BRB No. 92-1241
and 92-1241A

RICHARD LUNDY	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
RAYMOND BAUR, JOINT VENTURE	)	DATE ISSUED:
	)	
and	)	
	)	
AMERICAN INTERNATIONAL ADJUSTMENT COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Denying Benefits of George G. Pierce, Administrative Law Judge, United States Department of Labor.

Timothy F. X. Cleary, Boston, Massachusetts, for claimant.

Richard H. Pettingell and Morgan J. Gray (Morrison, Mahoney & Miller), Boston, Massachusetts, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Denying Benefits (90-LHC-0440) of Administrative Law Judge George G. Pierce 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).

On September 28, 1988, claimant injured his left eye while working for employer as a

master mechanic on the Saugus River drawbridge. This drawbridge, which spans the Saugus River, is restricted to rail traffic and is a Vascule - type *i.e.*, the drawbridge raises at one end. Employer contracted to underpin the existing bridge by installing new pilings and constructing a new foundation. Claimant's job duties were to service and repair the drilling rig and other equipment at the site. These duties were performed on the bridge as well as at the repair shop, which was located about 100 yards from the bridge. The drawbridge remained in continuous operation for railway traffic during its refurbishment. Following claimant's injury, employer voluntarily paid claimant compensation and medical benefits pursuant to the workers' compensation laws of Massachusetts.

In his Decision and Order, the administrative law judge found that claimant's employment did not fall within the coverage provisions of the Act. Specifically, the administrative law judge first determined that claimant satisfied the situs requirement of the Act, *see* 33 U.S.C. §903(a), finding that claimant was injured on actual navigable waters because his injury occurred on a drawbridge spanning a navigable waterway. The administrative law judge next found that claimant failed to satisfy the status requirement of the Act, *see* 33 U.S.C. §902(3), reasoning that claimant produced no evidence that he assisted in the loading and unloading of a vessel or in ship construction and repair. Lastly, the administrative law judge rejected claimant's contention that he was engaged in maritime employment. *See* 33 U.S.C. §903(a) (1970)(amended 1972 and 1984). The administrative law judge distinguished the instant case from *LeMelle v. B.F. Diamond Construction Co.*, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), *rev'g* 13 BRBS 542 (1981), *cert. denied*, 459 U.S. 1177 (1983), in which the United States Court of Appeals for the Fourth Circuit held that a bridge builder was covered under the Act. Accordingly, the administrative law judge denied claimant's claim for benefits under the Act.

On appeal, claimant challenges the administrative law judge's finding that he is not covered under the Act. Employer, in its cross-appeal, contends that the administrative law judge erred in determining that claimant's injury occurred on actual navigable waters.

A. Injury on Actual Navigable Waters

We first address employer's contention that the administrative law judge erred in concluding that claimant had satisfied the situs requirement because he was injured on a drawbridge spanning a navigable waterway of the United States. Initially, we note that prior to 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) and to expand landward the sites covered under Section 3(a). 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 while 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); *see also Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992).

In the instant case, the administrative law judge found case law addressing jurisdiction under the pre-1972 Act instructive, but not controlling. Pursuant to *Perini*, however, if claimant would have been covered under the pre-1972 definition of navigable waters, he is covered under the Act as amended in 1972, as such an employment injury satisfies both Sections 2(3) and 3(a). Thus, should the administrative law judge's finding that claimant sustained an injury on navigable waters be affirmed, claimant would be entitled to coverage under the Act. *See Perini*, 459 U.S. at 323-324, 103 S.Ct. at 650-651, 15 BRBS at 80-81 (CRT). In *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 90 S.Ct. 347 (1969), the Supreme Court reaffirmed a narrow reading of the phrase "upon the navigable waters" in pre-1972 Section 3(a) and held that injuries to longshoremen which arise while they work on a pier permanently affixed to shore are not compensable under the Act, reasoning that structures permanently affixed to land have long been construed as extensions of land and not within admiralty jurisdiction or that of the Act. Additionally, the Court, in *dicta*, indicated that its holding also applies to bridges permanently affixed to land. 396 U.S. at 215 n.6, 90 S.Ct. at 350 n.6. Similarly, in considering the Act's coverage after the *Perini* decision, the Board has held that a claimant who was injured on a completed bridge that was both permanently affixed to land and was in use at the time claimant was employed to paint it was not injured on actual navigable waters. *Johnsen*, 25 BRBS at 329; *see also Crapanzano v. Rice Mohawk, U.S. Constr. Co. Ltd.*, ___ BRBS ___, BRB No. 93-1737 (May 13, 1996)(bridge construction worker not injured on actual navigable water); *Laspargata v. Warren George, Inc.*, 21 BRBS 132 (1988)(claimant injured on the platform of a sewage treatment plant permanently affixed to the riverbed is not injured on actual navigable waters).

