



BRB No. 19-0087

MICHAEL J. LONG)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
TAPPAN ZEE CONSTRUCTORS, LLC)	
)	DATE ISSUED: 11/20/2019
and)	
)	
ACE AMERICAN INSURANCE)	
COMPANY)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order Dismissing Claim for Lack of Jurisdiction of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Timothy McEnaney (Law Office of Joseph A. Romano, P.C.), Garden City, New York, for claimant.

Robert N. Dengler (Flicker, Garelick & Associates, LLP), New York, New York, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, ROLFE and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Dismissing Claim for Lack of Jurisdiction (2018-LHC-00004) of Administrative Law Judge Lauren C. Boucher rendered on a claim filed pursuant to 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 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 worked for employer as an ironworker on the Tappan Zee Bridge project: the construction of a new bridge to replace the existing one across the Hudson River between Westchester and Rockland Counties in the State of New York. His duties included the preparation and bolting together of bridge girders.¹ He worked from a temporary “saddle,” described as an upside down “u-shape” platform constructed of rebar and wood or aluminum planks. He stood on the planks to reach up and bolt girders. *See* Decision and Order at 3. In September 2015, he allegedly suffered a back injury while working. *Id.* at 4-5; *see* EX 4 at 59-60. While the new Tappan Zee Bridge was not yet affixed to either shoreline at the time, the saddle was attached to a bridge pier anchored in the riverbed.

Before the administrative law judge, the parties limited their argument to whether the Act covered claimant at the time of his injury. To be covered, claimant must satisfy both a “status” requirement and a “situs” requirement. *Chesapeake & Ohio Ry. v. Schwalb*, 493 U.S. 40, 45 (1989); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). The “status” inquiry concerns whether the claimant is a maritime employee. 33 U.S.C. §902(3). The “situs” inquiry, at issue here, concerns whether the worker was injured “upon the navigable waters of the United States” that include certain enumerated onshore locations and “other adjoining area[s].” 33 U.S.C. §903(a). The administrative law judge found claimant’s injury did not occur on a covered situs because the apparatus supporting him was anchored in the riverbed, establishing it as a “fixed platform,” which is not considered navigable waters. Claimant appeals, asserting this conclusion is in error; employer urges affirmance. For the reasons set forth below, we affirm.

Section 3(a) of the Act establishes the situs requirement:

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).

¹ The girders used during this project were described as steel beams that span bridge piers to form the horizontal surface of the bridge. *See* Decision and Order at 3.

33 U.S.C. §903(a). A bridge is not an enumerated site under the plain language of the statute, and claimant does not argue that the plank on which he was standing is an “other adjoining area.” See Decision and Order at 5 and n.4. Claimant therefore can establish coverage only if his injury occurred on actual navigable waters. *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983); *F.S. [Smith] v. Wellington Power Co.*, 43 BRBS 111 (2009). For the reasons that follow, we affirm the administrative law judge’s conclusion that it did not.²

Initially, we reject claimant’s contention that the Section 20(a) presumption applies to the situs issue. 33 U.S.C. §920(a). The administrative law judge properly acknowledged Section 20(a) may apply to facts underlying coverage issues, but does not apply to the legal interpretation of those facts. Decision and Order at 4; see *Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir.), cert. denied, 525 U.S. 981 (1998); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 4 BRBS 156 (2d Cir. 1976), aff’d sub nom. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). As the facts are undisputed, the situs issue here involves a pure question of law.

Claimant contends he was on navigable waters because the Tappan Zee Bridge was not yet affixed to the shoreline at the time of his injury.³ But as the administrative law judge correctly recognized, while the bridge itself was not attached to land, the saddle supporting claimant attached to two concrete bridge piers permanently anchored in the

² In *Perini*, the Supreme Court held a worker injured while on a floating structure on actual navigable waters in the course of his employment is a maritime employee under Section 2(3) of the Act, 33 U.S.C. §902(3). Regardless of the nature of the work being performed, such a claimant satisfies both the situs and status requirements, unless he is specifically excluded from coverage by another statutory provision. *Perini*, 459 U.S. at 323-324, 15 BRBS at 80–81(CRT); *Pulkoski v. Hendrickson Brothers, Inc.*, 28 BRBS 298 (1994).

³ It is uncontested that the Tappan Zee Bridge was not yet permanently attached to either shoreline at the time of claimant’s injury. See Decision and Order at 8–9. Bridges permanently affixed to land are not “navigable waters” or statutorily enumerated sites. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 215 n.6 (1969) (bridges “are not transformed from land structures into floating structures by the mere fact that vessels may pass beneath them); *F.S. [Smith] v. Wellington Power Co.*, 43 BRBS 111 (2009); *Kehl v. Martin Paving Co.*, 34 BRBS 121 (2000). Floating structures on “navigable waters of the United States,” however, are covered situs as explained below. See, e.g., *Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), cert. denied, 547 U.S. 1175 (2006).

riverbed. Decision and Order at 10. The bridge piers affixed to the riverbed were an extension of land, establishing claimant's injury occurred on a fixed platform, not navigable waters. See *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985) (to occur on navigable waters, the injury must occur on a structure "actually afloat"); *Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005) ("as a matter of law, a floating object cannot be a fixed platform or artificial island"), cert. denied, 547 U.S. 1175 (2006); *Laspragata v. Warren George, Inc.*, 21 BRBS 132 (1988) (sewage treatment plant permanently affixed to Hudson River riverbed not navigable waters).

A structure's ultimate connection to land establishes whether an injury occurring on it took place on navigable waters. In *Herb's Welding*, for example, the claimant was injured on a fixed offshore oil platform. The Supreme Court held he was not injured upon navigable waters because "fixed" oil platforms are like islands, which are "land." 470 U.S. at 424 n.10, 17 BRBS at 83 n.10(CRT); see *Rodrique v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969). In *Morganti*, by contrast, the Second Circuit rejected the employer's contention the claimant was injured on a similarly "fixed" platform because the research structure at issue was moored to Cayuga Lake. The court reasoned that "at a minimum" a "fixed" platform, akin to the artificial island recognized in *Herb's Welding*, means "non-floating." *Morganti*, 412 F.3d at 414; 39 BRBS at 42(CRT). Thus, to be "fixed," the "seabed, rather than the buoyancy principle, must provide the fundamental support for the structure in question[.]" *Id.* The issue, therefore, is properly framed as whether claimant was injured on land or an extension thereof, including a seabed; the test, is not, as claimant suggests, limited to whether the structure is permanently affixed to "the shoreline." See *Morrissey v. Kiewit-Atkinson-Kenny*, 36 BRBS 5 (2002) (claimant not injured on navigable waters where injury occurred under the seabed of the Atlantic Ocean while claimant was digging a sewage tunnel).

The Board's case law confirms claimant was injured on an extension of land. The claimant in *Laspragata*, for example, was injured while working on the platform of a sewage treatment plant permanently affixed to the riverbed of the Hudson River. He appealed the denial of his claim, asserting the injury occurred on navigable waters pursuant to *Perini*. The Board affirmed, however, because the sewage treatment plant was affixed to the riverbed. *Laspragata*, 21 BRBS at 134-135 (citing *Herb's Welding*, 470 U.S. at 424 n.10, 17 BRBS at 83 n.10(CRT)). The Board recognized that the claimant in *Perini*, who worked on the same project, was injured on a barge floating on navigable waters and that the Supreme Court specifically noted he was not standing on the foundation of the sewage treatment plant. *Id.* at 134 (citing *Perini*, 459 U.S. at 300 n.4, 15 BRBS at 63 n.4(CRT)). In *Gonzalez v. Tutor Saliba*, 39 BRBS 80 (2005), the Board similarly affirmed the conclusion that the Act did not cover an injury that occurred on a temporary trestle attached to bridge spans permanently attached to land. Although the trestle was not permanent,

neither was it “removable” or stored when not in use. *Id.*, 39 BRBS at 83-84. Because the trestle was attached to a bridge, the injury did not occur on navigable waters. *Id.*

So too here. It is undisputed that claimant was injured on a saddle attached to a bridge pier affixed to the bedrock of the Hudson River. The administrative law judge’s finding that the saddle, though temporary and located “over” the river, is an extension of land, i.e., the bridge pier, accords with law. *Gonzalez*, 39 BRBS 80. Thus, claimant’s injury did not occur “on navigable waters” pursuant to Section 3(a). *Morrissey v. Kiewit-Atkinson-Kenny*, 36 BRBS 5 (2002); *Laspragata*, 21 BRBS 132. Therefore, we affirm the administrative law judge’s conclusion that claimant’s injury is not covered by the Act and we need not address claimant’s remaining contentions.

Accordingly, the administrative law judge’s Decision and Order Dismissing Claim for Lack of Jurisdiction is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge