BRB No. 01-0465

WILLIAM T. MORRISSEY, III	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
KIEWIT-ATKINSON-KENNY	)	DATE ISSUED: FEB 8, 2002
	)	
and	)	
	)	
ST. PAUL FIRE & MARINE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and the Decision and Order Denying Motion for Reconsideration of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Thomas J. Freedman, Dedham, Massachusetts, for claimant.

Donald E. Wallace (Macdonald & Wallace), Quincy, Massachusetts, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and the Decision and Order Denying Motion for Reconsideration (99-LHC-2666) of Administrative Law Judge Daniel F. Sutton 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 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).

Claimant began working for employer in 1991 on a major construction project known

as the Harbor Clean-up Project on Deer Island, undertaken by the Massachusetts Water Resources Authority (MWRA), to build a new sewage treatment plant and a discharge, or outfall, tunnel to serve the Boston metropolitan area. The outfall tunnel is located 400 feet beneath the ocean floor and is to extend over nine miles from Deer Island into the Atlantic Ocean. Claimant worked as a member of a "bull gang," and his duties included maintenance of the rail system, water systems and the tunnel boring machine. He also was required to shovel muck, a substance he described as cement-like mixture of wet dirt and debris, and assisted with the changing of heads or blades on the tunnel boring machine. On October 11, 1994, claimant was working in the outfall tunnel approximately five miles from Deer Island, shoveling muck, when he felt pain in his low back and leg. Subsequently, claimant has undergone several surgical procedures on his lower back and right hip. He has not returned to work since the injury and sought benefits under the Act. Employer has paid claimant benefits pursuant to the Massachusetts workers' compensation laws.

In his Decision and Order, the administrative law judge found that claimant's work site was located in bedrock hundreds of feet below any navigable water and thus cannot be viewed as being "upon the navigable waters of the United States." *See* 33 U.S.C. §903(a). In addition, the administrative law judge found that claimant was not engaged in maritime employment as his work had no connection to loading and unloading ships, transportation of cargo, repairing or building maritime equipment or the repair, alteration or maintenance of harbor facilities. Therefore, the administrative law judge found that claimant failed to establish that he worked in covered employment. *See* 33 U.S.C. §902(3). Moreover, the administrative law judge found that the tunnel where the injury occurred was not an enumerated situs and was not used for any maritime activities; thus, he concluded it is not a covered situs under Section 3(a). In a post-hearing brief, claimant contended that, alternatively, he is covered under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §1333(b), and/or the Defense Base Act (DBA), 42 U.S.C. §1651, extensions of the Longshore Act. The administrative law judge rejected these contentions, finding that claimant did not meet the threshold requirements for coverage under these Acts. Therefore, the administrative law judge denied benefits. The administrative law judge denied claimant's motion for reconsideration of his coverage findings.

On appeal, claimant contends that the administrative law judge erred in finding that he is not covered under the OCSLA and the DBA. Alternatively, claimant contends that the administrative law judge erred in finding that he is not covered under the Longshore Act. Employer responds, urging affirmance of the administrative law judge's decisions.

Outer Continental Shelf Lands Act

Initially, claimant contends that the administrative law judge erred in finding that his claim is not covered under the OCSLA. The OCSLA provides benefits for employees injured as the result of operations connected with the exploration, development, removal and transportation of natural resources from the seabed and subsoil of the outer Continental Shelf. 43 U.S.C. §1333(b), (c). The United States Court of Appeals for the Third Circuit stated in *Curtis v. Schlumberger Offshore Service, Inc.*, 849 F.2d 805, 21 BRBS 61(CRT)(3d Cir. 1988), that "Congress enacted the OCSLA in 1953 to establish federal control and jurisdiction over the outer Continental Shelf and its apparently vast mineral resources, including oil and natural gas." *Id.*, 849 F.2d at 808, 21 BRBS at 66(CRT). The administrative law judge in the instant case found that "the outfall tunnel, which was designed and constructed to carry sewage out to sea, has no relationship to mineral exploration and extraction activities covered by the OSCLA." Decision and Order at 13. Claimant's contentions on appeal pertain to the geographic location of the injury site, that is, more than three miles offshore under the seabed, and erroneously disregard the statutory requirement that claimant's injury must result from explorative and extractive operations involving natural resources. *See* 43 U.S.C. §1333(k), (1), (m) (defining the terms "exploration," "development," and "production" in Section 1333(b)); *Robarge v. Kaiser Steel Corp.*, 17 BRBS 213 (1985), *aff'd sub nom. Kaiser Steel Corp. v. Director, OWCP,* 812 F.2d 518 (9th Cir. 1987). As claimant was not engaged in activities within the meaning of the OCSLA, claimant has not met a threshold requirement for coverage under the OSCLA. Thus, we affirm the administrative law judge's finding that the claim is not covered under the OSCLA as it accords with law. *See also Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986).

Defense Base Act

Claimant also contends that the oversight provided by the United States District Court for the District of Massachusetts to the project being run by the MWRA to build the sewage outfall tunnel is sufficient to bring the claim under the jurisdiction of the DBA.[1] We disagree. The DBA provides benefits under the Longshore Act for those workers injured while engaged in employment under contracts with the United States, or an agency thereof, for public work to be performed outside of the continental United States. 42 U.S.C. §1651.

[1]We deny claimant's request that the Board consider on appeal evidence which was not admitted into the record by the administrative law judge. The Board's review of an administrative law judge's decision is limited to consideration of evidence in the formal case record. 33 U.S.C. §921(b)(3); *Williams v. Hunt Shipyards, Geosource, Inc.*, 17 BRBS 32 (1985).

To be compensable under the DBA, a claim, *inter alia,* must stem from a "contract" for "public work" overseas, for public work constituting federal government-related construction projects, for work connected with national defense, or for employment under a service contract supporting either activity. *University of Rochester v. Hartman*, 618 F.2d 170 (2d Cir. 1980); *Airey v. Birdair, Division of Bird & Sons, Inc.*, 12 BRBS 405 (1980). Under the DBA, compensation is authorized under a public service contract entered into with the United States, but performed outside of the United States, irrespective of the place where the injury or death occurs. 42 U.S.C. §1651; *see generally Rosenthal v. Statistica, Inc.*, 31 BRBS 215 (1998).

In the present case, the administrative law judge found the record establishes that claimant was employed pursuant to a contract between employer and the MRWA, a state agency, and that there is no evidence that "any construction work on the outfall tunnel was performed pursuant to a contract with the Federal government." Decision and Order at 14. This finding is supported by substantial evidence. Moreover, the administrative law judge properly found that the DBA does not extend coverage for work on projects that must meet federal specifications, guidelines and statutes, but rather requires that the United States or an agency thereof be a party to the contract. *See, e.g., Cornell v. Lockheed Aircraft Int'l,* 23 BRBS 253 (1990); *Casey v. Chapman College, Pace Program,* 23 BRBS 7 (1989); *FitzAlan-Howard v. Todd Logistics, Inc.*, 21 BRBS 70 (1988). In this regard, we reject claimant's contention that the district court's oversight is sufficient to make the United States a party to the contract between employer and MWRA, as the United States is not contractually obligated to perform any duties. Consequently, we affirm the administrative law judge's finding that claimant has not established the requisite connection to a United States government contract or project as it is supported by substantial evidence and in accordance with law. *See Airey,* 12 BRBS at 410.

Longshore Act

Claimant also contends that the administrative law judge erred in finding that his injury was not covered under the Longshore Act. 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, 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 water 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). 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, 15 BRBS at 80-81(CRT); *Center v. R & D Watson, Inc*., 25 BRBS 137 (1991).

The Board has held that a threshold requirement of the navigability inquiry 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. *See LePore v. Petro Concrete Structures, Inc.*, 23 BRBS 403, 406 (1990), *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 of 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); *Rizzi v. Underwater Constr. Corp.*, 27 BRBS 273 (1994), *aff'd on recon.*, 28 BRBS 360 (1994), *aff'd*, 84 F.3d 199, 30 BRBS 44(CRT) (6th Cir. 1996), *cert. denied*, 519 U.S. 931 (1996); *LePore*, 23 BRBS at 406; *Williams v. Pan Marine Constr.*, 18 BRBS 98 (1986), *aff'd sub nom. Williams v. Director, OWCP*, 825 F.2d 246, 20 BRBS 25(CRT) (9th Cir. 1987).

