

SAM I. GEORGE)
)
 Claimant-Petitioner)
)
 v.)
)
 LUCAS MARINE CONSTRUCTION)
)
 and)
)
 STATE COMPENSATION INSURANCE)
 FUND)
)
 Employer/Carrier-) DATE ISSUED: _____
 Respondents)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS,)
 UNITED STATES DEPARTMENT)
 OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and the Order Denying Reconsideration of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

John R. Hillsman (McGuinn, Hillsman & Palefsky), San Francisco, California, for claimant.

Michael L. Mowrey, San Francisco, California, for employer/carrier.

Laura Stomski (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Acting Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and SHEA, Administrative Law Judge.*

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and the Order Denying Reconsideration (92-LHC-1174, 92-LHC-1175) of Administrative Law Judge Thomas Schneider 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board held oral argument in this case in San Francisco, California, on August 5, 1994.

Claimant, a pile-driver, was hired by employer to work on two projects. One project was on the American River at a water treatment plant in Sacramento, California, and the other was at the Navy docks on the Sacramento River.¹ Claimant alleges that, on October 17, 1990, during his lunch break from his duties at the American River project, his boss, Mr. Lucas, called from the Sacramento River project and asked claimant to bring an oxygen bottle to him. After lunch, claimant ordered the bottle, loaded it into a boat, took the boat from the barge to the shore and tied it down, hoisted the bottle to his shoulder, and, with one foot on the shore and one foot just exiting the boat, slipped and fell to the ground, aggravating a back condition. After walking off the immediate pain, claimant carried the bottle to a truck, drove to the Navy docks, and delivered the oxygen to Mr. Lucas. Tr. at 119-120. Thereafter, claimant filed a claim for compensation under the Act.

The American River, which is located entirely in the state of California, is a tributary of the Sacramento River. The treatment plant where the construction occurred is located between the H Street Bridge and the Howe Avenue Bridge on the American River. The H Street Bridge is approximately 7.1 miles upstream from the confluence of the American and the Sacramento Rivers, and the Howe Avenue Bridge is approximately 7.8 miles upstream from the confluence. Cl. Ex. 6; Cl's M/Partial Summ. Judg. ex. B (hereinafter

¹Workers at the American River project used a floating barge to build a cofferdam beneath the filtration plant, pump out the water, and reinforce the foundation of the plant. Tr. at 103, 108, 114-115. A small boat with an engine pushed the barge when it was necessary to move it. Tr. at 94-95.

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5)(1988).

"Map").² The Folsom Dam, built in the 1950's, lies approximately 18 miles upstream from the confluence of the two rivers. Tr. at 177; Map. The water downstream of the dam flows unimpeded to the Pacific Ocean.

The administrative law judge denied the claim for benefits based on his finding that the American River, in the vicinity of the accident site, is not navigable. Specifically, he rejected claimant's assertion that he should rely on the findings of the Army Corps of Engineers, the Coast Guard, and an 1885 decision of the Supreme Court of the United States to conclude that the American River is navigable at the accident site, and he relied instead on the law as it pertains to the admiralty power of the United States. The administrative law judge also found that use of a floating barge on the construction project, while being a maritime activity, does not make the water navigable and that there is no evidence of the River's present commercial use or of the River's susceptibility to future commercial use. Decision and Order at 2, 6. Further, he concluded that the tidal "ebb-and-flow" test is not a valid test for determining the navigability of a waterway and that the River at the area in question is not subject to tidal fluctuations. *Id.* at 4. Thereafter, claimant filed motions for reconsideration and oral argument, and the administrative law judge denied both motions. Order at 1, 4. Claimant now appeals the administrative law judge's decisions, and employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds, agreeing with claimant and urging reversal of the decisions.

To be covered under the Act, a claimant must meet both the status requirement of Section 2(3) and the situs requirement of Section 3(a). 33 U.S.C. §§902(3), 903(a). Section 3(a) states:

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
.....

33 U.S.C. §903(a). Pursuant to the Supreme Court's decision in *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983), a claimant injured on actual navigable waters meets both the status and situs requirements.³ *Perini*, 459 U.S. at 323-324, 15 BRBS at 80-81 (CRT); *see also Rizzi v. Underwater Construction Corp.*, 27 BRBS 273, 276 (1994); *Laspragata v.*

²Claimant's Motion for Partial Summary Judgment and the exhibits thereto were made part of record at the hearing. Tr. at 19.

³In *Perini*, the Supreme Court held that in enacting the 1972 Amendments to the Act Congress intended to expand coverage and not to withdraw coverage from workers injured on navigable waters who would have been covered by the Act prior to 1972. Further, the Court held that when a worker is injured on navigable waters, in the course of his employment, he is a maritime employee under Section 2(3), and thus he satisfies both the status and situs requirements, unless he is specifically excluded from coverage, regardless of the nature of his work. *Perini*, 459 U.S. at 323-324, 15 BRBS at 80-81 (CRT).

Warren George, Inc., 21 BRBS 132, 134 n.3 (1988); *Ransom v. Coast Marine Construction, Inc.*, 16 BRBS 69, 72 (1984). As the administrative law judge rested his opinion solely upon the navigability of the American River, no other issues relating to claimant's status are raised on appeal in this case. The issue before the Board, therefore, is whether the administrative law judge's finding that the American River is non-navigable, downstream of the Howe Avenue Bridge, at the site of the injury, is in accordance with law and is supported by substantial evidence.

Claimant contends the administrative law judge erred in finding that the American River is not a navigable body of water. Specifically, he argues that the administrative law judge misapplied the test for navigability and should have considered the River's past, present, and future susceptibility to commercial use. In this regard, claimant contends that the American River is "navigable in fact," in that it presently supports maritime activity, was historically navigable, and is susceptible to future commercial use, thus conferring coverage under the Act. Additionally, claimant contends that the American River is navigable because it is a tidal water, subject to the ebb and flow of the tide from the Sacramento River. In response, employer argues that the correct test for ascertaining whether a body of water is navigable is whether it is presently used for commercial purposes or whether it is susceptible to such use in the future, and that under this test, the River is not navigable. Employer also maintains that the ebb-and-flow test was rejected as a test for navigability. Claimant replies, delving into a history of the American River to show that it was once a busy trade route. The Director also responds to claimant's appeal, supporting claimant's position and arguing that the administrative law judge erred in placing the burden of proving navigability on claimant and in finding the American River at the point in question to be non-navigable.

Initially, the Director contends the administrative law judge erroneously placed the burden of proving jurisdiction on claimant. She argues that the Section 20(a), 33 U.S.C. §920(a), presumption places the burden of proof with regard to factual questions on employer. The Board has held that the Section 20(a) presumption does not apply to the legal interpretation of the jurisdictional provisions of the Act. *Palma v. California Cartage Co.*, 18 BRBS 119 (1986); *Sheridon v. Petro Drive, Inc.*, 18 BRBS 57 (1986); *Wynn v. Newport News Shipbuilding & Dry Dock Co.*, 16 BRBS 31 (1983). More specifically, the Board has determined that claimants must satisfy both the status and situs tests without benefit of the presumption. *Hagenzeiker v. Norton Lilly & Co.*, 22 BRBS 313 (1989); *Boughman v. Boise Cascade Corp.*, 14 BRBS 173 (1981); *Sedmak v. Perini North River Assoc.*, 9 BRBS 378 (Miller, J., dissenting), *aff'd sub nom. Fusco v. Perini North River Assoc.*, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981). Moreover, this case primarily involves the application of legal principles; thus, even if the presumption applied to facts underlying jurisdictional determinations, it would be inapplicable to this case. Consequently, we reject the Director's argument that the Section 20(a) presumption applies to the issue of the navigability of the River.