Based upon the facts of this case, which are essentially identical to those contained in *Johnsen*, we hold that the administrative law judge erred in concluding that claimant was injured on navigable waters. It is uncontroverted that claimant was injured upon a completed drawbridge and that the Saugus River drawbridge was in continual use at the time claimant was employed by employer. Therefore, pursuant to *Perini* and *Johnsen*, claimant's job was not performed on actual navigable waters since the Saugus River drawbridge was permanently attached to land during and after claimant's injury upon it. Accordingly, we reverse the administrative law judge's finding that claimant's injury occurred on the navigable waters of the United States; as claimant's job was not performed on actual navigable waters, claimant is not entitled to coverage under the Act pursuant to *Perini*.

B. Jurisdiction Under the 1972 and 1984 Amendments to the Act

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). Thus, to be covered under the Act, as amended in 1972 and 1984, claimant must satisfy both the "situs" requirement of Section 3(a) and the "status" requirement of Section 2(3). *See P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Section 3(a) provides coverage for an injury occurring 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). While the injury need not occur upon a situs specifically enumerated in Section 3(a), the Act requires that a non-enumerated situs be used in loading, unloading, building or repairing a vessel. *See Silva v. Hydro-Dredge Corp.*, 23 BRBS 123 (1989). The term "employee" is defined in Section 2(3) as a longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker. *See* 33 U.S.C. §902(3). While maritime employment is not limited to the occupations specifically enumerated in Section 2(3), claimant's employment must bear a relationship to the loading, unloading, building or repairing of a vessel. *See generally Chesapeake and Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 110 S.Ct. 381, 23 BRBS 96 (CRT)(1989).

In the instant case, claimant's employment meets neither the situs nor status requirement. A drawbridge is not a specifically enumerated situs in Section 3(a), and there is no evidence of record that the Saugus River drawbridge was used by an employer for loading, unloading, building or repair of a vessel. *See Crapanzano*, slip op. at 5-6; *Johnsen*, 25 BRBS at 329. Accordingly, we reverse the administrative law judge's finding that claimant satisfied the situs requirement, since we have previously held that his injury did not occur on actual navigable waters. *See Silva*, 23 BRBS at 123.

Lastly, in determining that claimant failed to satisfy the status requirement, the administrative law judge found that claimant produced no evidence that his employment refurbishing a drawbridge falls within one of the specifically enumerated categories in Section 2(3). Specifically, the record contains no evidence that claimant's employment had a relationship to loading, unloading, building or repair of a vessel. The administrative law judge next found the instant case distinguishable from *LeMelle*, reasoning that in *LeMelle* the claimant worked continually over navigable waters one mile from shore building a bridge, where he was required to wear a life jacket, and to which he was transported by boat. However, in the instant case, claimant spent a substantial amount of time on shore at the machine repair shop, he was not required to wear a life jacket and boat transport was not necessary, as claimant could walk off and on the bridge as required by his job duties.

We affirm the administrative law judge's finding that claimant was not engaged in maritime employment. The administrative law judge rationally distinguished *LeMelle* in that the drawbridge on which claimant was injured was an existing in-use structure, permanently affixed to land. Claimant herein, unlike the claimant in *LeMelle*, was thus not employed in a project whose purpose was to improve the navigability of the river. *See Crapanzano*, slip op at 3-4. Accordingly, the administrative law judge's finding that claimant failed to satisfy the status requirement is affirmed.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge