

FRANK HAIRE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DESTINY DRILLING (USA),	)	DATE ISSUED: <u>Sept. 25, 2002</u>
INCORPORATED	)	
	)	
and	)	
	)	
LOUISIANA WORKERS'	)	
COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Gary F. LeGros, Jr. (Simonds, Pittman & LeGros), Franklin, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

Before: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (2000-LHC-1603) of Administrative Law Judge C. Richard Avery denying benefits 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant alleged he sustained an injury to his back in the course of his employment on

September 1, 1996. Employer was engaged in surveying inland waterways in the Atchafalaya Basin for oil and gas. Claimant stated that he worked in bayous, ship channels, marshes, lakes and swamps. EX 1 at 46 (Cl.'s Dep.). Claimant's work required that he be on a vessel of some kind every day. Frequently, the vessel involved was an air boat, as it was on the day of the injury. On September 1, 1996, claimant was working in a bayou, identified by claimant as most likely Bayou Shaefer or Bayou Shane. *Id.* at 47. Employer's accident report states that claimant was injured on the Avoca side of the Avoca levee, whereas his supervisor was working on the Atchafalaya side of the levee. EX 2. The body of water where the injury occurred was described by claimant as a "floating marsh," meaning that vegetation was growing on top of the water with very thick "roots" below the surface. EX 1 at 47. Claimant's boat became stuck in the marsh vegetation and he got out of the boat to push it free. He stated he was standing in eight to ten inches of water during this activity. *Id.* at 48. While claimant was pushing the boat, he wrenched his back. Except for a few days following the injury, claimant has not worked since the accident.

The administrative law judge found that claimant's injury did not occur on "navigable waters" pursuant to Section 3(a) of the Act, 33 U.S.C. §903(a). Specifically, the administrative law judge stated that the Avoca levee separated claimant from the Atchafalaya River, and thus from the main waterway in the area. Decision and Order at 2-3. The administrative law judge further discussed the cases cited by the parties and concluded that the marshy area where claimant was injured was not "navigable in fact" because only air boats could navigate the area, and even such boats got stuck, as evidenced by claimant's deposition testimony.<sup>1</sup> The administrative law judge found that claimant's testimony regarding the floating vegetation demonstrated that the plants were a hindrance to navigation, by even an air boat. *Id.* at 4.

Claimant appeals, contending that his injury occurred on navigable waters because the marsh was "navigable in fact" by claimant's vessel, an air boat, even if it was not navigable in fact by other types of vessels. Employer responds, urging affirmance of the denial of benefits.

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<sup>1</sup>Claimant stated in his deposition that it was common for the air boats to carry cooking oil in order to free the propellers from the marsh vegetation. He stated that employer had cut back on its purchase of cooking oil due to increasing costs, and was using soap instead, which was less effective. EX 1 at 47, 53-55.

Section 3(a) of the Act provides coverage for injuries “occurring upon the navigable waters of the United States.” 33 U.S.C. §903(a). If claimant is injured on actual navigable waters in the course of his employment on such waters, claimant satisfies both the situs and status requirements for coverage under the Act. 33 U.S.C. §§902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983); *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5<sup>th</sup> Cir. 1999) (*en banc*). The Act does not define “navigable waters.” The Supreme Court has held that the concept of “navigability” has different meanings in different contexts. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In *George v. Lucas Marine Constr.*, 28 BRBS 230 (1994), *aff’d mem. sub nom. George v. Director, OWCP*, 86 F.3d 1162 (9<sup>th</sup> Cir. 1996) (table), the Board discussed *Kaiser Aetna* and held that the appropriate test for navigability under the Longshore Act is the “navigability in fact” test established in admiralty law. *See generally Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128 (1930); *Reynolds v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 788 F.2d 264, 19 BRBS 10(CRT) (5<sup>th</sup> Cir. 1986), *cert. denied*, 479 U.S. 885 (1986). In *The Daniel Ball*, 10 Wall. 557, 19 L.Ed. 999 (1871), the Supreme Court stated:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

*The Daniel Ball*, 10 Wall. at 563; *see also The Montello*, 20 Wall. 430, 22 L.Ed. 391 (1874); *The Propeller Genesee Chief v. Fitzhugh*, 12 How. 443, 13 L.Ed. 1058 (1852). A natural or artificial waterway which is not susceptible of being used as an interstate artery of commerce because of either natural or manmade conditions (such as a dam) is not navigable for purposes of admiralty jurisdiction. *Chapman v. United States*, 575 F.2d 147 (7<sup>th</sup> Cir. 1978) (*en banc*); *see Elia v. Mergentine Corp.*, 28 BRBS 314 (1994) (Croton Reservoir not navigable due to dam); *Rizzi v. Underwater Constr. Corp.*, 27 BRBS 273, *aff’d on recon.*, 28 BRBS 360 (1994), *aff’d*, 84 F.3d 199, 30 BRBS 44(CRT) (6<sup>th</sup> Cir. 1996), *cert. denied*, 117 S.Ct. 302 (1996) (reservoir under a building not navigable, even though water entering reservoir is from a navigable river); *Lepore v. Petro Concrete Structures, Inc.*, 23 BRBS 403 (1990) (same). Thus, the issue in the present case is whether the marsh where claimant was injured is “navigable in fact” such that it was used as an artery of interstate or international

commerce. We affirm the administrative law judge's finding that, on the facts of this case, the waterway where claimant incurred his injury is not "navigable in fact."

There is limited case law addressing the navigability of Louisiana marshes, and none of the cases involves a Longshore Act claim. In *Smith v. Pan Air Corp.*, 684 F.2d 1102 (5<sup>th</sup> Cir. 1982), the widow of a pilot who died in plane crash in an inland marsh filed a general federal maritime tort claim.<sup>2</sup> As the crash occurred in an inland marsh, and as a "maritime locality is still an indispensable element of maritime jurisdiction," the Fifth Circuit affirmed the district court's dismissal of the claim for want of maritime jurisdiction. *Id.* at 1108. In *Duplantis v. Petroleum Helicopters, Inc.*, Civ. A. No. 93-1265, 1993 WL 370619 (E.D. La. 1993), the district court addressed an admiralty tort claim arising from a plane crash in an inland marshy area with an average depth of three to five feet. The area contained reeds that would make actual navigation difficult. Following *Smith*, the court rejected the contention that the accident occurred at a maritime locality. The court further rejected the contention that the marsh was navigable because it was subject to the "ebb and flow of the tides," one of the tests for navigability set out by the Supreme Court in *The Propeller Genesee Chief*, 12 How. 443, 13 L.Ed. 1058. The court stated it was "not prepared to hold that water which is subject to the ebb and flow of the tide, *but is not navigable*, should fall within" the court's admiralty jurisdiction. *Duplantis*, at \*3 (emphasis in original). In *Strother v. Bren Lynn Corp.*, 671 F.Supp. 1118, 1119 (W.D. La. 1987), a man was injured while operating an amphibious vehicle in an inland marsh. The water depth ranged from zero to three feet, but the marsh consisted mostly of vegetation. There was testimony that the only type of boat one could conceivably use in the marsh was an air boat, or "maybe" a small pirogue. The district court, based on this evidence, stated that the marsh was "clearly incapable of supporting maritime commerce" because the marsh is not navigable. Thus, the general maritime tort claim was dismissed for lack of jurisdiction.

Claimant cites *Maddox v. Omni Drilling Corp.* 698 So.2d 1022 (La. App. 3d Cir. 1997), *writ denied*, 709 So.2d 706 (La. 1998), in support of his contention that he was injured

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<sup>2</sup>In *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 274 (1972), the Supreme Court held that "there is no federal admiralty jurisdiction over aviation tort claims arising from flights by land-based aircraft between points within the continental United States" absent legislation to the contrary. In *Smith*, the Fifth Circuit assumed that the aircraft at issue was not a "land-based" aircraft, in that it was a seaplane.

on navigable waters. In *Maddox*, the claimant alleged he was injured on the bow of an air boat in navigation on a navigable waterway in the Sabine National Wildlife Refuge, and he filed a claim under the Jones Act. The jury found that the waterway was navigable. The appellate court affirmed on the basis that there was evidence that could form a reasonable basis for the finding of navigability, namely, that the waters of the Refuge are affected by the ebb and flow of the tide, and that commercial activity, such as fishing, shrimping, and oil and gas exploration take place on the waters at issue. The court also stated, “We find it significant that Maddox was injured while aboard an air *boat*.” *Maddox*, 608 So.2d at 1025 (emphasis in original). From this statement, claimant herein avers that the ability to navigate the marsh by air boat establishes that a marshy area is “navigable in fact.”

We reject claimant’s contention. The cases cited by the parties do not mandate a finding either of navigability or non-navigability of the waterway in question in this case. Rather, the foregoing cases make clear that the navigability of a given waterway depends on the facts of a particular case, as well as the purpose for which navigability, or lack thereof, is sought to be established. See *Kaiser Aetna*, 444 U.S. 164; see also *Dardar v. Lafourche Realty Co., Inc.*, 55 F.3d 1082 (5<sup>th</sup> Cir. 1995), *aff’g* Civ. A. No. 85-1015, 1994 WL 374309 (E.D. La. 1994) (extensively discussing the navigability of various bayous for purposes of determining, pursuant to *Kaiser Aetna*, whether a federal navigational servitude exists under the Commerce Clause). In the instant case, the administrative law judge found, based on the limited evidence admitted into the record, that only air boats could navigate the shallow bayou where claimant was injured and that the floating vegetation rendered the navigational capability of even such boats doubtful. The administrative law judge found that this hindrance to navigation was evident from the fact that the boats were equipped with lubricants to free the vessels from the vegetation. See n.1, *supra*. The administrative law judge’s findings are rational and supported by substantial evidence.<sup>3</sup> See generally *Louisiana Ins. Guar. Ass’n v. Bunol*, 211 F.3d 294, 34 BRBS 29(CRT) (5<sup>th</sup> Cir. 2000); *Sisson v. Davis & Sons, Inc.*, 131 F.3d 555, 31 BRBS 199(CRT) (5<sup>th</sup> Cir.

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<sup>3</sup>The administrative law judge stated that the Avoca levee separated the area where claimant was injured from the Atchafalaya River, which is the “main waterway.” Decision and Order at 2-3. Thus, the implication is that the levee created an impediment to navigation. This description of the region’s topography, however, is not apparent from the record created in this case. Nonetheless, the basis for the administrative law judge’s finding that the marsh is not navigable is the presence of the floating vegetation. *Id.* at 4.

1998); *Elia*, 28 BRBS 314. Although the fact of navigational capability by air boats alone may, in a given case, render a waterway navigable in fact within the meaning of admiralty jurisdiction, the evidence in the instant case regarding the vegetation's impediment to navigation and the lack of any other evidence of navigable capability support the administrative law judge's finding that claimant was not injured on navigable waters pursuant to Section 3(a) of the Act. *See generally Dardar*, 55 F.3d at 1084 n.7 (non-specific claims of navigability, which lack supporting evidence, must fail). Thus, we affirm the administrative law judge's denial of benefits.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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PETER A. GABAUER, Jr.  
Administrative Appeals Judge