BRB No. 99-938

GLEN TURK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN SHORE RAILROAD INCORPORATED	)	DATE ISSUED: April 13, 2000
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits and the Order Denying Motion to Vacate Order Pending Motion for Reconsideration of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Betty M. Tharrington (Kalfus & Nachman, P.C.), Norfolk, Virginia, for claimant.

F. Nash Bilisoly and Kelly O. Stokes (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer.

Laura Stomski (Henry L. Solano, Solicitor of Labor; Carol A. 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: SMITH and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Order Denying Motion to Vacate Order Pending Motion for Reconsideration (97-LHC-2717) of Administrative Law Judge Daniel A. Sarno, Jr., 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).[1] 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).

Eastern Shore Railroad (employer) owns railyards in Cape Charles, Virginia (on the Eastern Shore), and in Little Creek, Virginia (Norfolk area). Trains needing to cross the Chesapeake Bay traverse it via barges. The revenue-producing rail cars are uncoupled, put onto the barge, and, upon reaching the other side of the Bay, are coupled and attached to an engine for further travel to their final destination. Tr. at 31. Employer has done business in

[1]By Order dated July 6, 1999, the Board granted employer a permanent stay of payments, as it submitted evidence to show that irreparable harm would occur if it had to satisfy the award. 33 U.S.C. §921(b)(3); 20 C.F.R. §802.105(b). Pursuant to the Board's Order dated June 10, 1999, review of this case has been expedited. 20 C.F.R. §802.303(c).

essentially this same manner for 100 years.[2] Tr. at 122. The only difference between this railroad and others is the 26 miles of water between employer's two facilities. Tr. at 128. Employer's assets include: locomotives, "float bridges,"[3] "reach cars,"[4] train track, barges, and land. Emp. Ex. 3; Tr. at 38, 122-123, 125, 159.

In order to get a train onto a barge, the trainmen uncouple the cars, attach them to the reach cars and push them with a locomotive over the float bridge. Each barge is approximately 400 feet long and can carry seven or eight rail cars on each of the inner two tracks and four or five cars on each of the outer two tracks, depending on the length of the cars. Tr. at 34, 94. Jobs that also must be performed by trainmen when a barge is about to arrive or depart include: pinning the barge to the float bridge, releasing or setting brakes and wheel chocks on the train cars, shifting the train cars around the yard, coupling and uncoupling rail cars, hooking and unhooking hoses, and operating the float bridge. Tr. at 46.

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[2]In 1975, the Commonwealth of Virginia and two counties on the Eastern Shore formed a public commission to keep the railroad operating. Tr. at 122.

[3]The "float bridge" at each facility on the Chesapeake Bay is a structure which is hinged to the shore, is approximately 80 to 100 feet long, and has four tracks which align with those on the barge, allowing rail cars to pass between the land and the barge. The float bridge is supported by a pontoon which can be raised or lowered depending on the barge level and the tide. Tr. at 34-35, 132.

[4]"Reach cars" are empty rail cars that are light enough to roll onto the float bridge and long enough to cross the float bridge to push or pull the revenue-producing cars onto or off of the barge. They extend the reach of the locomotive, as the locomotives are too heavy for the float bridge.

On October 23, 1995, claimant, who was called to work every time a barge came in, was performing his duties as a trainman when he was injured.[5] Specifically, he was preparing to operate the hydraulic cylinder[6] on the float bridge when, in attempting to compensate for its damaged condition by trying to insert a pin into the mounting to secure the cylinder, he lost his footing and wrenched his back. Tr. at 54-56. Claimant suffered a moderate lateral disc protrusion at L5-S1 and a broadly-based central disc protrusion at L4-5. Cl. Ex. 3 at 31. He underwent a left partial hemilaminectomy of L5 and S1 and a removal of the extruding herniation of nucleus pulposus at the left L5 interspace in December 1995, and he was released to return to his usual work without restrictions in April 1996. Cl. Ex. 3 at 19, 24, 30; Tr. at 59-60. Despite the release to return to work, claimant did not return to his usual job; instead, he located other work. Cl. Ex. 7 at 4; Tr. at 64. In August 1996, Dr. Neal assigned temporary restrictions, and in October 1996, he made them permanent, concluding that claimant has a 10 percent permanent partial disability. Cl. Ex. 3 at 14-17. Claimant sought temporary total disability benefits under the Act from October 23, 1995, through April 29, 1996, and from August 9, 1996, and continuing. Employer, which has insurance coverage only for claims under the Federal Employees' Liability Act, 45 U.S.C. §51 *et seq.* (FELA), and is facing its first claim under the Longshore Act, disputed the claim, arguing that claimant is not a covered employee, and that even if he is covered, he is not entitled to benefits because his failure to return to work is not related to his work injury.

