According to the police report, eight photographs of the scene were taken. Four color photographs are attached to the police report. Two of the photographs in JX 4 are also in JX 6 (photos # 1 and #3 of JX 6).

#### Aerial Photograph. JX 5.

This item is an aerial photograph of the “Hudson Generating Station,” extracted from the website “Wikipedia Commons.” The caption of the photograph indicates it was taken on February 2, 2009, and it shows coal-delivery barges in the foreground.

#### Photographs of Accident Scene and Environs. JX 6.

These four photographs were admitted into evidence upon the Claimant’s testimony. They show, respectively, the following: work area in which the accident occurred, showing two cranes and the conveyor for the coal (photograph # 1); area of accident scene, showing two piles installed into ground and portions of Claimant’s work clothing, as well as coal conveyor with its supporting structure and two towers for power lines (photograph # 2); crane (pile driver) with

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<sup>8</sup> Two numbers are superimposed on the photograph in the Exhibit. Based on the witness’s description, I infer that the number “1” on the photograph denotes the approximate site of the accident and the number “2” on the photograph denotes the location of the “ten wide” trailer.

hammer and leads, with conveyor in background and accident scene to left, next to pile that is on the ground (photograph # 3); coal barge with conveyor belt (photograph # 4).

### Coverage by the Act

For his claim to be covered by the Act, the Claimant must establish that the injury for which he seeks benefits occurred upon the navigable waters of the United States or an area covered by Section 3(a) of the Act. 33 U.S.C. § 903(a). He must also establish that his work was maritime in nature and not specifically excluded by the Act. These are known as the “situs” and the “status” requirements of the Act. 33 U.S.C. §§ 902(3), 903(a); Dir., OWCP v. Perini North River Assoc., 459 U.S. 297 (1983); P.C. Pfeiffer Co., Inc. v. Ford, 444 U.S. 69 (1979); Northwest Marine Terminal Co., Inc. v. Caputo, 432 U.S. 249 (1977). 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. Pfeiffer, 444 U.S. at 78.

### Situs

In order for a claimant to obtain benefits under the Act, an injury must occur on a covered situs. Dryden v. Dayton Power & Light Co., 43 BRBS 167 (2009). To be considered a covered situs, a landward site must be either one of the sites specifically enumerated in Section 3(a) or an “adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.”<sup>9</sup> 33 U.S.C. §903(a); Stratton v. Weedon Engineering Co., 35 BRBS 1, 4 (2001). An “adjoining area” therefore must have a maritime use, but it need not be used exclusively or primarily for maritime purposes. See Bianco v. Georgia Pacific Corp., 35 BRBS 99, 101 (2001). An area can be considered an “adjoining area” within the meaning of the Act if it is close to or in the vicinity of navigable waters, or in a neighboring area, and has some nexus to maritime activity. See Texports Stevedore Co. v. Winchester, 632 F.2d 504, 513-14 (5th Cir. 1980), cert. denied, 452 U.S. 905 (1981).

The parties stipulated that the Claimant was injured, during the course of and within the scope of his employment, at a PSE&G power plant in New Jersey. T. at 5. Based on the record, I find that the Claimant was injured at the “Hudson Generating Station,” which is located on the Hackensack River. T. at 17; see also CX 1 at 8.

I find the following facts, relevant to the issue of situs under the Act.

1. The Claimant was injured on the property of the Hudson Generating Station. T. at 16-17; JX 1 at 26-27; JX 2 at 17-18.
2. At the time he was injured, the Claimant was performing pile-driving work to support construction of “Back-End Technology” for the Hudson Generating Station. JX 1 at 14-17.
3. The Claimant was injured when a pile being moved by the crane hit him in the leg, and caused a traumatic amputation of his foot. T. at 12; JX 4.

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<sup>9</sup> The enumerated sites are “pier, wharf, dry dock, terminal, building way” and “marine railway.” I find the Claimant’s injury was at a power generating station, which is not at an enumerated site.

4. Photographs show the crane and the pile that injured the Claimant. T. at 20-23; see also JX 6 (Photographs #1-3).
5. The Claimant recalled the place at which he was injured, and testified to that effect. T. at 16-17, 21.
6. The Claimant also testified that photographs show the clothing that was cut off him at the time of his injury. T. at 21; see also JX 6 (Photograph # 2).
7. Photographs establish the Claimant was injured near the coal conveyor systems. JX 6 (Photographs # 1-3).
8. Testimony from Mr. Brown, an official of PSEG with knowledge of the Hudson Generating Station, establishes the site of the Claimant's injury was between the two conveyor systems (the system that took coal from barges to the coal pile, and the system that took coal from the coal pile and fed it to the plant). CX 1 at 18-25, 29-31.
9. Based on the testimony of Mr. Moran, who had knowledge of the investigation into the accident, the place where the Claimant was injured was within ¼ mile of the Hackensack River. JX 2 at 18.
10. At the location of the Hudson Generating Station, the Hackensack River is a navigable waterway. JX 2 at 11; CX 1 at 11.
11. The Hudson Generating Station is fueled by coal. JX 2 at 11.
12. Coal for the Hudson Generating Station is delivered by barge. JX 2 at 11.
13. Barge is the exclusive method of delivery for the Hudson Generating Station. CX 1 at 11.
14. Coal is transported from the barges via an above-ground conveyor system to the "coal pile." CX 1 at 11-12, 14-15; JX 2 at 12.
15. Coal is stored at the coal pile until it is needed to fuel the plant, at which time it is delivered to the burners via another conveyor system. CX 1 at 12-14.
16. The conveyor system that delivers coal to the burners begins underground, at the base of the coal pile, then emerges above-ground before ending at "unit one" of the Hudson Generating Station. CX 1 at 15; JX 2 at 12.

### Discussion

Because the Claimant's injury did not occur on a navigable waterway or a site enumerated in § 3(a) of the Act, the Claimant must establish that the injury occurred in an "adjoining area customarily used by an employer" in loading or unloading vessels. Caputo, 432 U.S. at 279. Courts have generally recognized that the term "adjoining area" requires both a geographic and functional nexus with navigable water. See, e.g., Nelson v. American Dredging Co., 143 F.3d 780, 32 BRBS 115 (CRT) (3d Cir. 1998). Regarding the functional nexus, a site must have a customary maritime use, but need not be used exclusively or even primarily for maritime purposes. See Winchester, 632 F.2d at 504.

Because the Hudson Generating Station is powered by coal that is delivered exclusively via barge and unloaded there, I find that the function of fueling the station is a maritime activity. Thus, actions that are in the area of the station that supports this function are in a covered situs.

Recently, in a published decision, the Benefits Review Board discussed the issue of situs involving a power plant that, like the Hudson Generating Station, was located on a navigable waterway and fueled by coal that was delivered by barge. Dryden, 43 BRBS 167 (2009). It stated that where a facility is used for both maritime and non-maritime functions, there is a point at which the unloading process ceases, and the manufacturing process begins. 43 BRBS at 169. The Board noted that the inquiry in “mixed-use” cases, that is: those involving a site with both a manufacturing and a maritime component, concerns whether the injury occurred in the area used for unloading vessels, as that area has a functional relationship with navigable water. Dryden, 43 BRBS at 169-70; see also D.S. [Smith] v. Consolidation Coal Co., 42 BRBS 80 (2008).

Because Dryden involved an electricity generating plant, it was reasonable to infer that the “manufacturing” component in such circumstances was the production of electricity. See 43 BRBS at 169-70. Although the Board did not specifically define where the “unloading” ended and manufacturing began, it did specifically note “there is no basis in law for apportioning the conveyor unloading system outside of the power plant into covered and uncovered situs.” 43 BRBS at 170. Thus, the Board held, the “area of the conveyor belt system” was a covered situs, because it had a functional relationship with the navigable waterway, was adjacent to the river, and was customarily used for the maritime activity of unloading coal from barges. Id.

Based on the testimony of the witnesses and my review of the record, including the photographs entered into the record (JX 4, JX 5, JX 6, Exhibit to CX 1), I find that the location where the Claimant was injured was on land, and was not more than ¼ mile from the river. Additionally, the spot at which the Claimant was injured is between the coal pile and the river. This is established because the Claimant was injured near the conveyor belt that takes coal from the barges to the coal pile. The aerial photograph of the Hudson Generating Station shows the conveyor belt system that takes coal from barges to the coal pile. JX 5. This photograph establishes that coal proceeds landward from the barges until it gets to the coal pile. The photograph also establishes that the coal pile is landward of the location where the Claimant was injured. Exhibit to CX 1.

As in Dryden, it is necessary to address whether the Claimant was injured in a location at which the “unloading” of coal had ended and the “manufacturing” of electricity begun. If the Claimant was injured at a location that was involved in “unloading” then he was injured in a covered situs. However, if he was injured in a location that was used for “manufacturing” then the situs of his injury is not covered under the Act. Based on the Board’s language in Dryden, I find that “manufacturing,” or the production of electricity, commences when the coal reaches the portion of the generating plant that is used to convert it into electricity. I further find that, prior to that point, the coal at the Hudson Generating Station is linked to the maritime activity of unloading, rather than the non-maritime activity of manufacturing. I further find that any portion of the Hudson Generating Station site devoted to or supporting the function of providing fuel, from the unloading of coal from a barge to its feeding into the plant, constitutes a situs covered under § 3(a) of the Act.

As Mr. Moran and Mr. Brown testified, coal is fed into the plant for fueling via a second conveyor belt system that feeds from the bottom of the coal pile and then rises up out of the ground and goes into generating plant. JX 2 at 12; CX 1 at 15. From my examination of the

photograph of the Hudson Generating Station (JX 5), there appears to be a conveyor line, beginning at a structure at the lower end of the coal pile, and proceeding into the plant.<sup>10</sup> Based on the record before me, I find this to be the conveyor system that feeds coal into “unit one” of the Hudson Generating Station.<sup>11</sup> I also find, based on the record before me, including the Claimant’s testimony and the testimony of Mr. Moran and Mr. Brown, that this conveyor system is landward of the accident site. Indeed, if a line were extended from the river to the coal pile along the conveyor system leading to the coal pile, and another line were drawn from the coal pile to the plant along the “feeder” conveyor system, the accident site would be between the river and “inside” of the conveyor systems. Exhibit to CX 1. I find that, though not every specific location within that area was set aside for maritime use, the entire land area within this perimeter supported the maritime activity of unloading coal. Put another way, if the two working conveyor systems are deemed to form the outer edge of that portion of the Hudson Generating Station that is related to the maritime activity of unloading coal for use in the plant, the accident site is within the perimeter.

Thus, I find that the Claimant was injured in an “adjoining area” used for the unloading of cargo, and thus was injured at a maritime “situs” covered under § 3(a) of the Act.

#### Status

The status test refers to the position the claimant holds with an employer. In addition to establishing that the injury occurred on a covered situs, a claimant must also establish that he has “status” in accordance with § 2(3) of the Act, 33 U.S.C. § 902(3). Perini, 459 U.S. at 314.

This provision, added to the Act in 1972, extends coverage to persons “engaged in maritime employment,” with some enumerated exclusions.<sup>12</sup> Specifically, 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.

The Supreme Court has consistently held that the 1972 amendments were not intended to cover employees other than those engaged in loading, unloading, repairing or building vessels, just because they were injured in an area adjoining navigable waters used for such activity. Herb’s Welding, Inc., v. Gray, 470 U.S. 414, 424 (1985). However, coverage is not limited to those persons directly engaged in the acts of loading and unloading. In Chesapeake & Ohio

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<sup>10</sup> At the hearing, the Claimant testified about an additional conveyor belt system, which he believed was represented in JX 5 as the line toward the bottom of the photograph. T. at 28-29. This may be the non-operational conveyor system about which Mr. Brown testified. See n. 10, below.

<sup>11</sup> Both the Claimant and Mr. Brown also testified about a conveyor belt system that was very close to the site of the accident, and both identified this system as the one in photograph # 2 (of JX 6). T. at 21-22; CX 1 at 20-21. According to Mr. Brown, this conveyor system was not in use after the 1980s and may have since been demolished. CX 1 at 20-21.

<sup>12</sup> The exclusions are listed at § 2(3)(A-H) and include clerical and data processing workers; employees who do recreational or retail work; marina employees; aquaculture employees, etc. I find the Claimant does not fall within the enumerated exclusions.

Railway Co. v. Schwalb, 493 U.S. 40 (1989), the Supreme Court held that only those land-based employees at a covered situs who are engaged in activity that is an integral or essential part of loading or unloading a vessel, are covered under the Act. Schwalb, 493 U.S. at 45. 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. 493 U.S. at 47. Thus, the Court determined that janitorial workers whose duties included (but were not limited to) cleaning spilled coal from loading equipment were engaged in maritime employment within the meaning of § 2 of the Act. Id.

Employees involved with maintaining or repairing a cargo delivery system have been held to be covered under the “status” provision of the Act. See, e.g., Dryden, 43 BRBS 167 (coal handler); Consolidation Coal v. Benefits Review Bd., 629 F.3d 322 (3d Cir. 2010)(diesel mechanic who repaired equipment used for multiple purposes, including unloading coal); Nelson v. Am. Dredging Co., 143 F.3d 789 (3d Cir. 1998)(bulldozer operator who moved pipelines that transported cargo). In order to make this occupational determination, the focus must be on whether the employee’s work involves the process of loading or unloading; however, any inquiry should assess the “regular” employment of the claimant rather than the actual work at the time of injury. See Sea-Land Service, Inc. v. Rock, 953 F.2d 56 (3d Cir. 1992).

Regarding the Claimant’s employment, I find the following facts, relevant to the issue of status:

1. At the time he was injured, the Claimant was a member of a pile-driving crew. T. at 13; JX 3.
2. He was employed by a construction company. Parties’ stipulation.
3. The Claimant’s employer was engaged in driving piles to support foundations for a structure that was to be built. JX 1 at 15-16.
4. The structure was to be built on the grounds of the Hudson Generating Station. Parties’ stipulation; JX 1 at 10-13.
5. The overall project in which the Claimant was engaged was the “Back-End Technology” (BET) project. JX 1 at 14-15; JX 2 at 20-21.
6. The construction involved erection of “scrubber boxes” to filter emissions from the Hudson Generating Station. JX 1 at 15.
7. The purpose of the BET project was to improve the post-combustion emissions of the Hudson Generating Station’s coal-fired power plant; specifically, to reduce nitric oxide, sulfur dioxide, mercury, and particulates. JX 2 at 21.

### Discussion

In this case, I find that “cargo” can be defined as (and limited to) the coal that was used as a fuel for the Hudson Generating Station. There is no evidence that the Claimant’s work involved, either directly or indirectly, the unloading or loading of coal. Moreover, his work did not involve the equipment used in the unloading process; nor did it involve any structure or system related to the unloading of the coal or the operation of feeding coal into the Hudson Generating Station.

The record establishes that the Claimant's job involved the construction of a structure. I note there is no evidence before me that the Claimant was ever involved with the erection of any structures supporting the unloading of coal or its delivery into the Hudson Generating Station as fuel. The record also establishes that the purpose of the structure in which the Claimant was involved at the time of his injury was not coal unloading or coal handling; rather, it was related to an end-product, coal emissions, which were created after the coal had been fed into the power plant as fuel.