It is well-established that the question of whether a body of water is navigable is one of fact to which complicated legal tests must be applied. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940); *United States v. Utah*, 283 U.S. 64 (1931). The basic test of navigability for purposes of admiralty jurisdiction was set forth by the Supreme Court in *The Propeller Genesee*

Chief v. Fitzhugh, 12 How. 443, 13 L.Ed. 1058 (1852). In that case, the Supreme Court stated that the "navigable water" within the scope of the admiralty and maritime jurisdiction of the federal government "is not limited to tide-waters, but extends to all public navigable lakes and rivers, where commerce is carried on between different States, or with a foreign nation." In *Ex Parte Boyer*, 109 U.S. 629 (1884), the Court noted that its decisions in *The Daniel Ball*, 10 Wall. 557, 19 L.Ed. 999 (1871), and *The Montello*, 20 Wall. 430, 22 L.Ed. 391 (1874), extended this "salutary view[]" of navigability. In *The Daniel Ball*, the 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. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

The Daniel Ball, 10 Wall. at 563. The Supreme Court later explained that the admiralty definition of navigability depends on the water's capability of commercial use and not on the mode or extent of that use. *The Montello*, 20 Wall. 430, 22 L.Ed. 391 (1874). Courts still rely on these early definitions of navigability. See *Reynolds v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 788 F.2d 264, 19 BRBS 10 (CRT) (5th Cir.), cert. denied, 479 U.S. 885 (1986); *Finneseth v. Carter*, 712 F.2d 1041 (6th Cir. 1983); *Chapman v. United States*, 575 F.2d 147 (7th Cir.) (en banc), cert. denied, 439 U.S. 893 (1978); *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975); *United States v. White's Ferry, Inc.*, 382 F.Supp. 162 (D.Md. 1974); *Rizzi*, 27 BRBS at 277; *Lepore v. Petro Concrete Structures*, 23 BRBS 403 (1990).

Claimant contends that the test for determining the navigability of a body of water is an "alternative, three-part" test which considers whether the water is affected by the tides, sustains current commercial use, or is susceptible to future commercial use. To determine the water's susceptibility to commercial use, claimant argues that the past, present, and future use of the waterway must be examined. OA Tr. at 8, 10. Claimant contends the American River, in the vicinity of the Howe Avenue and H Street Bridges, satisfies the test of navigability. Specifically, claimant argues that the American River has a long history of commercial usage and was navigable in the past and that such characterization is proof of the River's present-day "navigability in fact." In support of his argument, claimant cites the Supreme Court's decision in *Cardwell v. American River Bridge Co.*, 113 U.S. 205 (1885), wherein the Court determined that the American River is navigable.⁴ Claimant also relies on findings made by the Army Corps of Engineers and the Coast

⁴In considering a case involving the act which admitted California into the Union, the Supreme Court determined that the act also insured California's navigable waterways would be open to public

Guard which designate the American River as a navigable waterway. Cl. Exs. 6, 8; Tr. at 229-230. The Director agrees with claimant and argues that once a body of water is found to be navigable it remains so, and that later obstructions and interruptions to navigation do not make it non-navigable.

In 1979, the Supreme Court stated that the "navigability" of a waterway must be evaluated in light of "the purpose for which the concept of 'navigability' was invoked in a particular case." *Kaiser Aetna v. United States*, 444 U.S. 164, 171 (1979). In *Kaiser Aetna*, the Court identified four purposes underlying definitions of "navigability." *Id.* As summarized by the United States Court of Appeals for the Eighth Circuit, they are:

to delimit the boundaries of the 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 Rivers and Harbors Act of 1899; and to establish the limits of federal admiralty jurisdiction. Each of these areas of the law might well require a different definition of "navigability."

Livingston v. United States, 627 F.2d 165, 169 (8th Cir. 1980); *see also Kaiser Aetna*, 444 U.S. at 171-172; *Boone v. United States*, 944 F.2d 1489 (9th Cir. 1989). The Act derives its legitimacy from Article III of the United States Constitution, concerning federal court jurisdiction over admiralty and maritime cases. U.S. Const. art. III, §2, cl. 1; *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128 (1930). Therefore, in accordance with *Kaiser Aetna*, we hold that the applicable definition of "navigability" in cases arising under the Act is that which establishes the limits of admiralty jurisdiction.