It is axiomatic that the Atlantic Ocean is navigable. *See Nelson v. American Dredging Co.*, 30 BRBS 205 (1996), *aff'd in part and rev'd in part on other grounds*, 143 F.3d 789, 32 BRBS 115(CRT)(3d Cir. 1998). Claimant's injury, however, occurred under the seabed of the Atlantic Ocean. The Supreme Court has held that an oil drilling platform which is permanently affixed to the bottom of the sea is considered an island, albeit an artificial one, and thus an injury on such a platform does not occur on navigable waters. *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985), *citing Rodrique v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969); *see also Laspragata v. Warren George, Inc.*, 21 BRBS 132 (1988). The Court stated that, unlike workers on floating structures, workers on fixed structures do not enjoy the same remedies as workers on ships, who are covered under the Act if they are not members of the crew. *Herb's Welding*, 470 U.S. at 416 n.2, 17 BRBS at 79 n.2(CRT). Moreover, this is not a case in which water has been temporarily withdrawn from the site in question. *See Ransom v. Coast Marine Constr., Inc.*, 16 BRBS 69 (1984)(cofferdam which *temporarily* restricted navigation and created dry land is "navigable water" and thus a covered situs). Rather, the site where claimant was injured is a discharge tunnel for a sewage treatment plant. Claimant's duties were performed underground in the tunnel, regardless of whether the rock itself in which he was tunneling was under the ocean or if it sloped upward above the surface of the water. Thus, we reject claimant's contention that he was injured on navigable waters because the rock where the tunnel was being drilled rose above the surface of the water at the point where claimant was injured. The bedrock was at all times dry ground, and moreover, there is no assertion that the tunnel itself was used in interstate commerce as a waterway. *See Nelson v. Guy F. Atkinson Constr. Co.*, 29 BRBS

39 (1995), *aff'd mem. sub nom. Nelson v. Director, OWCP,* No. 95-7033 (9th Cir. Nov. 13, 1996). Therefore, we affirm the administrative law judge's finding that claimant's injury did not occur on the navigable waters of the United States. *Herb's Welding,* 470 U.S. 414, 17 BRBS 78(CRT).

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 on 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). 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). Claimant contends that the site where claimant was injured was a marine railway, and thus is specifically covered under Section 3(a). However, claimant has misinterpreted the meaning of the term "marine railway," which is a term of art. The United States Court of Appeals for the Ninth Circuit stated in *Western Boat Bldg. Co. v. O'Leary*, 198 F.2d 409, 411 (9th Cir. 1952), that "dry dock," "floating dock" and "marine railway" are interchangeable terms and that they "all are located on navigable waters and used for exactly the same purposes, *i.e.*, to raise a ship out of the water to permit examination and repairs to her hull which are impossible while she is afloat." In addition, the United States Court of Appeals for the Fifth Circuit has described a marine railway as an inclined structure at the water's edge which extends below the water and receives a vessel to be hauled out on rollers or wheels.[2] *See Maryland Casualty Co. v. Lawson*, 101 F.2d 732, 733 (5th Cir. 1939); *see also St. Louis Shipbuilding Co. v. Director, OWCP*, 551 F.2d 1119, 5 BRBS 787 (8th Cir. 1977). As claimant does not contend that the railway used in the tunnel played any part in removing ships from the water for repair, we reject the contention that claimant was injured on a marine railway.

[2]For an extensive description of a marine railway, see the decision in *The Professor Morse*, 23 F. 803, 804-805 (D.N.J. 1885).

Moreover, as the administrative law judge properly found, the site in the tunnel where claimant was injured is not one of the other enumerated sites in Section 3(a), and claimant raises no contention on appeal that the site is an "adjoining area" used for the maritime activity of loading, unloading, building, dismantling or repairing vessels. Therefore, we affirm the administrative law judge's finding that claimant's injury did not occur on a situs covered under Section 3(a) of the Act. Accordingly, as the situs requirement is not satisfied in this case, we affirm the administrative law judge's finding that claimant's injury is not covered under the Act.[3]

Accordingly, the Decision and Order and the Decision and Order Denying Reconsideration of the administrative law judge denying benefits are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3]Given our disposition of the situs issue, we need not address claimant's contentions with regard to the status requirement of Section 2(3), 33 U.S.C. §902(3). *See Rizzi*, 27 BRBS 273; *but see Laspragata,* 21 BRBS at 135 (claimant engaged in construction of sewage treatment plant is not engaged in maritime employment). Moreover, we need not address claimant's contention that the Section 20(a) presumption aids him in establishing that the Act's coverage provisions are met. It is clear that the material facts in this case are undisputed and that the coverage determination presents a legal issue. *See Fleischmann v. Director, OWCP,* 137 F.3d 131, 32 BRBS 28(CRT)(2d Cir. 1998), *cert. denied*, 119 S.Ct. 444 (1998).