

BRB No. 91-0134

LAWRENCE ELIA)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MERGENTIME CORPORATION)	
)	
and)	
)	
LIBERTY MUTUAL INSURANCE)	
COMPANY)	DATE ISSUED:
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order - Denial of Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Angelo C. Gucciardo (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Richard A. Cooper (Fischer Brothers), New York, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order - Denial of Benefits (89-LHC-2068) of Administrative Law Judge Ainsworth H. Brown 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).

On December 17, 1987, claimant sustained an injury to his right foot while working for employer on a barge afloat on a portion of the Croton Reservoir in Westchester County, New York.

As a result of this injury, claimant underwent surgery for a partial amputation of his great right toe. Claimant sought temporary total disability compensation under Section 8(b) of the Act, 33 U.S.C. §908(b).

In the proceeding before the administrative law judge, the sole issue was whether claimant is covered by Section 2(3) of the Act, 33 U.S.C. §902(3).¹ The administrative law judge found that as claimant was not engaged in maritime employment and was not injured while at work on actual navigable waters, he was not covered by the Act. Specifically, the administrative law judge found that claimant failed to prove that the Croton Reservoir was for any appreciable time a highway of commerce, and that even if the reservoir had been navigable at one time, it was not navigable at the Hunter's Brook tributary where the injury took place.

Claimant appeals, arguing that the administrative law judge erred in finding that he was not on a navigable body of water at the time of his accident. Employer responds, urging affirmance.

Before 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)(1982)(amended 1984), and to expand the sites covered under Section 3(a), 33 U.S.C. §903(a)(1982)(amended 1984), landward. In *Director, OWCP v. Perini North River Associates*, 459 U.S. 296, 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, 15 BRBS at 76-77 (CRT). Accordingly, the Court held that when a worker is injured on actual navigable waters 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 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, 15 BRBS at 80-81 (CRT); *Rizzi v. Underwater Construction Corp.*, 27 BRBS 273 (1994).

¹The parties stipulated that claimant sustained a 100 percent loss of the great toe in the course of his employment and that the maximum applicable compensation rate was \$616.92. The parties further stipulated that claimant was paid temporary total disability compensation under the New York workers' compensation statute from December 18, 1987, through March 25, 1988.

In the case at hand, claimant was injured while working on the construction of a new Route 129 highway bridge over a tributary of the Croton River, Hunter's Brook, which is now part of the Croton Reservoir. As claimant does not contest the administrative law judge's determination that his job duties were not maritime in nature, claimant can come under the coverage of Section 2(3) only if the area in which he was injured is considered to be part of the actual navigable waters of the United States. See *LePore v. Petro Concrete Structures, Inc.*, 23 BRBS 403 (1990). The determination of navigability of water is ordinarily a question of fact and the burden of proof rests with the party invoking jurisdiction. See *Reecer v. McKinnon Bridge Co.*, 745 F. Supp. 485, 496 (M.D. Tenn. 1990). Contrary to claimant's assertions, the presumption in Section 20(a) of the Act does not apply to the legal interpretation of the coverage provisions of the Act. *Boughman v. Boise Cascade Corp.*, 14 BRBS 173 (1981). See *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).

Claimant initially contends that in concluding that he was not injured on actual navigable waters, the administrative law judge erred by ignoring evidence in the record which indicates that at one time large ships navigated the Croton River out into the Hudson River. Claimant's argument rests on adoption of the "indelible navigability doctrine" as an appropriate test for determining navigability under the Act. This doctrine developed in the context of determining Congressional regulatory power under the Commerce Clause of the United States Constitution, and provides that once a body of water is part of the navigable waters of the United States, it remains so even if it is abandoned for navigation because of economic or technological reasons. See *Puget Sound Power & Light Co. v. Federal Energy Regulatory Commission*, 644 F.2d 785 (9th Cir.1981); *United States v. Appalachian Power Co.*, 311 U.S. 377 (1940), *reh'g denied*, 312 U.S. 712 (1941); *Economy Light & Power Co v. United States*, 256 U.S. 113 (1921). Claimant asserts that although the reservoir dam provides an artificial obstruction, this fact does not remove the reservoir from "navigable waters."

In the present case, the history of the Croton Reservoir was presented through the testimony of Mr. Beach, a survey engineer for employer, and excerpts from two historical books on Westchester County. CX 4, 5. This evidence indicates that a dam was first constructed on the Croton River in April 1837. CX 5, Alvah P. French, *The History of Westchester Country Vol. 1*, 347 (1925). In January 1841, heavy rains caused the dam to break. As a result, the bed of the mouth of the Croton River for a long distance and out into the tidewaters of the Hudson River was covered to a considerable depth with rocks, stones, dirt and debris, and the navigability of the lower Croton River and the adjacent Hudson River was permanently impaired. Shortly thereafter, the dam was reconstructed, and on July 4, 1842, water was admitted into the distributing reservoir on Murray Hill.

Mr. Beach testified that he had no independent basis for knowing whether the river was navigable in 1841, Transcript at 32, but from drawings in historical books it looked as if the Croton River was a babbling brook in the area in front of the old dam. Transcript at 23. Mr. Beach further noted that the actual body of water that now travels under the Route 129 bridge is not concurrent with the original dimensions of Hunter's Brook, the tributary which runs under the bridge. The current body of water was created by the new dam. *Id.*

In the present case, the administrative law judge rejected claimant's argument that the historical evidence demonstrated that the Croton River was navigable, finding that claimant failed to meet his burden of proving navigability at the site of injury. The administrative law judge found that a reference to merchant schooners going up the mouth of the Croton River as far as the eye could see contained in the *History of Westchester County Vol. 1* did not establish how much of the river was navigable or that the tributary here was navigable. The administrative law judge further determined that the reference to "silt dropping into the mouth of the Croton River forever barring large ships from navigating this area out into the Hudson River" contained in the excerpt from *The History of the New Croton Dam* by Mary Josephine D'Acvia (1976), CX 4, also was not sufficient to establish that the Croton River itself was ever navigable. Relying on the statement that the collapse of the old dam in 1841 permanently impaired navigability of the Croton River, the administrative law judge stated it supported a conclusion that the Croton River was never navigable, or if it was, it was not navigable at the site of claimant's injury.

Claimant contends that in reaching this conclusion, the administrative law judge ignored evidence that prior to 1841, the river was, in fact, navigable. We reject this argument, as whether the Croton River was navigable prior to 1841 is not dispositive of the issue in this case. The term "navigable waters" is not specifically defined in the Act. We have recently held that the "indelible navigability" test developed in Commerce Clause cases does not provide an appropriate test for cases under the Longshore Act. See *George v. Lucas Marine Construction*, BRBS , BRB No. 93-1612 (Sept. 28, 1994). This result is supported by *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), in which the United States Supreme Court observed that the concept of navigability is a pragmatic one, having different meanings in different contexts. In *Kaiser Aetna*, which dealt with the concept of navigability in an eminent domain context, the Court disagreed with the argument advanced by the government that the concept of "navigable waters" has a fixed meaning that remains unchanged in whatever context it is applied. *Id.* at 170. The Court stated that not all of its pronouncements regarding navigability "could be lumped into one basket" and that before a precedent dealing with whether a body of water is navigable is utilized, "one must make careful appraisal of the 'purpose' for which the concept of 'navigability' was invoked." *Id.* at 171. The Court then identified four separate purposes underlying definitions of navigability and noted that each might well require a different definition of navigability: to delimit the boundaries of navigational servitude; to define the scope of Congress' regulatory authority under the Commerce Clause; to determine the extent of the authority of the Corps of Engineers under the River and Harbors Act of 1899; and to establish the limits of federal admiralty jurisdiction. *Id.* at 171-173. Finally, the Court noted that Congress' regulatory authority under the Commerce Clause is historically very broad and that the expansive definitions of navigability developed in Commerce Clause cases are not necessarily appropriate in other contexts where the actual capability of a stream to support navigation is critical. *Id.* at 174-175.

A more appropriate test for navigability under the Longshore Act is the "navigability in fact" test established in admiralty law. *George*, slip op at 9; *Lepore*, 23 BRBS at 406. In *The Daniel Ball*, 77 U.S. (19 Wall.) 557, 563 (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.

Thus, water can only be deemed navigable when it forms a highway over which commerce is or may be carried on with other states or foreign countries. *The Montello*, 78 U.S. (11 Wall.) 411 (1871). A threshold requirement for navigability in admiralty is the presence of an "interstate nexus" in order for the body of water in question to function as a continuous highway for commerce between ports. Thus, a natural or artificial waterway which is not susceptible of being used as an interstate artery of commerce because of either manmade or natural conditions is not navigable waters for purposes of jurisdiction. *Chapman v. United States*, 575 F.2d 147 (7th Cir. 1978).

Recent decisions from the United States Courts of Appeals support the position that a body of water must be presently supporting, or capable of supporting, interstate commerce to be navigable for admiralty purposes. *See, e.g., Finneseth v. Carter*, 712 F.2d 1041 (6th Cir. 1983) (lake formed by construction of dam satisfied interstate requirement of admiralty jurisdiction where it straddled Kentucky and Tennessee and was susceptible of being used as interstate highway of commerce even though it was not presently so used); *Livingston v. United States*, 627 F.2d 165 (8th Cir. 1980), *cert. denied*, 450 U.S. 914 (1981) (historic use of Norfolk River does not render it forever navigable; where dam built and commercial activity ceased, river not navigable for purposes of admiralty jurisdiction); *Reynolds v. Bradley*, 644 F. Supp. 42 (N.D. N.Y. 1987) (Skaneateles Lake, a landlocked body of water located entirely within New York, not navigable water for admiralty purposes where lake was dammed at north end and the waters flowing to the Erie Canal, the only means of reaching interstate waters, were incapable of sustaining travel by boats of any size); *Smith v. Hustler, Inc.*, 514 F.Supp. 1265 (W.D. La. 1981) (although Lake Bistineau had been navigable in 1899, as all commercial activity ceased after the construction of a dam, lake is not now a navigable waterway). These cases support a rejection of claimant's theory that past navigability is determinative.

Consistent with this precedent, we conclude that the administrative law judge properly found that claimant was not injured on navigable water. Claimant was performing construction work to replace the old Hunter's Brook Bridge, a bridge that took Route 129 over the New Croton Reservoir in Westchester County, New York. The historical evidence presented indicates that the Croton River is not currently susceptible of being used as an interstate artery of commerce and has not been so used since at least 1841, when as a result of a natural occurrence, the washout of the dam formed a permanent bar to large ships being able to enter the mouth of the river. A new dam was constructed and at the present time claimant testified that the Croton Reservoir, which was created by damming the Croton River, is roughly 26 square miles, and connects with the entire reservoir system throughout New York State. JX 1, EX at 6. This reservoir was designed to provide fresh water to New York City, and allowing commerce which would tend to pollute the reservoir on its waters would be antithetical to that purpose. The record indicates that the reservoir is patrolled by the City Water Police, whose function is to ensure no motorized equipment is on the reservoir. Transcript at 15. In order to work on the construction of the bridge, employer was required to obtain

special permission to use motorized equipment and to take safety precautions and use silt walls or silt barges, known in the trade as "diapers," to absorb any spills of oil or waste products. Other than employer's tug boat and barge, the only other motorized vehicles on the reservoir are the vehicles used by the water police. Transcript at 16. Although rowboats are allowed on the reservoir, their use is strictly regulated -- they are licensed and once a rowboat is brought to the reservoir, it must be left there, subject to the risk that it may be stolen. *Id.*

Employer never transported its material through the mouth of the reservoir. Employer had permission to use a peninsula on the bank of the reservoir close to the bridge as its staging area, and from this area, material and personnel were transported to the bridge site. All material was trucked to the staging area; there was no way to bring water-borne equipment into the Croton Reservoir from the Hudson River. Transcript at 20. Mr. Beach, testified that the spillway to the Croton Dam has a 200 foot drop. Transcript at 20-24.

These facts lead to the conclusion that the reservoir should be considered a land-locked body of water similar to that in *Williams v. Pan Marine Construction*, 18 BRBS 98 (1986), *aff'd sub nom. Williams v. Director, OWCP*, 825 F.2d 246, 20 BRBS 25 (CRT) (9th Cir. 1987). In *Williams*, a diver was injured in a land-locked lake located entirely within the state of California, which was designed solely to provide drinking water. The Board and the United States Court of Appeals for the Ninth Circuit held claimant was not injured on the navigable waters of the United States. Similarly, in *Rizzi*, 27 BRBS at 273, the Board held that a diver who was injured while working in a reservoir tank under a building which was used as a depository for heating and cooling system water diverted from the Great Miami River was not injured on navigable waters. In so concluding, the Board noted that the tank in which the diver was injured was surrounded by walls, was not designed to support commerce by water, and could not be navigated through by any craft on the Great Miami River. *See also LePore*, 23 BRBS at 403. Most recently, the Board held that a pile driver injured while working at a water treatment plant on the American River in Sacramento was not injured on navigable waters. *George*, slip op. at 14-15. The Board noted that claimant was injured in an area below a dam, and that the river lacked any present commercial use or susceptibility for future use.

In the present case, claimant's injury on the Croton Reservoir took place on a land-locked body of water located entirely within the state of New York. Inasmuch as this body of water is not used and is not susceptible of being used for interstate commerce, we hold that the area in which claimant's injury occurred was not navigable water within the meaning of the Act. Where, as here, the damming of a waterway has the practical effect of eliminating commercial maritime activity, no federal interest is served by exercising admiralty jurisdiction over that body of water, whether or not it was originally navigable. *See Adams v. Montana Power Co.*, 528 F.2d 437, 440 (9th Cir. 1975). Accordingly, we affirm the administrative law judge's finding that claimant is not covered by the Act.²

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

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

²Although claimant contends that the Act must be liberally construed and doubtful questions of law and fact must be resolved in his favor, the United States Supreme Court recently held that the "true doubt rule" does not apply to cases under the Longshore Act because it violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. §556(d), which requires that the party seeking the award bear the burden of persuasion. *Director, OWCP v. Greenwich Collieries*, U.S. , 114 S.Ct. 2251, 28 BRBS 43 (CRT)(1994).