

MARK S. HILLER )  
 )  
 Claimant-Petitioner )  
 )  
 v. )  
 )  
 MADDEN INDUSTRIES CRAFTSMEN ) DATE ISSUED: \_\_\_\_\_  
 )  
 and )  
 )  
 SAIF CORPORATION )  
 )  
 Employer/Carrier- )  
 Respondents ) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Thomas J. Flaherty, Portland, Oregon, for claimant.

Carrol J. Smith, Salem, Oregon, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (92-LHC-01046) of Administrative Law Judge Henry B. Lasky 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).

On May 3, 1990, claimant sustained an injury to his distal right bicep when he fell while sandblasting a turbine receptacle during the course of his employment with employer, a company which provided industrial maintenance services at a Portland General Electric (PG&E) power plant. PG&E had hired employer to provide sandblasting and maintenance services. Claimant filed a claim for compensation under the Act on October 31, 1990.

The PG&E power plant building, wherein claimant sustained his injury, is operated for the sole purpose of generating hydro-electric power for sale to the public. The power plant consists of a permanent building attached to the bed of the Willamette River in West Lynn, Oregon; the building sits on a peninsula extending from the river's banks. PG&E does not dam or store the river water used by its facility, nor does it control the flow of the river water affecting the navigability of the river outside the building. Rather, PG&E uses the natural "river run" to generate electricity. Specifically, a small percentage of the Willamette River flows through a nine-foot diameter pipe which leads inside the power plant building; the water ultimately turns the turbines which, in turn, produce electricity. PG&E opens the gates on the upper river side of the power plant building to allow water to flow through this nine-foot pipe which decreases in size, thereby resulting in an increase in the water's velocity which, in turn, powers the turbines and produces electricity. The water then continues through the building and exits into the normal river flow to resume its course. At the time of his injury, claimant was sandblasting one of the thirteen turbine receptacles or housings located in the sub-basement of the power plant building when an air surge in the sandblasting hose which he was using forced claimant to fall from a five-foot platform. At the time of claimant's fall, there was no water flowing through this turbine receptacle, and the turbine had been removed to allow the maintenance work to be performed.

In finding that the claim was not covered under the Act, the administrative law judge determined that the situs requirement of Section 3(a), 33 U.S.C. §903(a), had not been satisfied. Specifically, he found that the power plant building was permanently affixed to the river bed and that the water which would run through its sub-basement, past the platform from which claimant fell and was injured, was not actual navigable water. The administrative law judge also noted that the power plant building was not a building used in the loading, unloading, repairing or building of a vessel. The administrative law judge also determined that claimant did not meet the status requirement of Section 2(3), 33 U.S.C. §902(3), because his sandblasting work at PG&E does not constitute maritime employment. Accordingly, the administrative law judge denied the claim for lack of jurisdiction.

On appeal, claimant contends that his injury occurred on navigable waters. Citing *Morrison-Knudsen Co. v. O'Leary*, 288 F.2d 542 (9th Cir.), cert. denied, 368 U.S. 817 (1961), claimant asserts that because the power plant is attached to the river bed, the place of his injury is a maritime situs. Claimant also argues that, similar to the workers in *O'Leary*, he was engaged in a maritime activity at the time of his injury; specifically, claimant avers that sandblasting is a maritime activity.<sup>1</sup>

---

<sup>1</sup>Contrary to claimant's assertion, the Section 20(a), 33 U.S.C. §920(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). Rather, the Board has held that claimants must satisfy both the status and situs tests without benefit of the presumption. *Hagenzeiger v. Norton Lilly & Co.*, 22 BRBS 313 (1989); *Boughman v. Boise Cascade Corp.*, 14 BRBS 173 (1981). Additionally, claimant's contention that doubts must be resolved in his favor lacks merit. See *Director, OWCP v. Greenwich Collieries*, U.S. , 114 S.Ct. 2251, 28 BRBS 43

Employer/carrier (employer) responds, urging affirmance of the administrative law judge's Decision and Order.

To be covered under the Act, 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); *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). 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 navigable waters of the United States, including any dry dock. See 33 U.S.C. §903(a)(1970)(amended in 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.<sup>2</sup> In *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 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); *Laspragata v. Warren George, Inc.*, 21 BRBS 132, 134 n.3 (1988).

This case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit, which addressed the issue of navigability of a waterway for purposes of admiralty jurisdiction in *Adams v. Montana Power Co.*, 528 F.2d 437 (9th Cir. 1975).<sup>3</sup> *Adams* clearly

---

(CRT) (1994).

<sup>2</sup>Section (3)(a) of the Act provides:

...compensation shall be payable under this Act 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).

33 U.S.C. §903(a).

<sup>3</sup>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.

establishes that the Ninth Circuit follows the rule set forth by the United States Supreme Court in *The Daniel Ball*, 10 Wall. 557, 19 L.Ed. 999 (1871), that navigability, in the context of admiralty law, is based on the use or potential use of a waterway for commerce between ports. Therefore, a showing of present commercial use or susceptibility to future commercial use must be made in order for a waterway to be navigable under admiralty law. *Adams*, 528 F.2d at 439-440. This condition precedent to establishing the navigability of a waterway has been consistently recognized by the Board. See *Nelson v. Guy F. Atkinson Construction Co.*, 29 BRBS 39 (1995); *George v. Lucas Marine Construction*, 28 BRBS 230 (1994); *Lepore v. Petro Concrete Structures*, 23 BRBS 403 (1990). Thus, the Board has 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 commerce between ports. *Nelson*, 29 BRBS at 41 n.2; *George*, 28 BRBS at 237; *Lepore*, 23 BRBS at 406.

We affirm the administrative law judge's conclusion that claimant was not injured on actual navigable waters. Initially, we reject claimant's contention that *O'Leary* is dispositive of this issue. The claimants in *O'Leary* were working from a boat floating on actual navigable waters, specifically the Snake River, at the time of their deaths. In contrast, claimant in the instant case was injured while cleaning a turbine receptacle which was deprived of water and was located in the sub-basement of a power plant building attached to the riverbed. The administrative law judge initially found that water entering the power plant building through a nine-foot pipe, which decreases in size, and passing into the sub-basement of the PG&E building into the turbine receptacles, is not actual navigable water as no vessel, however small, could go there. See *Rizzi v. Underwater Const. Corp.*, 27 BRBS 273, *aff'd on recon*, 28 BRBS 360 (1994); *George*, 28 BRBS at 230; *Silva v. Hydro-Dredge Corp.*, 23 BRBS 123 (1989). The administrative law judge further found that the power plant building is permanently affixed to land; thus, the area wherein claimant was injured is not likely to be returned to the river. See *Lepore*, 23 BRBS at 407 (wherein the Board affirmed an administrative law judge's finding that a flume under the World Trade Center through which the waters of the Hudson River flowed for purposes of heating and cooling the building was not navigable water); *Laspragata*, 21 BRBS at 132 (wherein the Board affirmed the administrative law judge's finding that claimant, who was injured on the platform of a sewage treatment plant, was not injured on navigable waters). Lastly, the administrative law judge distinguished claimant in the instant case from the claimant in *Perini* who was injured on actual navigable waters.

---

*Adams*, 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.

We hold that the administrative law judge's finding that claimant was not injured on actual navigable waters is supported by substantial evidence, and is in accordance with law. Claimant has set forth no conclusive precedent in support of his assertion that a turbine receptacle located within a power plant's sub-basement through which water flowed for purposes of generating electricity can be considered navigable water for the purpose of establishing jurisdiction under the Act. It is undisputed that claimant's injury occurred in an area permanently removed from the Willamette River and that the water which flowed into the sub-basement of the power plant could not be traversed by any vessel. Accordingly, as claimant's injury did not occur on a body of water used in maritime commerce, we affirm the administrative law judge's finding that claimant was not injured on actual navigable waters.<sup>4</sup> *See generally Nelson*, 29 BRBS at 39; *Rizzi*, 27 BRBS at 273; *Johnson*, 25 BRBS at 332-333; *Silva*, 23 BRBS at 125. Pursuant to our disposition of the situs issue, we need not address the parties' contentions regarding the status issue. *See Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982).

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

SO ORDERED.

BETTY JEAN HALL, Chief  
Administrative Appeals Judge

ROY P. SMITH  
Administrative Appeals Judge

REGINA C. McGRANERY  
Administrative Appeals Judge

---

<sup>4</sup>Claimant does not allege on appeal that his injury occurred on a covered landward situs under Section 3(a).