[5]Claimant testified that he worked as a trainman in the yard 90 percent of the time although he also is certified to be an engineer. Tr. at 42-45.

[6]The hydraulic cylinders are used to bring the barge in tightly to the float bridge and to raise or lower the float bridge as needed. Once the fit was snug, claimant could manually place the pins to secure the barge. Tr. at 48-49.

The administrative law judge found that the float bridge, which extends over navigable waters, resembles a pier because barges dock there. Therefore, he found that claimant satisfied the Act's situs requirement, 33 U.S.C. §903(a). Decision and Order at 4-5. Next, he determined that claimant satisfied the Act's status requirement, 33 U.S.C. §902(3), because claimant performed maritime employment in that he performed tasks integral to the loading and unloading process. Decision and Order at 7. The administrative law judge found that claimant could not return to his usual employment, as the duties of a trainman surpass his work restrictions, and that employer offered no evidence of suitable alternate employment; therefore, he awarded claimant temporary total disability benefits from October 23, 1995, through April 29, 1996,[7] August 9, 1996, through July 2, 1997, and April 23, 1998, and continuing. *Id.* at 10, 12. Finally, the administrative law judge noted that claimant worked between July 10, 1997, and April 22, 1998, in alternate employment. The administrative law judge found that the wages earned from this job reasonably represent claimant's post-injury wage-earning capacity; therefore, he awarded temporary partial disability benefits during that period. *Id.* at 11-12. Employer filed a motion to vacate the decision pending a motion for reconsideration. The administrative law judge denied the motion to vacate his decision.

Employer challenges the decisions on several grounds. First, it contends claimant is not a covered employee as he satisfied neither the situs nor the status requirements. Alternatively, it contends the administrative law judge erred in awarding claimant temporary total and temporary partial disability benefits. Finally, employer challenges the propriety of awarding a "continuing benefit" after the date of the hearing. Claimant responds on all issues, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), responds only on the coverage issue and urges affirmance.

Coverage

[7]The administrative law judge credited employer's evidence which established that after April 29, 1996, claimant's usual job was available to him but he did not return to work. Decision and Order at 10.

Employer contends claimant is a railroad worker, rather than a maritime employee, and that he is therefore not covered by the Act.[8] Claimant and the Director respond, arguing to the contrary that claimant is a covered employee. For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or that his injury occurred on a landward area covered by Section 3(a) and that his work is maritime in nature and is not specifically excluded by an exclusion contained in the Act. 33 U.S.C. §§902(3), 3(a), (b); *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); *Keating v. City of Titusville*, 31 BRBS 187 (1997). Thus, in order to demonstrate that coverage exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id.*

Situs

[8]Employer argues that the barge and the float bridge combine to form a very unique railroad bridge between its two facilities and that the float bridge should not be considered a covered situs under the Longshore Act because it is part of the operations of a railroad. The mere fact that employer operates a railroad does not prevent its railyard from being a covered situs under the Act. *See Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989); *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128 (1930); *Shives v. CSX Transportation, Inc.*, 151 F.3d 164, 32 BRBS 125(CRT) (4th Cir. 1998), *cert. denied*, 119 S.Ct. 547 (1998); *Etheridge v. Norfolk & Western Ry.*, 9 F.3d 1087 (4th Cir. 1993); *Hayes v. CSX Transportation, Inc.*, 985 F.2d 137 (4th Cir. 1993); *but see Artis v. Norfolk & Western Ry. Co.*, 204 F.3d 141 (4th Cir. 2000) (claimant denied coverage under the Act pursuant to election of remedies doctrine, as he previously filed and settled a claim under FELA).

Employer asserts that claimant does not meet the situs requirement of Section 3(a),[9] as claimant's injury did not occur over navigable waters, claimant's injury did not occur on a "pier" or other enumerated area, and if claimant's injury did occur on a pier, that pier was not customarily used for loading and unloading. Claimant responds, arguing that he was injured on a covered situs because the float bridge is a "pier," as the administrative law judge found, and a pier is an enumerated situs. The Director agrees with claimant, but he also argues that the float bridge is better considered an "other" adjoining area customarily used for loading and unloading. The United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, set forth the test for coverage under Section 3(a) to be applied in that circuit in *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (CRT) (4th Cir. 1995), *cert. denied*, 518 U.S. 1028 (1996). In *Sidwell*, the Fourth Circuit held that a covered situs under the Act must actually adjoin navigable waters; *i.e.*, it must be contiguous to and actually touch the navigable water. With regard to "other adjoining areas," the court stated that non-enumerated areas must be similar to the enumerated ones and must

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[9]Section 3(a), 33 U.S.C. §903(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 (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).

be customarily used for maritime activity. Thus, the *raison d'être* for the facility or structure must be for use in connection with navigable waters. *Id.*, 71 F.3d at 1138-1139, 29 BRBS at 142-144 (CRT).[10]

[10]For example, following its decision in *Sidwell*, the Fourth Circuit held that an injury sustained in a steel fabrication plant by an employee fabricating steel for an inland bridge did not occur on a covered situs. It held that the steel plant, located 1000 feet from the river, did not meet the geographical test and was not a facility the purpose of which was to serve navigable water. *Jonathan Corp. v. Brickhouse*, 142 F.3d 217, 32 BRBS 86 (CRT) (4th Cir. 1998), *cert. denied*, 119 S.Ct. 590 (1998); *see also Parker v. Director, OWCP*, 75 F.3d 929, 30 BRBS 10(CRT) (4th Cir. 1996), *cert. denied*, 519 U.S. 812 (1996); *Kerby v. Southeastern Public Service Authority*, 31 BRBS 6 (1997), *aff'd mem.*, 135 F.3d 770 (4th Cir. 1998) (table).

In this case, the administrative law judge determined that the float bridge constitutes a "pier" under Section 3(a) of the Act, as it meets the definition found in the *Merriam Webster's Collegiate Dictionary* (10th ed.).[11] Decision and Order at 5. We affirm his conclusion, as the barges dock at the float bridges. However, rather than relying solely on a standard dictionary definition, we believe the definition of "pier" set forth in *Hurston v. Director, OWCP*, 989 F.2d 1547, 26 BRBS 180(CRT) (9th Cir. 1993), is broad enough to encompass a structure such as the float bridge herein. *See also Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied*, 119 S.Ct. 444 (1998). Employer argues that the *Hurston* holding requires the "pier" to be a "structure *built on pilings* extending from land to navigable water[,]" *Hurston*, 989 F.2d at 1553, 26 BRBS at 190(CRT) (emphasis added), and that definition does not describe the float bridge. While *Hurston* does specifically refer to a pier as a structure on pilings, it also states that the question of whether a structure is covered is a factual one "which depends on the structure's appearance and location." *Id.* The structure at issue here, on pontoons, not pilings, extends out from land over the navigable waters and connects to the land by hinges, much like a floating dock or pier. Thus, we hold that the administrative law judge properly made an analogy between the float bridge and a pier.[12] *See Eckhoff v. Dog River Marina & Boat*

[11]The definition cited by the administrative law judge is: "a structure (as a breakwater) extending into navigable water for use as a landing place or promenade or to protect or form a harbor." *Merriam Webster's Collegiate Dictionary*; Decision and Order at 5.

[12]We reject employer's argument that a pier must be "customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel" as being contrary to the grammatical structure of the sentence in the Act. 33 U.S.C. §903(a). Neither the Supreme Court of the United States nor the Fourth Circuit has specifically determined whether areas enumerated in Section 3(a) are qualified by the phrase "customarily used" as are non-enumerated areas. *See Caputo*, 432 U.S. at 280-281, 6 BRBS at 170. However, both courts have indicated that the purpose of the 1972 amendments was to expand coverage landward and that reading the statute to require a functional analysis of enumerated areas might not accord to that purpose. *Caputo*, 432 U.S. at 280-281, 6 BRBS at 170; *Sidwell*, 71 F.3d at 1139-1140 n.10, 29 BRBS at 143(CRT) n.10; *see also Brooker v. Durocher Dock & Dredge*, 133 F.3d 1390, 31 BRBS 212(CRT) (11th Cir. 1998) (court avoided issue of whether "customarily used" modifies "pier"); *but see Hurston*, 989 F.2d at 1547, 26 BRBS at 180(CRT) (function of enumerated areas is irrelevant as the type of structure defines whether it is a covered situs); *Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989) (pier is covered situs regardless of its customary use); *Rhodes v. Healy Tibbits Const. Co.*, 9 BRBS 605 (1979) (Miller, J., dissenting) (modifying language applies only to "other adjoining areas"). In any event, the record in this case supports the administrative law judge's finding that the float bridge is used only for loading and unloading barges; thus, such activity would

Works, Inc., 28 BRBS 51 (1994).

Even absent the analogy with a pier, the float bridge would be a covered situs. Section 3(a) states that an area is covered if it is an "other adjoining area customarily used by an employer in loading, unloading, [*etc.*]" The float bridge is clearly an "other adjoining area" which is customarily used to load and unload rail cars from barges, as the record establishes that it is used only for this purpose. The Fourth Circuit has specifically held that an "other adjoining area" must abut a body of navigable water to even be considered as a covered area. *Sidwell*, 71 F.3d at 1138-1139, 29 BRBS at 142(CRT). The float bridge meets this standard. In fact, under *Sidwell*, employer's facility, including the float bridge, constitutes an adjoining area because it directly abuts the Chesapeake Bay, and its *raison d'être* is as a juncture between land and water transportation for trains crossing the Bay. *See id.* The float bridge itself is a "discrete shoreside structure" which is "*like* a 'pier,' 'wharf,' 'dry dock,' [etc.]" Because it extends over the water, allowing barges to dock for purposes of loading and unloading rail cars thereon, it satisfies the situs test. *Id.*, 71 F.3d at 1139, 29 BRBS at 143(CRT) (emphasis in original); Emp. Ex. 5 at 59; Tr. at 30. Therefore, viewed in either light, we affirm the administrative law judge's conclusion that the float bridge constitutes a covered situs.[13]

Status

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comport with the more restrictive definition espoused by employer. *See* discussion *infra.*

[13]Because this case can be resolved on the grounds established by the administrative law judge, we decline to address the Director's argument that the administrative law judge erred in determining that claimant's injury did not occur over navigable waters.

Employer also argues that claimant does not have the requisite status to be covered by the Act because claimant is a railroad worker performing the duties of a trainman. Generally, a claimant satisfies the "status" requirement of the Act if he is an employee engaged in work which involves loading, unloading, constructing, or repairing vessels. *See* 33 U.S.C. §902(3).[14] Employees of railroads are covered under the Act if they perform work which is essential to the loading and unloading of vessels. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989); *Shives v. CSX Transportation, Inc.*, 151 F.3d 164, 32 BRBS 125(CRT) (4th Cir. 1998), *cert. denied*, 119 S.Ct. 547 (1998). In *Schwalb*, the Supreme Court held that employees of a railroad who repair and maintain equipment used in the loading or unloading process are integral to those processes and, thus, are covered employees. *Schwalb*, 493 U.S. at 47, 23 BRBS at 99(CRT). In reaching this conclusion, the Supreme Court stated that Section 2(3) requires only that a land-based employee's activity be "an integral part of and essential to" loading or unloading. *Id.* Though the activity must be essential to the process in order to satisfy the Section 2(3) requirement, the employee need only "spend at least some of [his] time in indisputably longshoring operations." *Caputo*, 432 U.S. at 273, 6 BRBS at 165. The administrative law judge found that claimant's duties were integral to the loading and unloading process. Decision and Order at 7. Specifically, he found that claimant's duties included pinning the barges to the float bridge and operating the float bridge so as to facilitate the movement of the rail cars from the barge to the land and vice versa. Based on this evidence, the administrative law judge concluded that claimant

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[14]Section 2(3), 33 U.S.C. §902(3), provides in pertinent part:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include--[specific exclusions . . . provided those individuals are covered by another workers' compensation law].

spent "at least some time" in covered activities.[15] Decision and Order at 7.

[15]The administrative law judge noted that, while he was sympathetic to employer's plight and its business as a railroad, the activities performed by claimant were, nonetheless, maritime in nature. Decision and Order at 7.

Although employer does not dispute the administrative law judge's description of claimant's duties, it disputes the essence of them, *i.e.*, employer states that claimant's duties are railroading functions, performed by trainmen anywhere: he did not load and unload cargo; rather, he coupled and uncoupled trains. While we agree that claimant performed railroading functions, and his duties of releasing and setting brakes and wheel chocks or of moving rail cars are common among trainmen, we are persuaded that, as very few trainmen assist in the docking process by pinning barges to a float bridge or by operating a hydraulic float bridge which sits on a navigable body of water to move train cars about, claimant's duties also include maritime activities. Even employer itself admitted its method of transporting rail cars across a body of water is unique.[16] Tr. at 128. Based on the fact that claimant pinned barges to the float bridge and operated a float bridge to load or unload rail cars to or from a barge, we affirm the administrative law judge's determination that claimant performed maritime work and satisfied the status requirement. *See Shives*, 151 F.3d at 164, 32 BRBS at 131(CRT); *Etheridge v. Norfolk & Western Ry.*, 9 F.3d 1087 (4th Cir. 1993).

We reject employer's attempt to distinguish between loading and unloading *rail cars* and loading and unloading *cargo from rail cars*. The Fourth Circuit has declined to adopt a "cargo requirement," finding it would "be contrary to [the policy of liberally construing the definition of 'maritime employment'] and a disservice to the LHWCA." *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 126, 28 BRBS 89, 94(CRT) (4th Cir. 1994). Moreover, as the Director notes, the rail cars in question typically carry cargo and are themselves "containers," so cargo is moved when the rail cars are moved, and the Supreme Court stated: "From the standpoint of maritime employment, it obviously makes no difference whether the freight is placed in the hold or on the deck of a vessel, or whether the vessel is a car float or a steamship." *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128, 134 (1930). The Board has also stated that "cargo" can be any freight carried by a transport vessel, and it held that the loading/unloading of bridge parts and construction materials is maritime employment. *Kennedy v. American Bridge Co.*, 30 BRBS 1, 3 (1996). As cargo can take any number of forms and as there is no specific requirement regarding cargo under the Act, employer's argument fails, and we affirm claimant's status as a maritime worker.

Disability

Employer next argues that, if claimant is a covered employee, it should not be held liable for any benefits after April 29, 1996, because claimant was released to return to his usual work without restrictions and, upon failing to return to work in April 1996, claimant relinquished his right to disability benefits. Moreover, employer asserts that it should be

[16]The only other railroad operation in the country which uses barges similar to employer is in New York where the trains cross four miles of water. Tr. at 128.

relieved of liability for any disability because claimant's injury while working for a subsequent employer in August 1996 was an intervening injury which severed the connection between his disability and his work injury. Claimant argues that this contention was not raised before the administrative law judge and may not be raised for the first time on appeal. Employer replies, stating that its intervening cause argument is merely another "legal mechanism" for shifting liability from itself in support of its contention that claimant gave up his entitlement to benefits by failing to return to work.

Generally, a party may not raise a new issue on appeal. *Boyd v. Ceres Terminals*, 30 BRBS 218, 223 (1997). An exception to this rule is where a pure question of law is concerned and failure to address it would result in a miscarriage of justice. *See Bernuth Marine Shipping, Inc. v. Mendez*, 638 F.2d 1232 (5th Cir. 1981). However, the issue now raised by employer is not a pure question of law; rather, it is a factual one which requires a determination by an administrative law judge. The Board previously has declined to address such factual issues in *Levesque v. Bath Iron Works Corp.*, 13 BRBS 483, *aff'd*, 673 F.2d 1297 (1st Cir. 1981) (table) (claimant asserted work injury aggravated a pre-existing condition), and *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988) (employer contended disability was result of intervening injury), when those arguments were not raised before the administrative law judge. Because employer failed to first raise the issue of whether claimant's disability was the result of a subsequent intervening injury before the administrative law judge, we decline to address it on appeal. *Harrison*, 21 BRBS at 339. The administrative law judge's determination that claimant is entitled to disability benefits is affirmed.

Continuing Award

Finally, employer contends the administrative law judge is not empowered to award benefits beyond the date of the hearing, as he does not have evidence of a continuing disability beyond that date on which to base such an award. Specifically, employer alleges the administrative law judge does not have evidence which shows whether claimant is still disabled, whether he has returned to work or whether his wage-earning capacity has increased. In support of this contention, employer relies on *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994), wherein the Supreme Court stated that, pursuant to the Administrative Procedure Act, 5 U.S.C. §551 *et seq.* (the APA), an administrative law judge's decision must be based upon the record presented before him. Moreover, employer disputes the rebuttal argument that the use of Section 22, 33 U.S.C. §922, modification is a remedy because it does not apply retroactively and cannot compensate employer for benefits paid between, for instance, the hearing and the date of the decision. In a footnote, the administrative law judge rejected employer's argument, stating that an award of continuing benefits with the possibility of a Section 22 modification does not violate the APA. Decision and Order at 10 n.10.

We also reject employer's argument. The Act provides that disability awards continue for the duration of the disability. 33 U.S.C. §908(b); *see also* 33 U.S.C. §908(a), (c)(21), (c)(23); *Hoodye v. Empire/United Stevedores*, 23 BRBS 341, 343 (1990). Contrary to employer's assertion, the APA merely requires an administrative law judge's decision to identify his conclusions and his reasons therefor based on the record before him. 5 U.S.C. §557. Provided the record contains credible evidence of a long-term or continuing disability, and the administrative law judge bases his decision on that evidence, then there is substantial evidence to support a continuing award, and the decision does not violate the APA. *See generally Greenwich Collieries*, 512 U.S. at 267, 28 BRBS at 43(CRT); *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 61 (1985). Should a party later believe there is a change in conditions or there was a mistake in the determination of a fact, that party can request a modification of the award under Section 22.[17] To cease benefits as of the date of the hearing as employer argues would be judicially inefficient and would require the perpetual re-opening of records and issuance of new decisions for every claimant entitled to permanent or temporary disability benefits on a long-term basis. Thus, employer's argument against the continuing award in this case lacks merit, and we affirm the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order is affirmed.[18]

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge

[17]Contrary to employer's argument, Section 22 modification can be applied retroactively to an increase or decrease in the award, if, in the latter instance, the employer has a continuing obligation to pay benefits. 33 U.S.C. §922; *Spitalieri v. Universal Maritime Services*, 33 BRBS 6, *aff'd on recon. en banc*, 33 BRBS 164 (1999) (Brown and McGranery, JJ., dissenting).

[18]In light of our decision, we hereby lift the stay of payments previously granted to employer. The benefits awarded by the administrative law judge are due, 33 U.S.C. §914(f), unless the Fourth Circuit grants employer an additional stay of payments. 33 U.S.C. §921(c).