Claimant's counsel asserts that the Claimant has status under the Act because, were it not for the construction of the Back-End Technology on which he was engaged, the Hudson Generating Station would have to close, for failure to meet emissions control requirements.<sup>13</sup> Claimant's brief at 2-3. Claimant's assertion brings the concept of status far beyond the bounds enunciated by the Supreme Court. As the Supreme Court remarked: "... Congress did not seek to cover all those who breathe salt air. Its purpose was to cover those workers on the situs who are involved in the essential elements of loading and unloading. It is 'clear that persons who are on the situs but not engaged in the overall process of loading or unloading vessels are not covered.'" Herb's Welding, Inc., v. Gray, 470 U.S. at 424, quoting Northeast Marine Terminal Co. v. Caputo, 432 U.S. at 267 (1977). The Supreme Court also stated that "the maritime employment requirement as applied to land-based work ... is an occupational test focused on loading and unloading. Those not involved in those functions do not have the benefit of the Act." Schwalb, 493 U.S. at 46.

Similarly, the Third Circuit has limited coverage under the Act to persons whose work involved some aspect of loading or unloading cargo, or work that directly affected such activities. Thus, a mechanic injured while repairing equipment that has multiple uses, including unloading of cargo, is in a covered status. Consolidation Coal Co., 629 F.3d at 328. However, a courtesy van driver for a marine terminal, who did not personally engage in moving cargo, is not. Rock, 953 F.2d at 67. In Rock, the court acknowledged the importance of the claimant's work to the employer in its general maritime function, but stated that because such work was not essential to the loading or unloading process, it was not covered under the Act. Id. The court emphasized that land-based activity occurring on a covered situs is only covered under the Act "only if it is an integral and essential part of the chain of events leading up to the loading or unloading or building of a vessel." Id.

As set forth above, a power plant has been construed as a manufacturing facility in which the product to be manufactured is power. See, e.g., Dryden, 43 BRBS at 169-70. In essence, the Claimant asks that I accept that because the Claimant was engaged in construction to enhance the facility's manufacturing capabilities, he was engaged in maritime activity, because the delivery of coal that constitutes the raw material for the facility was delivered via maritime activity. I find no evidence of record that the Claimant's work was involved in any chain of events relating to

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<sup>13</sup> Notably, however, the witness cited by the Claimant, who testified that the Hudson Generating Station would have to close if it did not install the Back-End Technology, was the same witness who averred that the Back-End Technology had "nothing to do with coal handling." JX 2 at 48, 21.

the loading and unloading of cargo. Though concededly the coal fueling the power plant is delivered as cargo in maritime activity, I find that it loses its identity as cargo when it is fed into the plant and consumed to produce power. Notably, as discussed above, the “Back-End” Technology is intended to address an issue relating to “post-combustion” emissions, a by-product of the Hudson Generating Station’s manufacture of electricity. Based on the purpose of the construction in which the Claimant was engaged at the time of his injury, I find the Claimant’s work related not to the unloading or delivery of the cargo (coal), but rather to the manufacture of the power plant’s product (electricity), and the treatment of its byproduct (emissions).

In conclusion, I find the Claimant’s work was vital to the Hudson Generating Station because it helped to ensure its future viability, in light of increasingly stringent emissions standards. However, I also find that his work was not maritime in nature, because it was not related to the unloading or loading of cargo, as the Supreme Court and the Court of Appeals for the Third Circuit have uniformly demanded. Thus, I find that the Claimant was not in a covered “status” for purposes of the Act.

#### Conclusion

As set forth above, in order for the Claimant’s injury to be covered under the Act, the Claimant must have been at a covered “situs” and in a covered “status.” I have found that the location of the injury was at a covered “situs.” However, because I have found that the Claimant’s work was not maritime in nature, I conclude that he was not in a covered “status.” Thus, coverage under the Longshore Act is precluded.

#### Attorney’s Fee

Section 28 of the Act provides that an award of an attorney’s fee is permitted only in cases in which the claimant is found to be entitled to benefits. 33 U.S.C. § 928. Because benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services rendered to her in pursuit of this claim.

#### Order

The Claimant’s Claim for benefits under the Act is DENIED.

**ADELE H. ODEGARD**  
Administrative Law Judge

Cherry Hill, New Jersey

