

THOMAS PULKOSKI)
)
 Claimant-Petitioner)
)
 v.)
)
 HENDRICKSON BROTHERS,) DATE ISSUED:
 INCORPORATED)
)
 and)
)
 STATE INSURANCE FUND)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order Dismissing Claim of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (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 Dismissing Claim (90-LHC-418) of Administrative Law Judge Robert D. Kaplan 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant sustained an injury to his right knee on June 1, 1989, while in the course of his employment with employer, a heavy construction general contractor working on the Warwick Boulevard bridge project. Claimant's employment duties involved the construction of concrete pile caps on top of pilings, which had been installed prior to the commencement of claimant's employment.¹ Claimant performed some of this work on the pile caps from a wooden float stage

¹The bridge's pilings form the base of the roadway of the bridge; the pile caps keep the pilings intact.

which floated on the Island Park Canal. On the date of his injury, claimant returned to land to get a sledge hammer. After retrieving the sledge hammer, claimant stepped into a small hole located on the landward side of the bulkhead while returning to the pilings and injured his right knee. Employer paid temporary total disability benefits under the New York state workers' compensation law. Claimant subsequently filed a claim under the Act for permanent partial disability.²

²The parties stipulated that claimant sustained a 15 percent loss of use of his right leg as a result of the work incident.

The Warwick Boulevard bridge project entailed the demolition of a vehicular bridge over the Island Park Canal on Long Island, New York, and the construction of a new bridge of a different design in its place. The bridge is a continuation of Warwick Boulevard, which crosses the approximately 100 foot wide canal at a 90 degree angle, and is located in a residential area. Many of the private residences along the canal have docks for pleasure boats, but there are no docks or other facilities for boats in the immediate area of the bridge or the adjacent bulkheads. Since the canal itself is shallow, employer was unable to move its equipment via barge; rather, employer's equipment was loaded from the shore. Mr. Perenza, project superintendent on the Warwick Boulevard bridge project, testified that the new bridge was designed to have a lower profile to improve the visibility of oncoming vehicular traffic and, as a result, the new bridge's clearance for boats is about two feet less than that of the old bridge.³

The sole issue addressed by the administrative law judge was 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 initially discussed whether claimant was injured on actual navigable waters pursuant to the Supreme Court's holding in *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 103 S.Ct. 634, 15 BRBS 62 (CRT)(1983). The administrative law judge found that the site of claimant's injury was on land and that, therefore, the injury did not occur on actual navigable waters. *See Perini*, 459 U.S. at 315, 103 S.Ct. at 645-646, 15 BRBS at 74 (CRT). Next, the administrative law judge determined that the site of claimant's injury did not qualify as an "adjoining area" inasmuch as the site of the injury was not used by an employer in commercial maritime activity. The administrative law judge next found that claimant failed to meet the status requirement of Section 2(3), 33 U.S.C. §902(3); specifically, the administrative law judge determined that claimant was not engaged in maritime employment as his work did not have a significant relationship to navigation or commerce on navigable waters. In arriving at this determination, the administrative law judge distinguished the instant case from *LeMelle v. B. F. Diamond Construction Co.*, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), *cert. denied*, 459 U.S. 1177 (1983), which held a bridge construction worker covered under the Act. The administrative law judge noted that, unlike the bridge being constructed in *LeMelle*, the bridge in the instant case will provide less clearance for boats passing under it. Accordingly, the administrative law judge dismissed the claim.

On appeal, claimant challenges the administrative law judge's finding that he is not covered under the Act.⁴ Employer responds, urging affirmance of the administrative law judge's Decision

³Prior to the time claimant began working for employer, employer had completed all work involved in constructing new bulkheads and adding retaining sheeting to existing bulkheads.

⁴Claimant's contention that he is entitled to the benefit of the Section 20(a), 33 U.S.C. §920(a), presumption in establishing jurisdiction under the Act is rejected. It is well-established that Section 20(a) does not apply to issues involving interpretation of the coverage requirements of the Act. *See, e.g., Davis v. Doran Co. of California*, 20 BRBS 121 (1987), *aff'd mem.*, 865 F.2d 1257 (4th Cir. 1989); *Sedmak v. Perini North River Associates*, 9 BRBS 378 (1978), *aff'd sub nom. Fusco v. Perini North River Associates*, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131

and Order.

Injury on Actual Navigable Waters

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) and to expand the sites covered under Section 3(a) landward. In *Perini*, 459 U.S. at 297, 103 S.Ct. at 634, 15 BRBS at 62 (CRT), 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, 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).

In the instant case, claimant, in challenging the administrative law judge's conclusion that he was not injured on navigable waters, asserts that the Island Park Canal is navigable. The administrative law judge, however, did not reach the question of the navigability of the canal; rather, the administrative law judge found that "[a]ssuming that the canal is a navigable body of water, the fact that claimant occasionally performed his work from a float raft is immaterial because his injury did not occur while he was on the raft." Decision and Order at 5. The administrative law judge determined that claimant was injured "on the land one or two feet behind the bulkhead near the end of the vehicular bridge." *Id.* Our review of the record reveals that claimant's testimony supports the administrative law judge's finding that claimant stepped into a hole located landward of the bridge's bulkhead. *See* transcript at 26-29; EX-2; *see also* transcript at 48-49. Thus, we affirm the administrative law judge's finding that claimant's injury occurred on land as that determination is supported by substantial evidence. *See generally* *Silva v. Hydro-Dredge Corp.*, 23 BRBS 123, 125 (1989). Inasmuch as claimant's injury occurred on land one or two feet behind the bridge's bulkhead, we affirm the administrative law judge's finding that claimant was not injured on actual navigable waters and thus is not covered under the Act pursuant to the Supreme Court's holding in *Perini*.⁵ *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).

(1981).

⁵Pursuant to our affirmance of the administrative law judge's finding in this regard, claimant's argument concerning the navigability of the Island Park Canal need not be addressed.

Jurisdiction Under the 1972 and 1984 Amendments to the Act

While injury on actual navigable waters is sufficient to establish coverage under both Sections 2(3) and 3(a), claimant may also establish coverage 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 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 the purpose of the bridge's bulkhead is to contain water and prevent land erosion and that the bulkhead, therefore, may be considered a harbor facility. See *Ries v. Harry Kane, Inc.*, 13 BRBS 617, 624 n.8 (1981). The Board has held that a breakwater forming a harbor may be viewed as the equivalent of a pier and, therefore, may be considered an enumerated situs under Section 3(a). See *Olson v. Healy Tibbitts Construction Co.*, 22 BRBS 221 (1989)(Brown, J., dissenting). See also *Hurston v. Director, OWCP*, 989 F.2d 1547, 26 BRBS 180 (CRT)(9th Cir. 1993); *Eckhoff v. Dog River Marina and Boat Works, Inc.*, 28 BRBS 51 (1994). Pursuant to our affirmance of the administrative law judge's determination that claimant's injury occurred not on the bulkhead but, rather, one or two feet on the landward side of the bulkhead, we need not address claimant's specific argument that the bridge's bulkhead is an enumerated situs. We therefore hold that claimant was not injured on an area specifically enumerated in Section 3(a).

Additionally, the administrative law judge concluded that the site of claimant's injury was not an "adjoining area," based upon a finding that the bulkheaded area contained no facility for mooring, loading or unloading boats, and that no evidence was presented to establish that the canal was used for commercial maritime activities. Our review of the evidence concerning the characteristics of the site of claimant's injury fails to reveal any evidence that the site has a maritime purpose. Thus, as claimant was not injured on a site used for traditional maritime activities, we affirm the administrative law judge's determination 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.G. Ship Maintenance*, 24 BRBS 6, 9-10 (1990); *Silva*, 23 BRBS at 126. Thus, as we have previously affirmed the administrative law judge's finding that claimant's injury occurred not on navigable waters but rather landward of the bridge's bulkhead, on a non-enumerated situs, and as there is no evidence that the site of claimant's injury was used by an employer for maritime activities, we affirm the administrative law judge's finding that claimant has not satisfied

the situs requirement contained in Section 3(a) of the Act.

Lastly, claimant contends that the administrative law judge erred in finding that claimant failed to satisfy the status requirement of Section 2(3) of the Act. We disagree. The term "employee" is defined in Section 2(3) as a longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, shipbuilder, and shipbreaker. *See* 33 U.S.C. §902(3). Accordingly, while maritime employment is not limited to the occupations specifically enumerated in Section 2(3), claimant's employment must bear a relationship to the loading, unloading, building or repairing of a vessel. *See generally Chesapeake and Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 110 S.Ct. 381, 23 BRBS 96 (CRT)(1989). In the instant case, we initially reject claimant's contention that his work with employer consisted of constructing a structure which functioned as a bulkhead and that, thus, he may be considered a harbor worker under the Act. The administrative law judge's finding that employer had completed all bulkhead work prior to the commencement of claimant's employment is supported by substantial evidence; accordingly, we reject claimant's assertion that his work on pilings somehow related to the bridge's completed bulkhead. Similarly, we reject claimant's suggestion that, pursuant to *LeMelle*, 674 F.2d at 296, 14 BRBS at 609, a bridge construction worker is covered under the Act irrespective of whether the bridge aids in navigation. In *LeMelle*, a bridge construction worker was found to be covered under the Act where one of the purposes of the project was to improve the navigability of the James River. In the instant case, the administrative law judge rationally found *LeMelle* to be distinguishable, noting that the lower clearance of the bridge in the case at bar made the canal less navigable. Accordingly, claimant's employment in no way aided navigation on the Island Park Canal, and claimant has submitted no evidence that his employment had any other relationship to the loading, unloading, building or repair of a vessel. We therefore affirm the administrative law judge's finding that claimant has failed to satisfy the status requirement of Section 2(3) of the Act. *See Johnsen*, 25 BRBS at 329.

Accordingly, the administrative law judge's Decision and Order dismissing the claim is affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge