DALE R. RIZZI	)	BRB No. 90-2346A
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
UNDERWATER CONSTRUCTION CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
	)	
	)	
DALE R. RIZZI	)	BRB No. 93-0918
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNDERWATER CONSTRUCTION CORPORATION	)	
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order and Decision on Motion for Reconsideration of David W. Di Nardi, Administrative Law Judge, United States Department of Labor, and the Compensation Order - Award of Attorney's Fees of Richard V. Robilotti, District Director, United States Department of Labor.

David A. Kelly (Montstream & May), Glastonbury, Connecticut, for claimant.

Scott Wilson Williams and James D. Moran, Jr. (Maher & Williams), Bridgeport, Connecticut, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and Decision on Motion for Reconsideration (89-LHC-3118) of Administrative Law Judge David W. Di Nardi awarding benefits and claimant appeals the Compensation Order-Award of Attorney's Fees (Case No. 10-27319) of District Director Richard V. Robilotti rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (the Act).[1] We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary, and the award may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant was injured on January 20, 1987 while employed as a diver for Underwater Construction Corporation (employer). Employer has its headquarters in Connecticut, and claimant was dispatched to diving jobs in various states. As a diver on this particular job, claimant was responsible for pumping the silt and mud from the underground tank of the Champion International Paper Company which is located adjacent to the Great Miami River in Hamilton, Ohio. The water from the river was pumped into the reservoir tank through an intake pipe for use in the paper-making process and, after being used, was discharged through other pipes and returned to the river. In the performance of his work, claimant used a pump which weighed over 100 pounds to remove the silt from the reservoir's intake pipes and pump it back into the river. The tank was approximately 100 feet by 100 feet by 15 feet. Claimant estimated that the depth of the water in the reservoir was about four to twelve feet and characterized the tank as essentially a basement with water. H. Tr. at 68.

On the morning of the accident, claimant started work at 7:30 a.m. and some time thereafter developed a headache. The headache worsened and he started to climb up the ladder to egress the water but started to regurgitate and, as he was wearing an air-tight helmet, he swallowed some vomit, unsuccessfully tried to hold his breath, and "vaguely remembers reaching the surface." Claimant was taken to Mercy Hospital and a CT scan showed a massive intraventricular hemorrhage. He eventually regained consciousness and was hospitalized for 122 days, 80 of which were spent in intensive care.

[1]Employer's appeal of the attorney's fee award (BRB No. 90-2346) was dismissed by Board Order dated April 28, 1993 pursuant to employer's request for withdrawal dated March 23, 1993.

Following a period of recovery, claimant worked on and off in non-diving employment between March 1988 and June 9, 1989 and at the time of the hearing was being re-trained for an alternative career as a machinist. However, the retraining had been delayed by claimant's significant memory loss. Claimant sought temporary total and permanent partial disability benefits under the Act.

Initially, the administrative law judge found that claimant's work for employer was covered under the Act as it was performed under navigable waters and as claimant's work is maritime employment. The administrative law judge also found that claimant was injured on January 20, 1987 in the course and scope of his maritime employment for employer and that claimant established that he cannot return to work as an underwater diver. However, the administrative law judge found that as claimant was working part-time, he is partially disabled and that his disability became permanent as of June 10, 1989.

The administrative law judge calculated claimant's average weekly wage pursuant to Section 10(c) of the Act, 33 U.S.C. §910(c), and found that claimant had an average weekly wage of $353.50 at the time of injury. The administrative law judge also found that claimant's post-injury wages at a part-time job at a supermarket fairly represent his wage-earning capacity, and thus, after an adjustment for inflation, found that claimant's post-injury wage-earning capacity is $73.70 per week. The administrative law judge awarded claimant temporary total disability benefits from January 20, 1987 to June 6, 1989, and permanent partial disability benefits, as of June 10, 1989, based upon two-thirds of the difference between $353.50, his average weekly wage, and $73.70, his post-injury wage-earning capacity. 33 U.S.C. §908(b),(c)(21). The administrative law judge also awarded claimant interest, medical expenses, a penalty pursuant to Section 14(e), 33 U.S.C. §914(e), and ordered employer to pay claimant's attorney's fee. In a Decision on Motion for Reconsideration, the administrative law judge reviewed employer's contentions regarding the findings of average weekly wage, post-injury wage-earning capacity, and coverage under the Act and concluded that the original Decision and Order would not be modified, except for a typographical error. Decision on Motion for Reconsideration at 4.

Subsequently, the district director awarded claimant's counsel an attorney's fee in the amount of $10,500 to be paid by employer. In a letter dated October 29, 1990, the district director noted that the fee was reduced from the requested amount of $19,987.63 because it contained work unrelated to the Longshore Act claim.

