

F.S.)	
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Claimant-Petitioner)	
)	
v.)	
)	
WELLINGTON POWER COMPANY)	DATE ISSUED: <u>AUG 7, 2009</u>
)	
and)	
)	
ST. PAUL FIRE AND MARINE)	
TRAVELERS INDEMNITY COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

William F. Mulrone (Ashcraft & Gerel, L.L.P.), Baltimore, Maryland, for claimant.

F. Nash Bilisoly and Lisa L. Thatch (Vandeventer Black, L.L.P.), Norfolk, Virginia, 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 (2007-LHC-00500) of Administrative Law Judge Pamela Lakes Wood 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant worked as an electrician on the Woodrow Wilson Bridge project.¹ Each day, claimant parked his car on the Virginia side of the Potomac River and checked in at a trailer. He crossed a series of barges and ascended a makeshift stairwell to reach the road deck, which was on the Maryland side of the river. He then descended to the unenclosed level beneath the road deck, which is where the electrical work was performed. This maintenance level was permanently affixed to the bridge at the time of claimant's injury and remains permanently attached. The bridge was not open to traffic at the time of claimant's employment. On the date of claimant's injury, February 23, 2006, he was working with mechanisms related to the drawbridge. Claimant became entangled in some equipment and fell, fracturing his left wrist. Claimant was totally disabled from February 24 through September 8, 2006. Employer paid claimant temporary total disability benefits under the Virginia workers' compensation statute, as well as permanent partial disability benefits for a 6 percent hand impairment. Claimant sought benefits under the Act.

The administrative law judge found that claimant's injury did not occur on a covered situs, rejecting claimant's contention that as he was injured directly above navigable waters on a bridge adjacent to the draw span, his injury occurred on navigable waters within the coverage of Section 3(a) of the Act, 33 U.S.C. §903(a). Decision and Order at 7-8. The administrative law judge relied on the Board's decision in *Kehl v. Martin Paving Co.*, 34 BRBS 121 (2000), holding that an injury occurring on a bridge permanently affixed to land did not occur on a navigable waters. The administrative law judge also discussed *LeMelle v. B.F. Diamond Constr. Co.*, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), *cert. denied*, 459 U.S. 1177 (1983), but found that the court's decision therein was limited to consideration of the status inquiry at Section 2(3) as the parties had stipulated to situs. The administrative law judge made specific findings that the Wilson Bridge was permanently affixed to land and that the section of the bridge on which claimant worked at the time of injury was permanently affixed to the bridge. Decision and Order at 8. Thus, pursuant to *Kehl*, the administrative law judge concluded that claimant's injury on the bridge did not occur on navigable waters, and she found the situs element was not met. The administrative law judge, therefore, denied the claim.

On appeal, claimant contends he is covered by the Act because the Wilson Bridge project was uniquely maritime in that it was intended in part to increase the navigability of the Potomac River. Claimant contends that the *Kehl* decision recognizes that some

¹ A new drawbridge was required due to the aging infrastructure of the existing bridge and for the purpose of alleviating vehicular traffic where the interstate highway narrowed from eight lanes to six lanes. EX 4. In addition, the new bridge was to be higher than the existing bridge so that the draw span would not have to open as frequently for vessels traversing the Potomac River. EX 5.

bridge projects could be covered situs and that *LeMelle* mandates a finding of coverage based on the similarity of the cases. Employer responds, urging affirmance of the administrative law judge's finding that the situs element is not met in this case. For the reasons that follow, we affirm the administrative law judge's finding that claimant's injury did not occur on a covered situs.

Section 3(a) of the Act provides:

Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon 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) (2006). As the bridge is not an enumerated site or "other adjoining area" under Section 3(a), claimant can recover in this case only if his injury occurred on actual navigable waters and thus would have been covered prior to 1972. *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). In *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969), the Supreme Court, in addressing the scope of the pre-1972 version of Section 3(a), held that structures such as piers and wharves permanently affixed to land are extensions of land, and thus injuries occurring thereon were not compensable.² *Id.* at 214-215. In *Perini*, the Supreme Court subsequently held that, post-1972, the Act's coverage is extended to those workers whose injuries would have been covered prior to 1972 because the injuries occurred on actual navigable waters in the course of employment on those waters. 459 U.S. at 324, 15 BRBS at 80(CRT); *see, e.g., Walker v. PCL Hardaway/Interbeton*, 34 BRBS 176 (2000) (employee working on a bridge from a barge is covered as the injury occurred on navigable waters).

