

ALLEN C. WALKER)	
)	
Claimant-Respondent)	
)	
v.)	
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PCL HARDAWAY/ INTERBETON)	DATE ISSUED: <u>Nov. 28, 2000</u>
)	
and)	
)	
LIBERTY MUTUAL INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits of Richard E. Huddleston, Administrative Law Judge, United States Department of Labor. Robert E. Walsh and Chanda L. Wilson (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Robert A. Rapaport and Dana Adler Rosen (Clarke, Dolph, Rapaport, Hardy & Hull, P.L.C.), Norfolk, Virginia, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (97-LHC-2373) of Administrative Law Judge Richard E. Huddleston 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 if they are rational, supported by substantial evidence, and in accordance with law. *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, working for employer as a form carpenter on the Chesapeake Bay Bridge Tunnel, sustained a work-related injury to his left knee on October 6, 1996. Claimant

worked as part of a three member crew which attached platforms, set and poured caps, and then set modules on top of the caps. Claimant traveled to and from the job site on the crew launch.

At the job site, there was a floating work barge which had a crane mounted on top, and four “jack-up legs” under each corner. The work barge was used by the work crew to change locations at the job site and to store supplies, *i.e.*, concrete, metal forms, concrete additives, a concrete truck and various other tools. Essentially, the work barge would be moved into place by a tugboat and then anchored by the four legs which were extended down to the bed of the Chesapeake Bay.

Claimant performed most of his work on top of a platform which, once loaded with the crew and their supplies, was lifted into place over the pilings by the work barge crane. Claimant participated in the process of getting the platform into place and tightening it down onto the pilings. Specifically, the platform would be further adjusted east or west by internal steamboat jacks and then attached to the pilings by a friction collar and secured with tension rods. Once the platform was attached, concrete caps were raised into place by the crane and put on top of the friction collar. The work crew then poured concrete inside the piles to keep the cap in place. After the concrete dried, the modules would be set on top of the cap.¹ Once the work crew completed one set of caps, they would detach the platform from the pilings and load it back onto the work barge. The work barge would then be moved to another set of piles and the entire process would start over again.

Claimant was injured during the attachment process. Specifically, he was tightening one of the steamboat jacks when it slipped and he hit his left knee on the platform railing. At the time of his injury, the platform was not completely attached to the pilings as the tension rods had not yet been tightened. Claimant eventually returned to his regular employment with employer on February 12, 1997, and thereafter filed a claim for compensation which employer contested on the ground that claimant lacks the requisite coverage under the Act.

In his decision, the administrative law judge found that claimant satisfied the situs and status requirements and, therefore, is covered under the Act. 33 U.S.C. §§902(3), 903(a). Accordingly, he determined that claimant is entitled to temporary total disability benefits from November 25, 1996, through December 10, 1996, and permanent partial disability pursuant to the schedule based on a five percent impairment to his left lower extremity.

On appeal, employer challenges the administrative law judge’s findings that claimant established the situs and status elements necessary for coverage under the Act. Claimant

¹The road bed was placed on top of the modules by a separate road crew.

responds, urging affirmance.

Employer argues that the administrative law judge erred in finding that claimant satisfied the situs and status requirements for coverage under the Act since claimant, a bridge builder, worked on a fixed platform which was not used in the loading or unloading of marine cargo or the building or repair of ships. Specifically, employer asserts that contrary to the administrative law judge's finding, claimant cannot establish situs as his work was exclusively performed on a fixed platform which was attached to the bridge rather than on the work barge. Additionally, employer argues that the evidence conclusively establishes that claimant's work involved building a bridge to aid land travel, not navigation, and thus, claimant has not established the requisite status requirement under the Act. Employer also avers that the decision of the United States Supreme Court in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78 (CRT)(1985), controls the outcome in this case. Moreover, employer asserts that the Board's decisions in *Pulkoski v. Hendrickson Brothers, Inc.*, 28 BRBS 298 (1994), and *Crapanzano v. Rice Mohawk*, 30 BRBS 81 (1996), further support its position that the instant claimant, as a bridge builder, does not meet the status and/or situs requirements under the Act.

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), 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 of the United States determined that Congress, in amending the Act to expand coverage, did not intend to withdraw coverage 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). Thus, 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. *Id.*, 459 U.S. at 323-324, 15 BRBS at 80-81 (CRT).² See also *Ezell v. Direct Labor, Inc.*, 33 BRBS 19

²The *Perini* Court expressed no opinion whether coverage under the Act extends to workers injured while transiently or fortuitously upon navigable waters. *Perini*, 459 U.S. at 324 n.34, 15 BRBS at 80 n.34 (CRT). Following *Perini*, the Board has held that where an employee is required to perform his duties upon navigable waters and suffers an injury upon navigable waters, the status test is met under Section 2(3), as his work is inherently maritime in nature. *Caserna v. Consolidated Edison Co.*, 32 BRBS 25 (1998). In *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir. 1999)(*en banc*), the United States Court of Appeals for the Fifth Circuit held that a worker injured upon navigable waters is engaged in maritime employment and meets the status test if his presence on the water at the time was

(1999); *Caserma v. Consolidated Edison Co.*, 32 BRBS 25 (1997); *Nelson v. Guy F. Atkinson Constr. Co., Ltd.*, 29 BRBS 39 (1995), *aff'd mem. sub nom. Nelson v. Director, OWCP*, No. 95-70333 (9th Cir. Nov. 13, 1996). In *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78 (CRT)(1985), the Supreme Court, in holding that an employee who welded and maintained fixed offshore platforms in state territorial waters was not a covered maritime employee under the Act, noted the fact that the employee might have been covered had he been injured while traveling by boat to work on the platform. Declining to address this issue, the Court "noted in passing" that there is "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.*, 470 U.S. at 427 n.13, 17 BRBS at 84 n.13 (CRT).

The Supreme Court has also held that a structure which is permanently affixed to land is considered an extension of land and does not fall within pre-1972 Act jurisdiction. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969); *accord Kehl v. Martin Paving Co.*, 34 BRBS 121 (2000); *Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992). See also *Herb's Welding*, 470 U.S. at 414, 17 BRBS at 78 (CRT). With regard to bridge workers specifically, prior to 1972 employees engaged in bridge construction who were injured on navigable waters were held covered by the Act. See *Davis v. Dept. of Labor*, 317 U.S. 249 (1942); *Peter v. Arrien*, 325 F.Supp. 1361 (E.D. Pa. 1971), *aff'd*, 463 F.2d 252 (3d Cir. 1972); *Dixon v. Oosting*, 238 F.Supp. 25 (E.D. Va. 1965). Since 1972, the Board has generally held that employees engaged in bridge construction are covered by the Act only if they establish that their duties include working aboard, or loading or unloading materials

neither transient nor fortuitous. In *Bienvenu*, as the employee spent a portion of his time working on navigable waters, the court held him covered. The United States Court of Appeals for the Eleventh Circuit has held that the status test was not satisfied where claimant was injured when traveling by boat to a land-based work site, as the employee's presence on the water was merely transitory or incidental to his land-based employment. *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit.

from, vessels on navigable waters or that a particular bridge construction project will aid navigation. *Kehl*, 34 BRBS at 121; *Crapanzano*, 30 BRBS at 81; *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996); *Pulkoski*, 28 BRBS at 298; *Johnsen*, 25 BRBS at 329. Where the employees are working from a fixed structure, such as the bridge itself, the Board has generally held such employees are not covered because bridge projects aid overland commerce and thus do not involve inherently maritime work. *Id.* In *LeMelle v. B.F. Diamond Constr. Co.*, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), *cert. denied*, 459 U.S. 1177 (1983), the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, held that an employee who assisted in construction of a bridge designed, in part, to aid navigation, was a covered maritime employee under Section 2(3) of the Act. The court did not address situs.

In the instant case, the administrative law judge found that the evidence of record establishes that claimant's injury occurred during the process of attaching a work platform over the pilings. Specifically, the administrative law judge found that claimant was injured while setting the steamboat jacks against the pilings, and thus determined that not all of the steps to insure the security of the platform to the pilings had been completed, *i.e.*, the crew had not yet tightened the tension rods to secure the platform to the pilings. As such, the administrative law judge found that at the time of injury the platform remained suspended from the crane which is attached to the barge which was sitting on jack-up legs. He then determined that, as a barge with jack-up legs is considered a vessel because it floats and thus is not an artificial island or fixed platform, claimant's injury occurred "over navigable waters." The administrative law judge therefore concluded pursuant to *Perini*, that claimant satisfied both the situs and status requirements and is covered under the Act as he was injured on actual navigable waters while in the course of his employment on those waters,³ and was not specifically excluded from coverage by another statutory provision.

³In this regard, claimant also performed some of his work aboard the work barge, which the administrative law judge determined is a vessel. Additionally, the record establishes that part of claimant's job required him to unload the supply barge and at certain times help load the work barge. Moreover, claimant assisted when the work barge was moved from spot to spot. As these duties support a finding that claimant performed some work aboard a vessel on navigable waters, claimant cannot be said to have been "transiently or fortuitously" on navigable waters.

Inasmuch as the administrative law judge's analysis under *Perini* is rational and his findings of fact are supported by substantial evidence, his finding that claimant is covered under the Act is affirmed. *Davis*, 317 U.S. at 249; *Caserma*, 32 BRBS at 25. Additionally, inasmuch as the administrative law judge determined that claimant's injury occurred on navigable waters, there was no need for him to further, and for that matter separately, consider the issues of situs and status in this case, as argued by employer on appeal. Similarly, in light of the administrative law judge's conclusion in this case, employer's reliance on the Supreme Court's holding in *Herb's Welding*, and on the Board's cases in *Pulkoski* and *Crapazano* is misplaced. Specifically, contrary to employer's assertions, it is not the designation of claimant as a "bridge worker" or his work on a bridge itself which conveys coverage. Rather, it is his employment upon actual navigable waters at the time of injury which determines the applicability of the Act.⁴ *See generally Kehl*, 34 BRBS at 125.

Accordingly, the Decision and Order Granting Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁴Moreover, we note that in light of his finding that claimant's injury occurred on navigable waters, the administrative law judge was not required to consider the holding in *Herb's Welding* in terms of the status requirement. Furthermore, in contrast to the instant case, the administrative law judges in both *Pulkaski* and *Crapazano* explicitly determined that the subject injuries did not occur on navigable water and thus, their queries progressed to a further consideration of the situs and status requirements. This progression is not necessary for determining claimant's coverage under the Act in this case.

MALCOLM D. NELSON, Acting
Administrative Appeals Judge