On appeal, employer contends that the administrative law judge erred in finding that claimant's employment was covered by the Act as the tank where claimant was working should not be considered navigable waters, nor was the tank used for loading, unloading, repairing, dismantling or building vessels. In addition, employer contends that the administrative law judge erred in finding that claimant satisfied the status test as claimant's duties were not related to maritime activities. Employer also contends that the administrative law judge erred in calculating claimant's average weekly wage and in determining claimant's post-injury wage-earning capacity. BRB No. 93-918. Claimant responds, urging affirmance of the administrative law judge's Decision and Order.

On appeal of the district director's award of an attorney's fee, claimant contends that the district director reduced the fee without sufficient explanation and did not specifically apply the regulations governing the award of an attorney's fee. BRB No. 90-2346A. Employer responds, urging affirmance as the district director unequivocally stated that he considered the value of the attorney's services to claimant, the complexity of the case, the amount of time involved, the results achieved and other facts including the professional expertise of the attorney.

Initially, we agree with employer's contention that the administrative law judge erred in finding that claimant was injured on navigable waters. Before the enactment of the 1972 Amendments to the Act, in order to be covered by the Act, claimant had to establish that his injury occurred "upon the navigable waters of the United States (including any dry dock). . . ." *See* 33 U.S.C. §903(a)(1970)(amended 1972 and 1984). In 1972, Congress amended the Act to add the status requirement of Section 2(3), 33 U.S.C. §902(3), and to expand the sites covered under Section 3(a) landward. In *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 103 S.Ct. 634, 15 BRBS 62 (CRT)(1983), the Supreme Court held that in making these changes to expand coverage, Congress did not intend to withdraw coverage of the Act from workers injured on navigable waters who would have been covered by the Act before 1972. *Perini*, 459 U.S. at 315-316, 103 S.Ct. at 646, 15 BRBS at 76-77 (CRT). Accordingly, the Court held that when a worker is injured on actual navigable waters 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 satisfies 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, 103 S.Ct. at 650-651, 15 BRBS at 80-81 (CRT); *Center v. R & D Watson, Inc*., 25 BRBS 137 (1991): 33 U.S.C. §902(3)(A)-(H)(1988).

In his Decision and Order, the administrative law judge found that claimant was injured in a channel of water which flowed from the Great Miami River (GMR) through the Champion International reservoir underneath its factory and then back into the GMR. The administrative law judge found that the GMR is a "navigable waterway" of the United States as it is "susceptible of use in its ordinary condition as a highway of trade and travel in customary modes on water," and it is "useful for commerce or transportation." Decision and Order at 21. The administrative law judge also noted that the GMR is capable of floating logs, boats and rafts, is used as waterway transportation by private boats, and any subsequent disuse of the GMR, due to changed geographical conditions and improved roadways does not change the navigable character of the waterway without a specific declaration by Congress. *Id.* Moreover, citing *Morrison-Knudson Co. v. O'Leary*, 288 F.2d 542 (9th Cir. 1961), and *C.J. Montag and Sons, Inc. v. O'Leary*, 304 F.Supp. 188 (D. Or. 1969), the administrative law judge found that the water in the reservoir was an "uninterrupted flow" of the GMR that was merely diverted and thus constituted a continuation of the navigable waters of the United States.[2] Decision and Order at 22.

[2]The administrative law judge also found that inasmuch as claimant had to avoid the onrushing flow of water at the intake and outflow pipes in the tank, claimant's work subjected him to hazards

We first hold that the administrative law judge erred in focusing on the navigability of the GMR, as the record establishes that claimant's injury occurred in the reservoir of the paper factory, and not in the actual river or in a channel thereof. We also reject the administrative law judge's reliance on the aforementioned cases, as both involved the navigability of artificial waterways that could be navigated by boats or barges.[3] The facts of the instant case are similar to those addressed by the Board in *LePore v. Petro Concrete Structures, Inc.*, 23 BRBS 403 (1990). In *LePore*, the claimant was injured on a pontoon in a flume removing a temporary support structure from below the concrete base laid for the construction of the Winter Garden building of the World Financial Center at Battery Park, New York. The flume is a 60 by 30 feet channel with sides, a concrete slab on top, landfill on the bottom, earth at one end and a seawall at the other end. The water in the flume was 20 to 25 feet deep, and seeped in through the gravel and rock base. The Board held that a threshold requirement of navigability is the presence of an "interstate nexus" in order for the body of water in question to function as a continuous highway for commerce between ports. *LePore*, 23 BRBS at 406 *citing The Montello*, 78 U.S. (11 Wall.) 411 (1871). Thus, a natural or artificial waterway which is not susceptible of being used as an interstate artery of commerce because of either manmade or natural conditions is not navigable waters for purposes of coverage under the Act. *See Chapman v. United States*, 575 F.2d 147 (7th Cir. 1978) *cert. denied*, 439 U.S. 893 (1978); *LePore*, 23 BRBS at 406; *Williams v. Pan Marine Construction*, 18 BRBS 98 (1986), *aff'd sub nom. Williams v. Director, OWCP*, 825 F.2d 246, 20 BRBS 25 (CRT)(9th Cir. 1987)(diver injured in land-locked lake entirely within state of California is not injured on navigable waters of the United States).

The Board noted in *LePore* that water from the Hudson River was permitted to seep into and out of the flume for the sole purpose of facilitating heating and cooling, not navigation, and that the flume could not support commerce. Similarly, in the instant case, the tank in which claimant was injured was a depository for heating and cooling system water and was tantamount to being land-locked because no vessel could gain access to it due to the walls surrounding it. *See Lepore*, 23 BRBS at 406; *Williams*, 18 BRBS at 100. Entry to the tank could only be gained by a door in the first floor of the factory, and claimant testified that it had the characteristics of a basement. H. Tr. at 68. Therefore, as the reservoir is surrounded by walls, was not designed to support commerce by

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for which the Act was enacted. Decision and Order at 22.

[3]In *Morrison-Knudson Co. v. O'Leary*, 288 F.2d 542 (9th Cir. 1961), four workers were killed in a diversion tunnel of the Snake River. The court held that the water in the tunnel, constructed to carry the main stream of the river during dam construction, remained navigable within the meaning of the Act. In *C.J. Montag and Sons, Inc. v. O'Leary*, 304 F.Supp. 188 (D. Or. 1969), a worker was killed in the tailrace of the Willamette River, which was a stream formed by water returning to the river after diversion to two manufacturing plants. The court held that the tailrace was navigable as barges up to 130 feet long and 28 feet wide operated in the tailrace. *See also Ransom v. Coast Marine Construction, Inc.*, 16 BRBS 69 (1984)(Board holds that it takes a permanent withdrawal of water from bed of river to divest jurisdiction under the Act).

water and could not be navigated through by any craft on the Great Miami River, we reverse the administrative law judge's finding that the reservoir constitutes "navigable waters" for the purposes of determining coverage under the Act.[4] *See Lepore*, 23 BRBS at 406-407.

While injury on actual navigable waters is sufficient to establish coverage under both Sections 2(3) and 3(a), claimant may also establish coverage if his injury occurs in a landward area covered by Section 3(a) and his work is maritime in nature, bringing him within the definition of maritime employee in Section 2(3). *See* 33 U.S.C. §§902(3), 903(a)(1988); *Melerine v. Harbor Construction Co.*, 26 BRBS 97 (1992). Section 3(a) provides that the injury must occur on the navigable waters of the United States "including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. §903(a)(1988).

In the present case, as the administrative law judge found that claimant was injured on navigable waters, he did not make any further findings under Section 3(a). However, in addition to not constituting "navigable waters," the site at the paper factory where claimant was injured is not one of the enumerated sites in Section 3(a), and there is no contention that it is an adjoining area used for the maritime activity of loading, unloading, building, dismantling or repairing vessels. Therefore, we hold that claimant's injury did not occur on a situs covered under Section 3(a) of the Act. *See Melerine*, 26 BRBS at 102. Accordingly, as the situs requirement is not satisfied in this case, we reverse the administrative law judge's finding that claimant's injury on January 20, 1987 is covered under the Act and the resultant award of benefits.[5] *See generally Cabaliero v. Bay Refractory Co., Inc.*, 27 BRBS 72 (1993). We need not address employer's contentions with regard to the status requirement of Section 2(3), or the administrative law judge's findings regarding claimant's average weekly wage and post-injury wage-earning capacity.

In his appeal, BRB No. 90-2346A, claimant contends that the district director arbitrarily reduced the size of the attorney's fee awarded without sufficient explanation. However, inasmuch as we reverse the award of benefits, we also reverse the award of an attorney's fee to be paid by employer as there has been no successful prosecution of the claim. *See* 33 U.S.C. §928(a), (b); *see generally Bluhm v. Cooper Stevedoring Co.*, 13 BRBS 427 (1981).

Accordingly, the Decision and Order of the administrative law judge awarding benefits and the Compensation Order-Award of Attorney's Fees of the district director are reversed.

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[4]In *Lepore*, the Board also affirmed the finding that the situs requirement was not satisfied because the water in the flume was permanently withdrawn from the Hudson River. *See also Ransom v. Coast Marine Construction, Inc.*, 16 BRBS 69 (1984). In this case, there appears to be a continuous flow of water between the river and the plant reservoir through the intake and outflow pipes; nonetheless, the reservoir itself is not navigable, and the distinction between the two cases is immaterial.

[5]In its brief to the Board, employer states that claimant received an award of benefits under Connecticut's workers' compensation law, which employer ultimately did not challenge. Emp. Brief at 22.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge