

JOE D. GRIFFIN, JR.)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
McLEAN CONTRACTING COMPANY)	DATE ISSUED:
)	
and)	
)	
THE SCHAFFER COMPANIES,)	
LIMITED)	
)	
Employer/Carrier-)	
Respondents)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Robert A. Rappaport and Lynne M. Ferris (Knight, Dudley, Clarke & Dolph, P.L.C.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-574) 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). 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).

Claimant worked for employer from November 1993 until July 17, 1994, as a concrete finisher on the Rudee Inlet bridge and highway reconstruction project. This project entailed widening a portion of Pacific Avenue in Virginia Beach, Virginia, from two to four lanes, as well as construction of a two-lane bridge adjacent to the existing two-lane bridge on Pacific Avenue. Claimant filed for benefits under the Act, alleging that he injured his neck on May 12, 1994, when

he was working on a concrete diaphragm between girders of the bridge, which was over navigable waters.

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. §908(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 not, as claimant asserted, on a concrete diaphragm but, rather, that the injury occurred while claimant was working on a drop inlet which was a part of the roadway portion of the project; accordingly, the administrative law judge concluded that claimant's injury did not occur on 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 for any maritime purpose. Accordingly, the administrative law judge denied the claim.

On appeal, claimant alleges that the administrative law judge erred in finding that he was not injured over navigable waters while working on a concrete diaphragm, as the administrative law judge's finding is predicated on testimony that is inherently incredible and irrational. Alternatively, claimant contends that the drop inlet locale of his injury is a covered situs under the Act. Employer responds, urging affirmance.

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 Pulkoski v. Hendrickson Bros., Inc.*, 28 BRBS 298 (1994); *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 administrative law judge erred in relying upon the testimony of project superintendent Cleve Barrow, assistant project superintendent Sam Blevins, and claimant's foreman, Joe Sawyer. In his Decision and Order, the administrative law judge, after setting forth the testimony of claimant and the three aforementioned employees of employer, credited the testimony of those three individuals, as well as the business records of employer, finding that evidence to be both compelling and overwhelming. Based upon that evidence, the

administrative law judge concluded that on May 12, 1994: there were no concrete diaphragms in place on the bridge; all road and bridge work was over land; and claimant was working on a drop inlet, which was part of the road construction portion of the contract. *See* Decision and Order at 7. In adjudicating a claim, it is well-established that is the duty of the administrative law judge to determine the credibility of witnesses and to ascribe weight to their testimony, *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT)(4th Cir. 1994), and he is not bound to accept the opinion or theory of any particular witness. *See Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962). In the instant case, we hold that the administrative law judge's credibility determinations are rational and within his authority as factfinder, and as employer's business records and the testimony of Messrs. Burrow, Blevins and Sawyers constitute substantial evidence to support the administrative law judge's ultimate finding, we affirm the administrative law judge's determination that claimant was not injured over navigable waters and thus is not covered under the Act pursuant to the Supreme Court's holding in *Perini*. *See generally Pulkoski*, 28 BRBS at 298; *Johnsen*, 25 BRBS at 329.

Alternatively, claimant asserts that, should the administrative law judge's finding that he sustained an injury while working on a drop inlet be affirmed, the site of that drop inlet should satisfy the situs requirement contained in Section 3(a), 33 U.S.C. §903(a), of the Act. While injury on actual navigable waters is sufficient to establish coverage under both Sections 2(3) and 3(a) of the Act, 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). In *Sidwell v. Express Container Services, Inc.*, 71 F.3d 1134, 29 BRBS 138 (CRT)(4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit, wherein this case arises, held that an area is "adjoining" navigable waters only if it is contiguous with or otherwise touches navigable waters. To be included as an "other area" under the Act, the court additionally stated that the area must be "customarily used by employer in loading, unloading, repairing, dismantling, or building a vessel." *Id.*, 71 F.3d at 1138-1139, 29 BRBS at 143 (CRT); *see Parker v. Director, OWCP*, 75 F.3d 929, 30 BRBS 10 (CRT)(4th Cir. 1996).

In his Decision and Order, the administrative law judge concluded that the site of claimant's injury was not an "adjoining area," based upon a finding that the drop inlet area was part of the roadway portion of the project, was over land, and that no evidence was presented to establish that

the roadway site has any maritime purpose.¹ 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. Rather, all of the evidence of record indicates that the drop inlet at issue was located on a roadway leading to a yet-to-be-constructed bridge. 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 Sidwell*, 71 F.3d at 1134, 29 BRBS at 138 (CRT). Thus, as we have previously affirmed the administrative law judge's finding that claimant's injury did not occur on navigable waters, 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. *See Pulkoski*, 28 BRBS at 298.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

¹No party contends that claimant's injury occurred on an enumerated situs.