BRB No. 02-0761

JAMES D. LEE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ELLIOT TURBOMACHINERY	)	DATE ISSUED: 07/23/2003
	)	
and	)	
	)	
AMERICAN HOME ASSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Timothy F. Schweitzer (Cappiello Hoffman & Katz, P.C.), New York, New York, for claimant.

Richard L. Garelick (Flicker, Garelick & Associates), New York, New York, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2002-LHC-00174) of Administrative Law Judge Robert D. Kaplan 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). We must affirm the administrative law judge=s findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. '921(b)(3); *O=Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

On December 4, 2000, employer contracted with Orion Power to overhaul gas turbines at its Gowanus electrical generating station. The Gowanus facility is comprised of four barges that float on Upper New York Bay in Brooklyn, New York. Claimant worked for employer at the Gowanus facility from March 1 to April 16, 2001, when he injured his lower back during the course of his employment. Claimant=s job duties for employer involved assisting in overhauling the gas turbines. The only job duty claimant performed off the barges was to retrieve parts from an adjoining pier. Claimant was working on a turbine when he injured his back.

In *Caserma v. Consolidated Edison Co.*, 32 BRBS 25 (1998), the Board determined that an injury arising on a barge at the Gowanus facility is covered under the Act, pursuant to *Director, OWCP v. Perini North River Associates [Perini]*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), as the claimant was injured on a barge afloat in actual navigable waters. In his decision in the instant case, the administrative law judge found *Caserma* controlling. The administrative law judge rejected employer=s argument that *Caserma* is not binding because the Board did not address coverage in the context of a claimant who is injured while Atransiently or fortuitously on navigable waters.@ Decision and Order at 6. The administrative law judge declined to find that the Board in *Caserma* was unaware of the Atransiently or fortuitously@ language in *Perini* and *Herb=s Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985), as the Board cited these cases in *Caserma*. The administrative law judge also rejected employer=s contention that the Fifth Circuit=s decision in *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir. 1999)(*en banc*), compelled the finding that claimant was transiently or fortuitously on navigable waters. The administrative law judge noted that employer did not cite any precedent in which coverage was denied to an employee, such as the claimant in this case, whose usual employment duties at the date of injury are upon navigable waters. Accordingly, the administrative law judge resolved the sole issue before him by concluding that claimant is entitled to coverage under the Act because his injury occurred while he was performing his job duties for employer aboard a barge upon navigable waters.[1]

[1]The parties stipulated, *inter alia*, that claimant had an average weekly wage of $1,232.44, that employer had not paid any medical benefits to claimant, but it had paid claimant compensation for temporary total disability from April 17, 2001, to February 5, 2002, pursuant to the New York workers= compensation statute.

On appeal, employer asserts that the administrative law judge erred by finding *Caserma* controlling. Specifically, employer argues that because claimant=s usual employment as a millwright is exclusively land-based, and due to the highly unusual circumstance that the Gowanus electrical generating plant is affixed to barges rather than on land, claimant=s injury on navigable waters was fortuitous, and therefore coverage under the Act should be denied. Alternatively, employer argues that, pursuant to the 1984 Amendments to the Act, the holding in *Perini* that Congress did not intend to withdraw coverage from workers injured on navigable waters who would have been covered by the Act before the 1972 Amendments was superceded, in that every claimant must now establish the status element for coverage in addition to the situs element. Employer argues, pursuant to this contention, that claimant=s work repairing gas turbines is not maritime employment, and that claimant=s employment therefore does not satisfy the status element; thus, coverage under the Act should be denied.[2]

We initially address employer=s contention that the administrative law judge erred by finding coverage under the Act because employer argues that claimant was fortuitously on navigable waters at the time of his injury. In order to establish coverage prior to the enactment of the 1972 Amendments to the Act, a claimant had to show that his injury occurred Aupon 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 *Perini*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), the Supreme Court held that in making these changes to expand coverage, Congress did not intend to withdraw the 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, 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). *Perini*, 459 U.S. at 323-324, 15 BRBS at 80-81(CRT). It is therefore well established that, 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. *See generally Harwood v. Partredereit AF 15.5.81*, 944 F.2d 1187, 1190-1191 (4th Cir. 1991), *cert. denied*, 503 U.S. 907 (1992); *Zapata Haynie Corp. v. Barnard*, 933 F.2d 256, 24 BRBS 160(CRT) (4th Cir. 1991), *aff=g* 23 BRBS 267 (1990); *Center v. R & D Watson, Inc.*, 25 BRBS 137 (1991).

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[2]Employer also argues that the Gowanus facility is not on navigable waters. Employer asserts that the barges are effectively a physical extension of a land-based electricity generating operation because the barges are attached to a land-based sub-station by cables, and the barges therefore cannot move when the facility is operating. The Board addressed this issue in *Caserma*, holding that the Gowanus barges are floating structures not permanently affixed to land. *Caserma*, 32 BRBS at 28. The barges float with the tides and wind. The cables may be disconnected from the barges, which enables towing of the barges to another sub-station, or for servicing at a dry dock. Consequently, an injury on a barge at the Gowanus facility occurs on navigable waters. Accordingly, employer=s contention is rejected.

In *Perini*, the Supreme Court, in *dicta*, noted it expressed no opinion on whether coverage extends to a worker Ainjured while transiently or fortuitously on actual navigable water.@ *Perini*, 459 U.S. at 324 n. 34, 15 BRBS at 81 n. 34(CRT). In *Herb=s Welding*, the Court reiterated this statement in holding that a worker injured on a fixed oil platform in state waters was not covered as he was a land-based worker, since a fixed platform is akin to an island, and the claimant was not engaged in maritime employment under Section 2(3). The Court noted that AGray traveled between platforms by boat and might have been covered, before or after 1972 had he been injured while in transit.@ *Herb=s Welding*, 470 U.S. at 427 n. 13, 17 BRBS at 84 n. 13(CRT). The Court cited *Perini* as support for this proposition, but followed it with a Abut see@ citation to the *Perini* Court=s reservation of an opinion with regard to those Atransiently or fortuitously@ on navigable waters. The Court concluded by noting Ain passing a substantial difference between a worker performing a set of tasks requiring him to be both on and off navigable waters, and a worker whose job is entirely land-based but who takes a boat to work.@ *Id.*

In *Bienvenu,* the Fifth Circuit specifically addressed the question reserved by the Supreme Court and concluded that the signals in the Supreme Court=s opinions in *Perini* and *Herb=s Welding* Aindicate the Supreme Court would hold that a workman who is aboard a vessel simply transiently or fortuitously, even though technically in the course of his employment, does not enjoy coverage under the LHWCA.@ *Bienvenu*, 164 F.3d at 908, 32 BRBS at 223(CRT). The court declined to set Athe exact amount of work performance on navigable waters sufficient to trigger [Longshore Act] coverage,@ instead electing to leave Athat task to the case-by-case development for which the common law is so well suited.@ *Id.* The court held the claimant in *Bienvenu* covered because he spent 8.3 percent of his time working on production equipment aboard a vessel. As this time was sufficient to confer coverage, the court did not consider whether the time claimant spent aboard the vessel being shuttled to various platforms should be included in determining whether claimant spent sufficient work time on navigable waters.[3] *Id.* at n. 6.

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[3]The Board subsequently addressed coverage of an employee who was injured on navigable waters while traveling from an oil production facility. The Board held that it is consistent with the pre-1972 Supreme Court decisions in *Parker v. Motor Boat Sales*, 314 U.S. 244 (1941), and *Penn R. Co. v. O=Rourke*, 344 U.S. 334 (1953), to find that an employee who is regularly assigned by his employer during the course of his employment to travel on navigable waters is covered under *Perini* as such an employee is not transiently or fortuitously on navigable waters. *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003). In *Ezell*, the claimant was required to travel by boat 45 minutes each way to specific job assignments during the course of his day and as part of his overall work on 53 percent of his workdays for employer prior to his injury. The Board thus distinguished the claimant in *Ezell* from the claimant in *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). In *Brockington*, the claimant was injured while using water transportation to commute to his land-based job, and he

In this case, employer does not dispute that claimant spent 99 percent of each workday on navigable waters on the barges at the Gowanus electrical generating station, and that his injury arose during the course of his employment on the barges. In *Caserma*, the claimant=s job duties as a mechanic included repairing the generators located on the barges at the Gowanus facility, and he was injured on a barge at the Gowanus facility during the course of his employment. Thus, pursuant to *Perini*, the Board held that claimant Caserma was covered by the Act. *Caserma* is directly on point with the instant case, and the administrative law judge properly found *Caserma* controlling. *Caserma*, 32 BRBS at 27-29.

Moreover, this case, wherein the injury occurred in Brooklyn, New York, arises within the jurisdiction of the United States Court of Appeals for the Second Circuit. Thus, we reject employer=s contention that the Fifth Circuit=s decision in *Bienvenu* would necessarily control. In any event, claimant was not transiently on navigable waters under *Bienvenu*, as 99 percent of claimant=s work duties were performed upon navigable waters on the barges at the Gowanus facility, Tr. at 33; in *Bienvenu*, the court found 8.3 percent of claimant=s time working on navigable water was sufficient for coverage.

We also reject employer=s contentions that claimant was fortuitously on navigable waters because his job duties as a millwright were not performed upon navigable waters prior to his working on this job and because the case involves the unusual circumstance of an electrical generating plant being affixed to barges floating on navigable water when such structures are ordinarily land-based. Pursuant to *Perini*, the pertinent inquiry for establishing coverage under the pre-1972 Act is whether the worker was injured during the course of performing his employment duties on navigable waters. *Perini*, 459 U.S. at 323-324, 15 BRBS at 80(CRT). The nature and location of claimant=s work with previous employers or on other jobs with this employer are not relevant considerations. *See generally Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997); *McGray Constr. Co. v. Director, OWCP [Hurston]*, 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999); *Cabral v. Healy Tibbits Builders, Inc.*, 118 F.3d 1363, 31 BRBS 67 (CRT), *amended*, 128 F.3d 1289, 32 BRBS 41(CRT) (9th Cir. 1997), *cert. denied*, 523 U.S. 1133 (1998). The fact that electrical generating stations are usually on land is similarly without consequence for purposes of determining coverage under the pre-1972 Act. In *Perini*, the claimant worked on a barge in constructing a sewage treatment plant; thus, the fact that the structure=s purpose was non-maritime cannot affect claimant=s coverage. Therefore, we reject employer=s contention that claimant was transiently or fortuitously on navigable waters at the time of his injury.

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had not been required by employer to commute by water to more than two job sites in ten years. *Ezell*, 37 BRBS at 17. There is no issue in the present case regarding travel to a jobsite on navigable waters.

We next address employer=s contention that, due to the enactment of the 1984 Amendments, claimant also must establish that he is a maritime employee pursuant to Section 2(3) of the Act. In this regard, employer relies on the dissenting opinion of Judge DeMoss in *Bienvenu*, 164 F.3d at 913, 32 BRBS at 229(CRT). Judge DeMoss stated, *inter alia*, that the 1984 addition of exclusions from coverage for specific occupations *see* 33 U.S.C. ' 902(3)(A)-(F) (1994),[4] is a significant change from prior law, as the exclusions apply even if the worker is injured on navigable waters. *Bienvenu*, 164 F.3d at 914, 916-917, 32 BRBS at 229, 231(CRT). Judge DeMoss opined that this language and its legislative history make clear that Congress sought to withdraw coverage under the Act from any worker enumerated in subsections (A)-(F), if they are subject to coverage under a state compensation scheme, and to supercede the holding in *Perini* that an injury on navigable waters is all that is required to establish Amaritime employment@ for purposes of establishing coverage under the Act. *Id.*, 164 F.3d at 917-918, 32 BRBS at 229-230(CRT).

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[4] Section 2(3) of the Act states:

The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not includeC

> (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;
>
> (B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
>
> (C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);
>
> (D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter;
>
> (E) aquaculture workers;
>
> (F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;. . .

if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. ' 902(3).

In its majority opinion, the Fifth Circuit sitting *en banc*, held that the exclusions from coverage in Section 2(3)(A)-(F) are irrelevant for determining coverage when the injury arises upon navigable waters unless the injured worker falls within the six separate, narrowly defined types of employment enumerated therein. The court reasoned that the dissent failed to recognize the long-established principle that persons engaged to work upon vessels are engaged in maritime employment, which principle underlies the holding in *Perini*, and that imposing a duties test on workers injured on navigable waters directly conflicts with the Supreme Court=s holding in *Penn. R. Co. v. O=Rourke*, 344 U.S. 334 (1953). *Bienvenu*, 164 F.3d at 910, 32 BRBS at 224-225(CRT). In *O=Rourke*, which arose under the pre-1972 Act, a railroad worker was injured on navigable waters while removing boxcars from a float. In reversing the decision of the United States Court of Appeals for the Second Circuit, the Supreme Court stated that the A[T]he Court of Appeals, we think, is in error in holding that the statute requires as to the employee, both injury on navigable waters and maritime employment as a ground for coverageY@ *Bienvenu*, 164 F.3d at 906, 32 BRBS at 221(CRT), *quoting O=Rourke*, 344 U.S. at 340. Finally, the *Bienvenu* court reasoned that workers injured on navigable waters on a vessel who are excluded from coverage under the Act would consequently qualify as seamen and be entitled to recover under the uncapped liability scheme of the Jones Act and General Maritime law, which would be contrary to the purpose of workers= compensation to provide a no-fault, limited damage compensation scheme. *Bienvenu*, 164 F.3d at 906, 32 BRBS at 221(CRT).

We find this analysis persuasive, especially in the absence of any legislative history indicating that the 1984 Amendments intended to overrule or to modify the *Perini* holding. *See generally Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (Congress is presumed to know the law when it passes legislation). We note in addition that the post-1972, pre-1984 Act contained exclusions from coverage for a Amaster or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.@ 33 U.S.C. '902(3)(1982). The Supreme Court, in *Perini*, did not utilize these exclusions to impose the Section 2(3) Amaritime employment@ requirement on all putative claimants, and the 1984 Amendments simply added additional exclusions for employees in specified jobs who would otherwise be covered under Section 2(3). Accordingly, as employer=s contentions are without merit, we need not address its contention that claimant=s work repairing gas turbines was not Amaritime employment@ within the meaning of Section 2(3). As the administrative law judge properly found that claimant is covered by the Act by virtue of his work on actual navigable waters, we affirm the administrative law judge's finding of coverage under the Act. *Caserma*, 32 BRBS 25.

Accordingly, the administrative law judge=s Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge