BRB No. 98-0425

STEPHEN D. MELLIN	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: Nov. 30, 1998
	)	
v.	)	
	)	
MARINE WORLD-WIDE SERVICES	)	
	)	
and	)	
	)	
STATE OF WASHINGTON, DEPARTMENT OF LABOR AND INDUSTRIES	)	
	)	
	)	
	)	
Employer/Administrator-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order-Denying Benefits of Alfred Lindeman, Administrative Law Judge, United States Department of Labor.

Charles Robinowitz, Portland, Oregon, for claimant.

Ronald W. Atwood (Ronald W. Atwood, P.C.), Portland, Oregon, for employer.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order-Denying Benefits (97-LHC-137) of Administrative Law Judge Alfred Lindeman 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. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

The facts in this case are undisputed. Claimant, along with several other employees, was sent by employer, a Washington-based company, to Baltimore, Maryland, to perform a rigging job on a vessel in the Baltimore Harbor. On October 28, 1995, while on a public highway en route from the motel to the harbor, another driver crashed into employer's rental truck. Claimant fractured one of his lower vertebrae in this accident. Claimant, who was not represented by counsel, sought worker's compensation under both the Washington state system and the Longshore Act. On December 12, 1995, the Washington Department of Labor and Industries, the administrator of employer's state coverage,[1] issued an Order rejecting the claim on the basis that "the injury had occurred while in the course of employment subject to Federal (Longshore and Harbor Worker's Compensation Act) jurisdiction." Although the Order stated that "protest or request for reconsideration" must be made within 60 days, on the advice of his stepfather that it would not be a problem because he was covered under the Longshore Act, claimant did not challenge the rejection of the state claim.[2] Claimant's claim under the Act was ultimately referred

[1]In the state of Washington's workers' compensation system, the legislature has eliminated private insurance companies from the workers' compensation arena; the only two methods by which an employer may fulfill its duty to provide workers' compensation are by participation in the state workers' compensation fund or by qualifying as a self-insurer. RCW 51.04.010; *Washington Insurance Guaranty Assoc. v. The Dept. of Labor & Industries*, 859 P.2d 592 (Wash. 1993).

[2]Claimant also filed a separate claim for medical benefits which the Department rejected on May 13, 1996, on the ground that the claimant was an Oregon worker at the time of injury. In a June 4, 1996, letter of appeal, claimant's counsel challenged the Department's May 13, 1996 Order, but subsequently moved

for a formal hearing.

---

to have this appeal dismissed on September 18, 1996. In his Petition for Review at 3, claimant's counsel characterizes these proceedings as an attempt to reopen the initial denial.

In his Decision and Order, the administrative law judge determined that inasmuch as claimant conceded that his injury did not occur on a covered situs, he was not covered under the Longshore Act. Moreover, he rejected claimant's arguments that employer's conduct in denying the state claim based on the Longshore Act was somehow tantamount to an agreement to provide Longshore benefits and that collateral estoppel should apply to provide coverage. In so concluding, the administrative law judge determined that the record did not support the contention that employer was in any way negligent or otherwise acted wrongfully in the state forum, noting that there was no evidence that employer had taken any action to cause the state officials to deny the state claim, or represented to any state official that the claim should be denied on the ground that it was compensable under the Longshore Act. Rather, the administrative law judge found that the record established that employer had properly submitted the claim to the state for processing, and that claimant's own testimony was that his stepfather, and not employer, advised him incorrectly not to appeal or pursue the state decision. The administrative law judge further determined that, in any event, even if there had been negligence or misrepresentation on employer's part, it would not serve to bestow jurisdiction under the Act, and that, contrary to claimant's assertion, employer in this case at no time waived the situs requirement or agreed to Longshore Act coverage without regard to situs.[3] Finally, he found that neither the facts presented nor the cases cited by claimant support a finding that equitable relief is available against employer in the federal forum in the absence of any evidence that the statutory situs requirement is met, and that any claim for equitable relief would have to be filed in state court.

On appeal, claimant reiterates the argument that employer, through its state workers' compensation carrier, waived any defenses it may have had regarding coverage under the Longshore Act when it denied compensation under the state act based solely on the fact that claimant's injury came within the jurisdiction of the Longshore Act. Claimant maintains that because employer through its state carrier took a position in the state proceeding with which the claimant agreed, and which became the subject of a final state workers' compensation decision, employer should be collaterally estopped from changing its position in the federal proceeding.

---

[3]In rejecting claimant's suggestion that employer's acquiescence in accepting the state's rejection of the claim was tantamount to an agreement by the parties that Longshore Act coverage existed, the administrative law judge properly noted that *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137 (CRT)(9th Cir. 1991), contains nothing supporting claimant's suggestion that in that case the parties contracted for coverage under the Act even though none existed.

Employer responds, urging affirmance. Claimant replies that the administrative law judge erred in treating employer and the state carrier as separate entities and in not imputing the actions of the state insurer to the employer.

The administrative law judge's determination that claimant is not covered under the Longshore Act is affirmed. It is axiomatic that for a claim to be covered under the Act, a claimant must establish that his injury occurred upon a covered situs under Section 3(a) and that he was a maritime employee under Section 2(3) of the Act. 33 U.S.C. §§902(3), 903(a). *See Director, OWCP v. Perini North River Associates,* 459 U.S. 297, 15 BRBS 62 (CRT) (1983); *P. C. Pfeiffer Co. v. Ford,* 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Stone v. Ingalls Shipbuilding, Inc.* 30 BRBS 209 (1996); *Kennedy v. American Bridge Co*, 30 BRBS 1 (1996). Thus, in order to demonstrate that he is covered by the Act, a claimant must satisfy both the "situs" and "status" requirements. In the present case, as claimant conceded that his injury did not occur on a covered situs, the administrative law judge properly determined that he did not fall within the coverage of the Act. *See generally Rizzi v. Underwater Construction Corp.*, 84 F.3d 199, 30 BRBS 44(CRT) (6th Cir. 1996), *aff'g* 27 BRBS 273, *aff'd on recon.*, 28 BRBS 360 (1994), *cert. denied*, U.S. , 117 S.Ct. 302 (1996).

Claimant nonetheless argues on appeal that the state's actions in denying the state claim based on a finding of federal jurisdiction should be imputed to the employer and that, as employer through its insurance carrier effectively agreed to provide coverage under the Act, it should be estopped from contesting coverage in the federal forum based on equitable or collateral estoppel principles. We disagree, as the basic premise underlying claimant's argument is incorrect. Initially, employer has no private "state carrier;" its participation in the state fund in Washington is mandatory, and workers' compensation benefits are thus paid by the fund, rather than under an insurance policy. The Department of Labor and Industries is not an insurer, and it has no identity of interest with the employer. *See generally Washington Insurance Guaranty Assoc v. Dept .of Labor & Indus.*, 859 P.2d 592 (Wash. 1993). Thus, the action of the Department of Labor and Industries in rejecting the claim cannot be imputed to employer. In addition, the administrative law judge's finding that employer did not agree to Longshore coverage is supported by substantial evidence; employer did not take any action tantamount to stipulating to coverage, even if it could properly do so. *See generally Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997); *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84 (1985); *Mire v. The Mayronne Co.*, 13 BRBS 990 (1982)(holding stipulations regarding coverage ineffective).[4] Moreover, as federal courts are courts of limited

[4]Citing *Perkins v. Marine Terminal Corp.*, 673 F.2d 1097, 14 BRBS 77 (9th Cir. 1982), and *Ramos v. Universal Dredging Corp.*, 653 F.2d 1353, 13 BRBS 689 (9th Cir. 1981), claimant argues that the United States Court of Appeals for the

jurisdiction, jurisdiction that is otherwise lacking cannot be conferred by consent, collusion, laches, waiver, or estoppel. *See Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365, 377 n.21 (1978); *Mickler v. Nimishillen and Tuscarawas Railway* Co., 13 F.3d 164 (6th Cir. 1993), *cert. denied*, 511 U.S. 1084 (1994); *Franzel v. Kerr Mfg. Co.*, 959 F.2d 628, 630 (6th Cir. 1992)(citing *American Fire & Casualty Co. v. Finn*, 341 U.S. 6 (1951)).[5] Inasmuch as the administrative law

---

Ninth Circuit, within whose jurisdiction this case arises, has held that an employer can stipulate to situs or status if it wishes, where a claim has a sufficient connection with traditional maritime activity. Contrary to claimant's assertions, however, neither case addresses stipulations, which must evince a correct application of law. Rather, these cases address the relationship between coverage issues and the Board's subject matter jurisdiction. *See Hite v. Dresser Guiberson Pumping,* 22 BRBS 87 (1989). Thus, in *Ramos,* after holding that the Board erred in raising subject matter jurisdiction *sua sponte* since where claimant is injured on a site within admiralty jurisdiction, the sole issue is coverage, the court went on to state:

> By so holding, we do not mean to say that an employer and an employee should be able to stipulate that the tort occurred at a situs embodied in §903(a) and that the employee is engaged in "maritime employment," within the meaning of §902(3), when in fact the injury was suffered some fifteen or twenty miles inland and the employee was a bookkeeper for his stevedore employer. In this situation, a subject matter jurisdictional issue would be presented even through the parties might desire to contest only whether a disability existed.

Ramos, 653 F.2d at 139, 13 BRBS at 693-694. In the present case, claimant was injured on an inland public highway.

[5]We note that even if it were possible to confer jurisdiction under the Act based on equitable principles, the doctrine of collateral estoppel would not be applicable on the facts presented. Collateral estoppel bars a party from relitigating an issue if: (1) the issue at stake is identical to one alleged in prior litigation; (2) the issue was actually litigated in prior litigation; and (3) a determination on the issue in prior litigation was a critical and necessary part of the judgment in the earlier action. *Clark v. Bear Stearns & Co.*, 966 F.2d 1318, 1320 (9th Cir. 1992). Because the issue of jurisdiction under the Act was not actually litigated at the state level in this case, collateral estoppel could not be applied. *Figueroa v. Campbell Industries*, 45 F.3d 311 (9th Cir. 1995).

Equitable estoppel would be similarly unavailable. In *Rambo v. Director, OWCP*, 81 F.3d 840 (9th Cir. 1996), *vacated on other grounds*, 521 U.S. 121 (1997),

judge in the present case properly determined that even if there had been negligence or misrepresentation on employer's part, it could not serve to bestow jurisdiction under the Act where the facts otherwise fail to establish that the situs requirement was met, we affirm this determination, and consequently, his denial of Longshore benefits.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

---

the United States Court of Appeals for the Ninth Circuit identified a four-part test for such estoppel in Longshore cases: (1) the party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury. *Ellenburg v. Brockway*, 763 F.2d 1091, 1096 (9th Cir. 1985) (citing *Lavin v. Marsh*, 644 F.2d 1378, 1382 (9th Cir. 1981) In the present case, inasmuch as the administrative law judge rationally found that claimant's own testimony established that it was his stepfather, rather than employer, who advised him incorrectly not to appeal or pursue the state decision, the facts necessary for application of this doctrine are absent. *See Rambo*, 81 F.3d at 843.