We reject claimant's contention that the Board's decision in *Kehl*, 34 BRBS 121, permits the conclusion that an injury sustained on a bridge occurs on navigable waters. In *Kehl*, the decedent worked as a carpenter on the construction of a bridge over the

² Section 3(a), 33 U.S.C. §903(a) (1970) (amended 1972), stated,

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock)

Intracoastal Waterway in Florida. Part of the bridge was complete, and two lanes were open to traffic. The other half of the bridge, separated from the lanes of traffic by jersey barriers, was still under construction. The decedent was walking on wooden planks on an unfinished part of the bridge when he fell to his death through an opening in the planks, striking the concrete foundation of the bridge and falling into the water.

The administrative law judge's finding of coverage was administratively affirmed, and employer appealed to the Eleventh Circuit. The court remanded the case for additional fact-finding on both the status and situs issues. The court stated that claimant must establish that decedent was injured on actual navigable waters of the United States in order to satisfy the Act's situs requirement. The court further held that because decedent was not engaged in the loading, unloading or building of ships, his work fails the status requirement, unless his employment duties required him to work on actual navigable waters. *Martin Paving Co. v. Kehl*, No. 96-3566, 152 F.3d 933 (11th Cir. July 30, 1998) (table).

On remand, the administrative law judge determined that the span of the bridge on which decedent was working when he fell was incomplete and, therefore, was not permanently affixed to land. Because the bridge was still under construction, she determined that the water was not removed from navigation. Consequently, the administrative law judge found that decedent's fall occurred while he was upon navigable waters and that the situs test was satisfied. The administrative law judge also found that decedent's job required him to work over navigable waters every day, and she inferred that the bridge under construction was "logically intended to aid navigation." Therefore, she concluded that decedent's job on navigable waters satisfied the status test.

Employer appealed. The Board held that the administrative law judge erred in concluding that the bridge was not permanently attached to land on the basis that it was under construction. As the bridge was in use for highway traffic, the Board reversed the finding that the bridge was not permanently attached to land. Because a bridge is an extension of land pursuant to *Nacirema*, 396 U.S. 212, the Board held that the decedent's death did not occur on navigable waters. Thus, the Board reversed the award of benefits. *Kehl*, 34 BRBS at 126. This result is consistent with prior bridge cases decided by the Board. See *Crapanzano v. Rice Mohawk, U. S. Constr. Co., Ltd.*, 30 BRBS 81 (1996) (claimant tripped on bridge girders and landed on shore - not covered); *Pulkoski v. Hendrickson Bros., Inc.*, 28 BRBS 298 (1994) (injury on bridge bulkhead not covered); *Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992) (claimant injured on scaffolding suspended from bridge permanently affixed to land not covered). The decision in *Kehl*, on which the administrative law judge relied in this case, thus supports the legal conclusion that an injury occurring on a bridge permanently affixed to land does not occur on navigable waters such that coverage is conferred pursuant to *Perini*.

Claimant also contends he is entitled to coverage pursuant to the Fourth Circuit's decision in *LeMelle*, 674 F.2d 296, 14 BRBS 609, inasmuch as this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. The claimant in *LeMelle* was a concrete finisher employed on the James River Bridge project; the old drawbridge was to be demolished and replaced by a new one that would provide more horizontal clearance for side-by-side vessel traffic and vertical clearance for tall vessels so that frequent openings of the draw span could be avoided. The claimant was injured on a piling in the James River, located about one mile from shore and eight to ten feet above the river. Claimant's employment required that he wear a life jacket and that he be transported to his work site by boat.

The court stated the parties agreed that the situs requirement of Section 3(a) was met. *Id.*, 674 F.2d at 297, 14 BRBS at 611. Thus, the court addressed only the status element of Section 2(3), framing the issue as "whether a construction worker employed in building a bridge over navigable water, designed to benefit both highway traffic and river navigation, is engaged in maritime employment within the meaning of the LHWCA."³ The court held that the claimant's work was:

maritime employment as defined in Section 2(3). It is not necessary to relate again the tortured history of employee coverage under the LHWCA, except to note that bridge construction workers employed over navigable waters were covered prior to the 1972 Amendments. *Davis v. Department of Labor*, 317 U.S. 249 (1942); *Hardaway Contracting Co. v. O'Keefe*, 414 F.2d 657 (5th Cir. 1968); *Peter v. Arrien*, 325 F.Supp. 1361 (E.D. Pa. 1971), *aff'd*, 463 F.2d 252 (3^d Cir. 1972).

This court said in *Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 1090 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980), "we are confident that employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 Amendments." [footnote omitted].

³ Section 2(3) of the Act, 33 U.S.C. §902(3), 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,

We hold, therefore, that the claimant, working over navigable waters on a bridge designed in part as an aid to navigation, is engaged in maritime employment, and is therefore an employee within the meaning of the Act.

LeMelle, 674 F.2d at 298, 14 BRBS at 613.

We reject claimant's contention that *LeMelle* provides a basis for finding coverage in this case. Initially, the court's holding explicitly addresses only "maritime employment" under Section 2(3); thus, a bridge worker on a project intended to improve navigation may meet the status requirement under *LeMelle*. That, however, is immaterial to this case which concerns situs, and as we have explained, claimant can meet the situs requirement only if injured on actual navigable waters. The situs inquiry looks to the nature of the place of work at the moment of injury. *Humphries v. Director, OWCP*, 834 F.2d 372, 20 BRBS 17(CRT) (4th Cir. 1987), *cert. denied*, 485 U.S. 1028 (1988). In *LeMelle*, the claimant was injured on a piling in the river one mile from shore and accessible only by boat. The Fourth Circuit accepted the parties' agreement that the situs element was met, and the pre-1972 cases it cited found coverage where claimant's injury occurred upon actual navigable waters. *Davis*, 317 U.S. 249 (injury dismantling a bridge from a barge); *Hardaway*, 414 F.2d 657 (decedent injured on a vessel); *Peter*, 3215 F.Supp. 1361 (crane operator killed when crane toppled into water). *See also Dixon v. Oosting*, 238 F.Supp. 25 (E.D.Va. 1965) (claimant covered for injury sustained in the Chesapeake Bay 1.5 miles from land on equipment resting on pilings that had no physical connection with land or the bridge under construction; site reached only by vessel). Similarly, claimant *LeMelle* was injured while surrounded by water on a piling in the middle of the river. In this case, by contrast, claimant was injured on the maintenance level of the bridge span itself, which was permanently attached to land. Although claimant arrived at his work site by crossing a series of barges in order to reach a stairway to the bridge deck, there is no evidence that claimant could reach his work site only by vessel. The administrative law judge found, based on claimant's testimony, that the bridge was traversable by land at the time of claimant's injury. Decision and Order at 8; Tr. at 34.

As claimant's injury occurred on a non-enumerated site permanently attached to shore, the Supreme Court decision in *Nacirema* is controlling precedent. The claimants in *Nacirema* were longshoremen injured and/or killed on piers permanently attached to the shore. The lower court had reversed the denials of benefits. The Supreme Court reversed, applying the "settled law that structures such as wharves and piers, permanently affixed to land, are extensions of land." *Nacirema*, 396 U.S. at 214-215. Thus, the Act, which covered only injuries occurring "upon navigable waters" did not cover injuries occurring on piers. Although it did not directly address the issue of an injury on a bridge, the Court analogized a pier to a bridge, stating that the Act does "not cover injuries on a

pier even though a pier, *like a bridge*, extends over navigable waters.” *Id.* at 215 (emphasis added). Rather, the Supreme Court declined to interpret the 1927 Act as if “situs” coverage was based on the broader aspect of an employee's “status,” *i.e.*, his maritime employment contract, concluding that the language of the Act left little doubt that Congressional intent in providing compensation was narrower than covering all workers with maritime contracts who worked over navigable waters. *Id.* The Court also stated:

We reject [the lower court’s alternative holding] that all injuries on these piers, despite settled doctrine to the contrary, may now be considered injuries on navigable waters. * * * Piers, *like bridges*, are not transformed from land structures into floating structures by the mere fact that vessels may pass beneath them.

Id. at 215 n.6 (emphasis added).

As stated above, the Board has consistently applied *Nacirema* in holding that injuries on bridges or bridge-like structures permanently affixed to land do not occur on navigable waters and thus are not covered by the Act. *Gonzalez v. Tutor Saliba*, 39 BRBS 80 (2005) (temporary trestle attached to bridge spans which were attached to land); *Kehl*, 34 BRBS 121; *Crapanzano*, 30 BRBS 81; *Pulkoski*, 28 BRBS 298; *Johnsen*, 25 BRBS 329; *cf. Peter v. Arrien*, 325 F.Supp. 1361 (E.D. Pa. 1971), *aff’d*, 463 F.2d 252 (3^d Cir. 1972) (death on temporary causeway on Delaware River occurred on navigable waters because *Nacirema* applies only to structures permanently affixed to shore). The administrative law judge’s finding that the bridge on which claimant was injured was permanently affixed to land is supported by substantial evidence. Moreover, the administrative law judge’s conclusion that this injury did not occur “upon navigable waters” is in accordance with law. *Nacirema*, 396 U.S. 212; *Kehl*, 34 BRBS 121. Therefore, we affirm the denial of benefits. *Johnson*, 25 BRBS 329.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge