BRB No. 91-1850

WALLACE K. NELSON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GUY F. ATKINSON CONSTRUCTION COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
WAUSAU INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Kevin N. Keaney (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for claimant.

Dennis R. VavRosky and Patric J. Doherty (VavRosky, MacColl, Olson, Doherty & Miller, P.C.), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (90-LHC-1867) of Administrative Law Judge Alexander Karst 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a powderman, sustained an injury to his right knee and hip on January 8, 1988, while in the course of his employment constructing a lock as part of the Bonneville Dam project,

located adjacent to the Columbia River. Claimant's employment duties involved the preparation and excavation of an area of dry land through the use of explosives. At the time of his injury, claimant was on dry land on the floor of what would eventually become a navigational lock; the area being excavated at the time of claimant's injury was not, and had never been, part of the Columbia River. On the date of his injury, claimant slipped and fell on ice and snow as he was preparing to shoot a blast of explosives in the excavation site. Employer paid temporary and permanent disability benefits to claimant under the Oregon Workers' Compensation Act. Claimant subsequently filed a claim for benefits under the Act.

The Bonneville Dam project[1] involves, *inter alia*, the construction and improvement of a series of locks along the length of the Columbia River in order to create straighter waterways and/or deeper channels. The lock which would eventually be constructed in the area of dry land being excavated by claimant was to be approximately 675 feet in length; the entire project included constructing a main lock chamber, fabricating and installing upstream and downstream miter gates, excavating the downstream channel, and building connecting roads, bridges, and utilities. This new lock, when completed, was intended to replace a lock built in 1938. *See* CX 52.

The sole issue addressed by the administrative law judge was whether claimant had established coverage under the Act. The administrative law judge concluded that the situs requirement of Section 3(a), 33 U.S.C. §903(a), had not been satisfied. Specifically, the administrative law judge rejected claimant's contention that dry land is to be considered legal navigable waters when that land is capable of being improved to the point of being navigable. The administrative law judge, noting that claimant's injury occurred on dry land which had not been previously submerged under navigable waters, found that the injury did not occur on actual navigable waters. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge's finding that he is not covered under the Act. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

[1]The Bonneville Dam project was authorized by Congress on August 20, 1937. *See* 16 U.S.C.A. §832.

I. **Injury on Actual Navigable Waters.**

Initially, claimant contends that the administrative law judge erred in determining that his injury did not occur on navigable waters. Specifically, citing *Ransom v. Coast Marine Construction, Inc.*, 16 BRBS 69 (1984); *Dantes v. Western Foundation Corp.*, 10 BRBS 541 (1979); and *Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980), claimant avers that the site of his injury is legal navigable waters because it was capable of being improved to the point of becoming navigable waters. We disagree.

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, 103 S.Ct. 634, 15 BRBS 62 (CRT)(1983), the United States 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, 103 S.Ct. at 646, 15 BRBS at 76-77 (CRT). Accordingly, 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. *Perini*, 459 U.S. at 323-324, 103 S.Ct. at 650-651, 15 BRBS at 80-81 (CRT). *See also Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992).

The administrative law judge, in the instant case, rejected claimant's "very imaginative argument that dry land is legal navigable water when it is capable of being improved," stating that "dry land which may in some future time become submerged under navigable waters" is not navigable waters under the Act. *See* Decision and Order at 2. We agree with the administrative law judge's rational determination on this issue. The cases cited by claimant in his appeal fail to support his contention that dry land is legal navigable water if that land is capable of becoming navigable through reasonable improvement. For example, in *Ransom*, 16 BRBS at 69, an employee tripped and fell from a ledge to the ground within a cofferdam. The Board reversed the administrative law judge's determination that the employee failed to meet the situs test on the basis that the area confined by the cofferdam was not navigable water, noting that the area was previously under water. The Board held that a cofferdam which temporarily restricted navigation and created temporarily dry ground did not preclude a finding that the situs test had been met since the water had been temporarily removed and the area was to be flooded again. Similarly, in *Dantes*, 10 BRBS at 541, the Board concluded that an employee had been injured on a situs covered by the Act where the employee had been injured in an area of land which had previously been part of the Thames River, but had recently been filled in for the express purpose of building a graving dock. Lastly, in *Joyner*, 607 F.2d at 1087, 11 BRBS at 86, the court concluded that the site of a dry dock, which was formerly navigable water and would be used again in support of navigation, remained a part of

navigable waters and satisfied the Act's situs criteria.

The cases relied upon by claimant are thus distinguishable from the instant case and fail to support his contention that dry land capable of improvement may be considered navigable waters under the Act. Specifically, each case cited by claimant involved an area of land which had previously been submerged under navigable water, while it is undisputed that the area of dry land on which claimant herein sustained his injury had never previously been a part of the Columbia River. Claimant's reliance upon the Rivers and Harbors Appropriation Act and the Bridge Act, is similarly misplaced, since that Act clearly equates navigability with the existence of water when it states that

> [w]aters to be adjudged navigable must be capable of supporting interstate or foreign commerce in their natural condition or by reasonable improvement.

Rivers and Harbors Appropriation Act and the Bridge Act. Pub. L. 97-322, as amended, §401(b) and §525, 96 Stat. 1582.[2]

Finally, the fact that the site of an injury will be under navigable water at some point in the future does not render the site navigable at the time of the injury. In *Silva v. Hydro-Dredge Corp.*, 23 BRBS 123 (1989), the Board affirmed an administrative law judge's rejection of a employee's assertion that he had sustained an injury on actual navigable waters where his injury occurred atop a seawall which was below water at high tide, noting that the situs inquiry looks to the place of employment at the moment of injury. As claimant has set forth no conclusive precedent in support of his assertion that dry land which has not previously been submerged under navigable water can be considered navigable water based on its future use, we reject claimant's allegations of error. Accordingly, inasmuch as it is undisputed that claimant in the instant case sustained an injury on dry land which had never been submerged under navigable water prior to the date of his injury, we affirm the administrative law judge's finding that claimant was not injured on actual navigable waters. *See generally Johnsen*, 25 BRBS at 332-333; *Silva*, 23 BRBS at 125; *Laspragata v. Warren George, Inc.*, 21 BRBS 132 (1988). *See also Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969).

[2]We note that the Board has consistently held that the threshold requirement of navigability is the presence of an "interstate nexus" which allows the body of water in question to function as a continuous highway for commence between ports. *See George v. Lucas Marine Construction*, BRBS , BRB No. 93-1612 (September 28, 1994).

II. **Injury on an Adjoining Area**.

While injury on actual navigable waters is sufficient to establish coverage under both Sections 2(3) and 3(a), claimant may also establish coverage under the Act if his injury occurs in a landward area covered by Section 3(a) and his work is maritime in nature, bringing him within the definition of maritime employee in Section 2(3). Thus, to be covered under the Act, as amended in 1972 and 1984, claimant must satisfy both the "situs" requirement of Section 3(a) and the "status" requirement of Section 2(3). *See P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977).

Section 3(a) provides coverage for a disability resulting from an injury occurring on 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). 33 U.S.C. §903(a)(1988). Accordingly, coverage under Section 3(a) is determined by the nature of the place of work at the moment of injury. *See Melerine v. Harbor Construction Co.*, 26 BRBS 97 (1992); *Alford v. MP Industries of Florida*, 16 BRBS 261 (1984).

Claimant contends that, because the location of his injury on dry land adjoins navigable waters and will have a future maritime use, that area has a maritime nexus sufficient to confer situs jurisdiction under the Act.[3] We disagree. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that the phrase "other adjoining area" contained in Section 3(a) of the Act is qualified so as to require a relationship to maritime activity, specifically the area must be "customarily used by employer in loading, unloading, repairing, dismantling, or building a vessel." *See Hurston v. Director, OWCP*, 989 F.2d 1574, 1578, 26 BRBS 180, 184 (CRT)(9th Cir. 1993), *rev'g Hurston v. McGray Construction Co.*, 24 BRBS 94 (1990). Thus, the situs test is not met merely because the injury occurred adjacent to water. *See Melerine*, 26 BRBS at 101. In the instant case, claimant has set forth no evidence that, at the time of his injury, the site where the injury occurred was used by an employer for maritime activities; we therefore hold that claimant's injury did not occur on an "adjoining area." *See Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978); *Anastasio v. A.F. Ship Maintenance*, 24 BRBS 6, 9-10 (1990); *Silva*, 23 BRBS at 126. As we have previously affirmed the administrative law judge's finding that claimant's injury occurred not on navigable waters but rather on dry land, and as there is no evidence that the site of claimant's injury was used by an employer for maritime activities at the time of injury, we

[3]Claimant does not allege on appeal that his injury occurred on a situs enumerated under Section 3(a).

affirm the administrative law judge's finding that claimant has not satisfied the situs requirement contained in Section 3(a) of the Act.[4]

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[4]Pursuant to our disposition of this issue, we need not address claimant's contention that he satisfied the status requirement of the Act.