The United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, addressed the issue of the navigability of a waterway for purposes of admiralty jurisdiction in *Adams*, 528 F.2d 437. In *Adams*, a man riding in a small boat near the Hauser dam on the Missouri River in Montana was killed when his boat was overturned by a discharge of water from the dam. At the point of the accident, the water was obstructed by the Hauser Dam on one side and the Holter Dam on the other. Only non-commercial fishermen, water skiers, and pleasure boaters used this part of the river. *Id.*, 528 F.2d at 439. The court affirmed the finding of the district court that the Missouri River is not navigable between the two dams for purposes of admiralty jurisdiction. It stated that non-commercial fishing and pleasure boating are not commercial activities as they are not related to shipping, and it differentiated between the commerce and admiralty powers' definitions and scope of "navigability." *Id.* at 439-440. Further, the court noted that once a body of water is considered navigable under the commerce clause, it is forever navigable; however:

if the damming of a waterway has the practical effect of eliminating commercial maritime

access and use without duties or tolls, and it enjoined the defendant from placing a bridge across the river which would impede boat travel, as it determined that the American River was a navigable waterway entitled to the protection of the United States Government. *Cardwell v. American River Bridge Co.*, 113 U.S. 205 (1885).

activity, no federal interest is served by the exercise of admiralty jurisdiction over the events transpiring on that body of water, whether or not it was originally navigable. No purpose is served by application of a uniform body of federal law, on waters devoid of trade and commerce, to regulate the activities and resolve the disputes of pleasure boaters.

Adams, 528 F.2d at 440. As the Ninth Circuit has expressly rejected the position that navigability, for admiralty purposes, is unchanging, we reject the argument that, to determine coverage under the Act, navigability should be based on the rule of navigability for purposes of the commerce clause that once a body of water is deemed navigable it remains so despite later obstructions or interruptions.⁵

Moreover, *Adams* clearly establishes that the Ninth Circuit follows the rule espoused by the Supreme Court in *The Daniel Ball* that navigability, for admiralty purposes, is based on the use or potential use of the waterway for commerce between ports. Thus, the Ninth Circuit requires a showing of present commercial use or susceptibility to future commercial use before it will consider a waterway to be navigable under admiralty law. *Adams*, 528 F.2d at 439-440. Other United States Circuit Courts of Appeals agree. See *Price v. Price*, 929 F.2d 131 (4th Cir. 1991) (Fourth Circuit determined that a reservoir, lying between Virginia and North Carolina, which is currently used mainly for recreational purposes, is capable of sustaining commercial travel); *Sanders v. Placid Oil Co.*, 861 F.2d 1374 (5th Cir. 1988) (Fifth Circuit, in finding a lake navigable, concluded that present commercial use or susceptibility to future commercial use of a natural or artificial body of water is not defeated by seasonal non-navigability); *Finneseth*, 712 F.2d at 1046-1047 (Sixth Circuit determined that a lake formed by a dam and bound by Kentucky and Tennessee is navigable, despite the absence of present commercial use, because interstate commerce is possible across the lake, regardless of the obstruction by the dam to downstream travel); *Chapman*, 575 F.2d at 149-151 (Seventh Circuit determined that the Kankakee River near Wilmington, Illinois, is not navigable because the waterway is presently used for recreational and not commercial purposes and is not susceptible to future commercial use).

The Board's decisions on this matter accord with the Ninth Circuit's precedent. See *Rizzi*, 27 BRBS at 273; *Lepore*, 23 BRBS at 403; *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 those cases, the Board addressed the issue of the navigability of water in a reservoir tank, a flume, and a land-locked reservoir, respectively, and determined that the claimants therein were not injured on navigable waterways. *Rizzi*, 27 BRBS at 278; *Lepore*, 23 BRBS at 407; *Williams*, 18 BRBS at

⁵Cases which address the issue of navigability with respect to the scope of commerce power in relation to the need for federal approval to construct a dam on a waterway provide that a waterway once found navigable maintains its status despite obstructions, lack of contiguity, or non-use. See *Appalachian Electric*, 311 U.S. at 377; *Economy Light Co. v. United States*, 256 U.S. 113 (1921); *Rochester Gas & Electric Corp. v. Federal Power Comm'n*, 344 F.2d 594 (2d Cir. 1965).

100. The Board has consistently held that the threshold requirement of navigability is the presence of an "interstate nexus" which allows the body of water to function as a continuous highway for commerce between ports. *Lepore*, 23 BRBS at 406; *see also Rizzi*, 27 BRBS at 277. Thus, a natural or an artificial waterway which is not capable of being used as an interstate artery of commerce because of natural or man-made conditions is not considered navigable for purposes of jurisdiction under the Act.⁶ *Lepore*, 23 BRBS at 407.

The instant case differs from the Board's previous cases in that the American River is not a land-locked or artificially-made reservoir or tank of water. Downstream of the Folsom Dam, where the injury occurred, the water flows unimpeded to the Sacramento River, the San Francisco Bay, and the Pacific Ocean. The dam precludes travel to upstream sites and causes the downstream river to be very shallow. *See Tr.* at 180, 212-217. Given these facts, the administrative law judge determined that the American River is not navigable at the site of the injury despite the fact that it was once used as an artery of commerce. *Decision and Order* at 3; *see also Order* at 3.

Because historical commercial usage of a waterway is irrelevant in ascertaining present navigability for admiralty purposes,⁷ *see Finneseth*, 712 F.2d at 1044; *Livingston*, 627 F.2d at 170; *Chapman*, 575 F.2d at 149; *Adams*, 528 F.2d at 439, and because the previous determinations of navigability by the Coast Guard and the Army Corps of Engineers were made for non-admiralty purposes, *see Kaiser Aetna*, 444 U.S. at 171-172, the administrative law judge correctly determined that those findings need not control his decision. *See Finneseth*, 712 F.2d at 1045 n.4;⁸ *Adams*, 528 F.2d 437. As the administrative law judge properly determined that the navigability determination herein must be made in consideration of the law of admiralty, he correctly decided the issue based on current and potential commercial usage of the River. Consequently, we reject the argument that, alone, past commercial use of the American River requires the administrative law judge to presently designate it as "navigable" in admiralty law. *See Adams*, 528 F.2d at 439-440.

Claimant next contends that the American River, downstream of the Howe Avenue Bridge, is currently used for commercial purposes. In support of his contention, claimant argues that the

⁶Where the withdrawal of water from a riverbed is temporary, there is no divesting of jurisdiction under the Act. *Ransom*, 16 BRBS at 71-72; *see also Morrison-Knudsen Co. v. O'Leary*, 288 F.2d 542 (9th Cir. 1961).

⁷In *Three Buoys Houseboat Vacations U.S.A. Ltd. v. Morts*, 921 F.2d 775 (8th Cir. 1989), *cert. denied*, ___ U.S. ___, 112 S.Ct. 272 (1991), the Eighth Circuit held that the standard for determining navigability, as it relates to admiralty, "is one of *contemporary* navigability in fact." *Id.* at 778 (emphasis added); *see also C.J. Montag & Sons v. O'Leary*, 304 F.Supp. 188 (D. Or. 1969).

⁸The court noted that the non-admiralty findings are not controlling but are "not without significance and may be taken into account by a court determining whether a water body is navigable [for admiralty jurisdiction]." *Finneseth*, 712 F.2d at 1045 n.4; *see also Sanders*, 861 F.2d at 1378.

barge on which he worked constitutes evidence of present commercial use of the American River. To bolster his argument, claimant cites *Ramos v. Universal Dredging Corp.*, 653 F.2d 1353, 13 BRBS 689 (9th Cir. 1981). In that case, the Ninth Circuit stated that "the operation of a dredge has a significant relationship to traditional maritime activity." *Ramos*, 653 F.2d at 1358, 13 BRBS at 693. Thus, claimant maintains that, as he was injured on a dredge on the River and the dredge has a relationship to maritime activity, the River supports maritime activity and is navigable in fact. The administrative law judge rejected claimant's logic, stating: "I do not believe that the dredge itself makes the water navigable; it is commerce that makes water navigable."⁹ Decision and Order at 6. Moreover, the administrative law judge found that claimant has not established a present use other than the activities connected with the water treatment plant construction project. The record supports this finding.

Witnesses testified to water depths in the American River near the water treatment plant which vary from 12 to 25 feet and are capable of supporting boat travel. However, additional testimony indicates that the depth of the American River varies from 1.4 to 50 feet, depending on where the measurement is taken, and there is no evidence in the record that the River is navigated even during periods of high water. See Tr. at 103, 127, 187, 212-217. Mr. Lucas, claimant's employer, testified to the absence of piers, buoys, channel markers, and boats transporting goods between the confluence of the two rivers and the Folsom Dam. Tr. at 178-180. Mr. Terry, a retired engineer for the Department of Water Resources, supported Mr. Lucas' testimony, stating that although the Coast Guard has jurisdiction over the river it has placed no markers, buoys, or facilities thereon. Tr. at 206-207, 229-230. Further, Mr. Lucas attested that the barge used on the American River project arrived at the site on trucks and was assembled on the River because the shallow water, the turns, and the rapids prevented its upriver travel. Tr. at 181-183. Therefore, we reject claimant's argument that the use of a barge for construction at the water treatment plant establishes present commercial use of the American River downstream of the Folsom Dam. The fact that the barge was capable of floating in the River after it was assembled at the construction site is insufficient, standing alone, to support a finding that the River is navigable.

As claimant has demonstrated no contemporary commercial use of the River, we affirm the administrative law judge's finding that there is no present commercial use of the American River at the accident site. See *Adams*, 528 F.2d at 439, 441; *Lepore*, 23 BRBS at 406. Additionally, because claimant has failed to present any evidence which may indicate the possibility of future commercial use, the administrative law judge's finding that the American River at the accident site is not susceptible to commercial use is rational, and we affirm it. See *Adams*, 528 F.2d at 439, 441;

⁹Contrary to claimant's assertion, navigability was not at issue in *Ramos*, and the Ninth Circuit did not address whether the presence of a maritime activity deems a waterway navigable. Indeed, it is possible for a claimant to meet the status test based on the performance of maritime work, while not meeting the situs test due to the nature of the location of the injury. See, e.g., *Brown v. Bath Iron Works Corp.*, 22 BRBS 384 (1989); *Humphries v. Cargill, Inc.*, 19 BRBS 187 (1986), *aff'd sub nom. Humphries v. Director, OWCP*, 834 F.2d 372, 20 BRBS 17 (CRT) (4th Cir. 1987), *cert. denied*, 485 U.S. 1028 (1988).

Lepore, 23 BRBS at 406-407. Because claimant has failed to establish either present commercial use or susceptibility to future commercial use, the administrative law judge properly determined that the American River, in the vicinity of the accident site, is not navigable in fact, and that claimant is not covered by the Act. *Id.* Therefore, we affirm his decision.

Finally, we reject claimant's assertions that the American River, at the water treatment plant, is subject to the ebb and flow of the tides and that this is a valid test for determining navigability. Not only has the ebb-and-flow test been rejected as the test for determining navigability, *see Perry v. Haines*, 191 U.S. 17, 26 (1903), but the administrative law judge credited Mr. Terry's opinion in finding that the water at the accident site is not subject to tidal fluctuations.¹⁰ Decision and Order at 4; Tr. at 212-214, 221, 225. As the administrative law judge's finding is in accordance with law and is supported by substantial evidence, we affirm it. *See Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979).

¹⁰Testimony of record indicates that depth variations were caused by releases from the dam. Tr. at 105, 127-128, 183-184.

Accordingly, the administrative law judge's Decision and Order and Order Denying Reconsideration are affirmed.

SO ORDERED.

NANCY S. DOLDER, Acting Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

ROBERT J. SHEA
Administrative Law Judge