BRB Nos. 13-0076
and 13-0076A

JEANENE DOWNEY-STAMMET	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CH2M HILL ALASKA, INCORPORATED f/k/a VECO, INCORPORATED	)	DATE ISSUED: 11/18/2013
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY (Third-Party Administrator for American Motorists Insurance Company)	)	
	)	
Employer/Carrier-Respondents Cross-Petitioners	)	DECISION and ORDER

Appeals of the Inclinations and Order and the Decision and Order Granting Summary Judgment for Employer of William Dorsey, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and David C. Barnett (Barnett & Lerner, P.A.), Fort Lauderdale, Florida, for claimant.

Nina M. Mitchell (Holmes Weddle & Barcott, PC), Seattle, Washington, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Inclinations and Order and Decision and Order Granting Summary Judgment for Employer (2012-LHC-00343) of Administrative Law Judge William Dorsey 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).

Claimant, while working as an oil recovery technician for employer in the summer of 1989,[1] alleged she was exposed to volatile hydrocarbons and other dangerous chemicals. Claimant was transported from her housing unit, one of several small cruise vessels located on the Prince William Sound, via landing craft to the shore where she would, after unloading equipment, commence her day's work. Claimant's work involved cleaning the beach of oil with pompoms and a steam hose. She also occasionally helped co-workers pull a boom off the boat that took them ashore and would sometimes pass soiled materials back onto the boat. At the end of her work day, claimant would load equipment back onto the landing craft which would then transport the employees back to the cruise vessel. Claimant alleged she developed health problems, including burning in her chest, nausea, headache, chronic interstitial cystitis, and the need for a hysterectomy, as a result of her occupational exposures and subsequently sought the right to medical care with a free-choice physician. Employer refused authorization for this treatment.[2]

Claimant's claim came before the administrative law judge and he ordered that coverage issues were to be addressed before the parties devoted resources to the merits of the case. After the parties filed briefs, the administrative law judge issued an "Inclinations and Order for Further Briefing on Coverage" on October 3, 2012, in which he found that claimant's work was on a covered situs, 33 U.S.C. §903(a), but that "further briefing" was needed regarding the status requirement, 33 U.S.C. §902(3), to determine whether claimant's claim is covered under the Act. The administrative law judge thus granted the parties 14 days to file supplemental briefs addressing that issue. In his subsequent decision, the administrative law judge found that claimant did not meet the status test because she offered no proof that her work – cleaning oil from beaches – involved the loading, unloading, constructing and/or repairing of any vessel. The administrative law judge, therefore, granted summary decision for employer and dismissed claimant's claim.

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[1]CH2M Hill Alaska, Incorporated (employer), previously known as VECO Corporation, was subcontracted by Exxon Corporation following the March 24, 1989 Exxon Valdez environmental accident to conduct clean-up of the oil spill in Prince William Sound, Alaska.

[2]Employer provided medical care for claimant in 1989 following her alleged inhalation of noxious substances. EX 2.

On appeal, claimant challenges the administrative law judge's finding that she did not meet the status test. Employer responds, urging affirmance of the administrative law judge's conclusion that claimant was not engaged in maritime employment and thus that claimant's claim is not covered by the Act. In its cross-appeal, employer challenges the administrative law judge's finding that claimant satisfied the situs test for coverage under the Act.

In determining whether to grant summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §§18.40(c), 18.41(a). For the reasons that follow, we vacate the administrative law judge's grant of summary decision because employer is not entitled to a decision in its favor as a matter of law and there are contested issues of material fact relating to claimant's work for employer which were not addressed by the administrative law judge. *See Walker v. Todd Pacific Shipyards*, 47 BRBS 11 (2013), *vacating in pert. part on recon.* 46 BRBS 57 (2012); *Morgan*, 40 BRBS at 13 (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)).

Claimant contends the administrative law judge erred in finding that her work loading and unloading cleaning materials in furtherance of her beach cleaning work was not "maritime" employment. Claimant further contends she was exposed to harmful stimuli throughout the course of her work for employer, including exposure aboard vessels. Claimant thus contends the administrative law judge erred in failing to discuss whether her employment is covered by the Act pursuant to *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). Employer agrees that the administrative law judge misstated the holding in *Perini*, but it contends that *Perini* is not applicable to this case because claimant did not perform any work aboard vessels or over navigable waters.

For a claim to be covered by the Act, a claimant must establish that her injury occurred upon the navigable waters of the United States, or that it occurred on a landward area covered by Section 3(a), and that her work is maritime in nature pursuant to Section 2(3) and is not specifically excluded by any provision in the Act. 33 U.S.C. §§902(3), 3(a); *Perini*, 459 U.S. 297, 15 BRBS 62(CRT); *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). Prior to the enactment of the 1972 Amendments to the Act, in order to be covered by the Act, claimant had to establish that her 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) and to expand the sites covered under Section 3(a) landward. In *Perini*, 459 U.S. 297, 15 BRBS 62(CRT), the United States Supreme Court determined that Congress, in amending the Act to expand coverage, did not intend to withdraw coverage under the Act from workers injured on navigable waters who would have been covered by the Act before 1972. *Id.*, 459 U.S. at 315-316, 15 BRBS at 76-77(CRT). Thus, the Court held that when a worker is injured on actual navigable waters while in the course of her employment on those waters, she 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 she is specifically excluded from coverage by another statutory provision. *Id.*, 459 U.S. at 323, 15 BRBS at 80-81(CRT). If the injury did not occur on navigable waters, in order to demonstrate that coverage exists, a claimant must separately satisfy both the "situs" and the "status" requirements of the Act. *See, e.g.*, *McGray Constr. Co. v. Hurston*, 181 F.3d 1008, 33 BRBS 8(CRT) (9th Cir. 1999).

For the reasons stated in *Miller v. CH2M Hill Alaska, Inc.*, BRB Nos. 13-0069/A (Sept. 24, 2013) (unpub.), slip op. at 7-9, we hold that the administrative law judge properly found that claimant's land-based cleaning work and her loading and unloading of cleaning supplies in furtherance thereof was not covered employment pursuant to Section 2(3). *Smith v. Labor Finders, Inc.*, 46 BRBS 35 (2012). Thus, we affirm this finding.[3] *Id.*

As the parties correctly aver, however, the administrative law judge did not fully address whether claimant is covered under the Act pursuant to *Perini*.[4] Claimant alleged injuries arising from injurious exposures during the entirety of her work for employer,

[3]As claimant's work on land was not "maritime employment" pursuant to Section 2(3), we need not address the parties' contentions concerning whether claimant's land-based work occurred on a covered situs. *See Smith*, 46 BRBS at 40 n. 6.

[4]The administrative law judge stated only that claimant was more than "transiently and fortuitously on navigable waters," but then inconsistently concluded summarily that *Perini* "has relatively little to offer that is directly applicable here." Inclinations and Order at 2. If, indeed, claimant was more than transiently and fortuitously on navigable waters in the course of her employment, *Perini* holds that the employment is covered under the Act. *See, e.g., Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003). We reject employer's contention that claimant's allegation of an occupational disease removes this case from consideration under *Perini*. The Supreme Court, in *Perini*, discussed its holding in terms of an "injury" occurring on actual navigable waters. By definition, an injury under the Act includes "such occupational disease or infection as arises naturally out of such employment." 33 U.S.C. §902(2).

including that allegedly incurred aboard vessels. The applicability of *Perini* rests on contested issues of material fact which must be addressed by the administrative law judge in the first instance. Thus, we must vacate the administrative law judge's grant of summary decision in employer's favor and remand the case. *See Walker*, 47 BRBS at 12; *Morgan*, 40 BRBS at 13.

Specifically, the administrative law judge must address more fully the nature of claimant's trips on vessels on Prince William Sound and whether claimant was exposed to injurious substances aboard the vessels in the course and scope of her employment. The Fifth Circuit has held that a worker injured in the course of her employment on navigable waters is engaged in maritime employment and meets the status test only if her presence on the water at the time of injury was neither transient nor fortuitous. *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir. 1999) (*en banc*).[5] The Ninth Circuit, within whose jurisdiction this case arises, has not adopted *Bienvenu*, nor cited it in any decisions. *See also Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006) (Second Circuit declines to rule on *Bienvenu* as the claimant was on actual navigable waters 30 to 40 percent of his time). An employee who is regularly assigned by her employer during the course of her employment to travel on navigable waters is covered under *Perini*, since such an employee is not "transiently or fortuitously" on navigable waters, but is there because such travel is a regular part of her job assignment. *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003) (citing *Pennsylvania R. Co. v. O'Rourke*, 344 U.S. 334 (1953), and *Parker v. Motor Boat Sales*, 314 U.S. 244 (1941)). Specific "duties" on a vessel are not required in order for a claimant to be covered under *Perini*. *Ezell*, 37 BRBS at 17.

As the administrative law judge did not explain the bases for his summary finding that claimant was not "transiently or fortuitously" on actual navigable waters or his inconsistent conclusion that *Perini* is not applicable, or address whether claimant was "injured" on actual navigable waters, we vacate the grant of summary decision for

[5]The court stated that an employee who performs a "not insubstantial" amount of work on navigable waters is neither transiently nor fortuitously on navigable waters. The court did not set an exact amount of work performance sufficient to trigger coverage, but offered guidance: the threshold amount must be greater than a "modicum of activity" in order to preclude coverage for those who commute from shore to work by boat. *Bienvenu*, 164 F.3d at 908, 32 BRBS at 223(CRT). The claimant in *Bienvenu* was held covered under the Act because 8.3 percent of his work was on navigable waters. *But see Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991) (Eleventh Circuit holds that land-based electrician who commuted to one job on an island was not covered under the Act pursuant to *Perini*).

employer. On remand, the administrative law judge must fully address these issues consistent with applicable law.

Accordingly, we affirm the administrative law judge's finding that claimant's beach cleanup work on land and removal of oil-absorbent materials from the transport vessels in furtherance of that work is not covered under the Act. The administrative law judge's summary finding that *Perini* is inapplicable to this case is vacated and the case is remanded for further consideration of this issue. If it is determined that claimant is covered by the Act, the administrative law judge must address any other issues raised by the parties regarding claimant's claim.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge