

DANE R. KOEPP)
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 Claimant-Petitioner)
)
 v.)
)
 TRINITY INDUSTRIES,) DATE ISSUED: 04/04/2012
 INCORPORATED)
)
 and)
)
 ACE AMERICAN INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Larry W. Price,
Administrative Law Judge, United States Department of Labor.

Ben E. Clayton (Clayton Law Firm, L.L.C.), Slidell, Louisiana, for
claimant.

V. William Farrington, Jr. (Farrington & Thomas, LLC), New Orleans,
Louisiana, for employer/carrier.

Before: McGRANERY, HALL and BOGGS, Administrative Appeals
Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-LHC-02168) of
Administrative Law Judge Larry W. Price 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls
Associates, Inc.*, 380 U.S. 359 (1965).

Claimant injured his back during the course of his employment with employer on March 9, 2009, at its Plant Number 48 (Brusly facility) located in Brusly, Louisiana. Employer's Brusly facility, which is adjacent to the Intracoastal Waterway, a navigable body of water, builds hopper barges.¹ On February 13, 1998, the United States Department of Labor issued a "Certificate of Exemption From Coverage" to employer certifying that, as of March 1, 1998, employer's Plant Number 48, with certain exceptions, was exempt from coverage under the Act. EX 2; 33 U.S.C. §903(d)(1). The parties agree that, at the time of his injury, claimant was working in an area of employer's facility covered by this exemption certificate. EX 4 at 18, ex. 2.

In an Order dated March 15, 2011, the administrative law judge granted employer's motion to bifurcate the coverage issue in this case from the other issues. After the parties presented their exhibits and briefs, the administrative law judge issued a Decision and Order denying benefits under the Act. The administrative law judge found that the area where claimant was working at the time of his injury was covered by the exemption certificate issued by the Department of Labor and that, consequently, claimant's injury is not covered by the Act. Accordingly, the administrative law judge denied claimant's claim for benefits under the Act.

On appeal, claimant challenges the denial of his claim for benefits on the ground that the administrative law judge improperly applied the exclusion from coverage of Section 3(d) of the Act, 33 U.S.C. §903(d). Employer responds, urging affirmance of the administrative law judge's decision, and claimant has filed a reply brief.

In urging the Board to reverse the administrative law judge's finding that the Act does not provide coverage for his claim, claimant contends that the administrative law judge erred in finding dispositive of the situs issue the geographic location of claimant's injury. Specifically, claimant argues that he spent some of his work time with employer in indisputably "covered employment" within the meaning of the Act, and that the administrative law judge's decision to focus solely on the location where claimant's injury occurred allows claimant to "walk in and out of coverage." Cl. br. at 4-5, 9. Claimant's contention, however, conflates the issues of situs and status, and does not take into account the 1984 amendment to Section 3 of the Act. Consequently, for the reasons that follow, we affirm the administrative law judge's decision.

¹Employer's division safety manager, Richard Badon, testified that a hopper barge is the marine equivalent of a dump truck, approximately 220 feet in length, 35 to 40 feet in width, and displacing 300 tons. *See* Badon deposition at 5, 16.

Prior to the 1972 Amendments to the Act, coverage was provided only if the disability sustained by the employee resulted from an injury that 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); *Director, OWCP v. Perini North River Associates*, 459 U.S. 296, 15 BRBS 62(CRT) (1983). In 1972, Congress amended the Act to broaden its coverage landward. Section 3(a) covers injuries occurring “upon the navigable waters of the United States (including any adjoining pier or 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). The 1972 Amendments additionally added a “status” element for coverage under the Act requiring that the injured worker be engaged in “maritime employment.”² *See* 33 U.S.C. §902(3); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977).

In 1984, Congress amended Section 3 of the Act by adding the Section 3(d) exemption at issue in this case. Section 3(d) states:

(d)(1) No compensation shall be payable to an employee employed at a facility of an employer if, as certified by the Secretary [of Labor], the facility is engaged in the business of building, repairing, or dismantling exclusively small vessels (as defined in paragraph (3) of this subsection), unless the injury occurs while upon the navigable waters of the United States or while upon any adjoining pier, wharf, dock, facility over land for launching vessels, or facility over land for hauling, lifting, or drydocking vessels.

(2) Notwithstanding paragraph (1), compensation shall be payable to an employee-

(A) who is employed at a facility which is used in the business of building, repairing, or dismantling small vessels if such facility receives Federal maritime subsidies; or

(B) if the employee is not subject to coverage under a state workers’ compensation law.

²In this case, employer does not challenge the administrative law judge’s statement that claimant’s employment duties as a crane operator/shipbuilder with employer would satisfy the status requirement. *See* 33 U.S.C. §902(3); Decision and Order at 2; *see generally Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 90(CRT) (1989).

(3) For purposes of this subsection, a small vessel means-

(A) a commercial barge which is under 900 lightship displacement tons; or

(B) a commercial tugboat, towboat, crew boat, supply boat, fishing vessel, or other work vessel which is under 1,600 tons gross.

33 U.S.C. §903(d)(1)-(3). Subsequently, regulations were promulgated by the Secretary of Labor to effectuate Section 3(d) of the Act; specifically, the regulations address the requirements for obtaining a Certificate of Exemption and employer's responsibility to post notices where the exemption does and does not apply.³ 20 C.F.R. §§702.171 – 702.175.

Contrary to claimant's argument that his satisfaction of the "status" requirement results in his claim being covered under the Act, a claimant must satisfy both the "situs" and the "status" requirements for the Act to apply to his claim. *Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Caputo*, 432 U.S. 249, 6 BRBS 150; *Keating v. City of Titusville*, 31 BRBS 187 (1997). Although claimant correctly states that the Act covers those who spend at least some of their time performing indisputably covered work, *Caputo*, 432 U.S. at 273, 6 BRBS at 165, so as to avoid employees' "walking in and out of coverage," this principle refers only to the status prong of coverage. *Alford v. MP Industries of Florida, Inc.*, 16 BRBS 261 (1984). It is well established that the injury must occur on a site covered by Section 3(a) and not otherwise exempted for the injury to be covered by the Act. See *Wheaton v. Golden Gate Bridge, Highway & Transp. Dist.*, 41 BRBS 51 (2007), *aff'd*, 559 F.3d 979, 43 BRBS 17(CRT) (9th Cir. 2009); *Keating*, 31 BRBS 187.

³Section 702.174(d), for example, requires that the employer post, immediately upon receipt of the certificate of exemption:

(1) A general notice in a conspicuous place that the Act does not cover injuries sustained at the facility in question, the basis of the exemption, the effective date of the exemption and the grounds for termination of the exemption.

(2) A notice, where applicable, at the entrances to all areas to which the exemption does not apply.

20 C.F.R. §702.154(d)(1), (2).

In this regard, Section 3(d), with exceptions not applicable here, specifically states that “no compensation is payable” if the site meets certain requirements and accordingly has a certificate of exemption.

Thus, the administrative law judge properly addressed the issue of coverage under Section 3 of the Act by addressing whether the site of the injury is within the Act’s coverage. *See generally Boomtown Belle Casino v. Bazor*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003); *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998); *Melerine v. Harbor Constr. Co.*, 26 BRBS 97 (1992). As the facts concerning the location of claimant’s injury and the existence of employer’s small vessel exemption are not in dispute, we affirm the administrative law judge’s finding that the location where claimant was injured is exempt from coverage pursuant to Section 3(d)(1) of the Act, 33 U.S.C. §903(d)(1). Specifically, claimant testified that his work injury occurred at employer’s facility in an area south of the plasma table. EX 4 at 17 – 18, ex. 1. Claimant further indicated the location of his work injury on a map of employer’s facility. *Id.* at ex. 2. Employer submitted into evidence the “Certificate of Exemption From Coverage” issued by the Department of Labor, dated February 13, 1998 and effective March 1, 1998, documenting employer’s Brusly facility’s exemption from coverage under the Act, with exceptions. Claimant’s injury occurred in an area covered by the exemption and claimant does not assert that this exemption was not effective on the date of his injury. *See* EX 2. Employer’s division safety manager, Richard Badon, testified that employer’s facility continued to construct vessels displacing 300 tons subsequent to 1998, that employer does not receive federal subsidies, and that the areas of employer’s facility covered by the Act, specifically the erection area for barges, are posted as being areas covered by the Act. *See* EX 5 at 6 – 7. Consequently, as claimant does not contend either that the site of his work injury was not covered by the Certificate of Exemption From Coverage issued by the Department of Labor in 1998, or that this Certificate was not valid at the time of his injury, and the exceptions to the exemption are not applicable, we affirm the administrative law judge’s determination that, as claimant’s work injury occurred in an area subject to the small vessel exemption from coverage, claimant’s claim is not covered by the Act.⁴

⁴There is no contention that claimant is not subject to coverage under the applicable state workers’ compensation statute. 33 U.S.C. §903(d)(2)(B).

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

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge