BRB No. 99-1154

PHYLLIS KEHL (Widow of EUGENE KEHL) Claimant-Respondent v. MARTIN PAVING COMPANY and FLORIDA EMPLOYERS INSURANCE SERVICE CORPORATION Employer/Carrier-Petitioners	)	DATE ISSUED: Aug. 20, 2000 DECISION and ORDER

Appeal of the Decision and Order on Remand Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Daniel P. Faherty and Charles W. Smith (Cianfrogna, Telfer, Reda, Faherty & Anderson P.A.), Titusville, Florida, for claimant.

John C. Taylor, Jr., and Rhonda B. Boggess (Taylor, Day & Currie), Jacksonville, Florida, for employer/carrier.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Granting Benefits (1992-LHC-2620) of Administrative Law Judge Pamela Lakes Wood 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).

On February 5, 1988, decedent was performing his duties as a carpenter in the

construction of the Eau Gallie Causeway Bridge over the Intracoastal Waterway in Florida.[1] After taking a piece of cut lumber to a co-worker, decedent walked on wooden planks on an unfinished part of the bridge to return to his workstation. In so doing, his pants leg got caught on a piece of steel rebar, and he fell through an opening in the planks. His jacket sleeve snagged on the steel rebar, momentarily suspending him, but then ripped before help could arrive. He fell to his death, striking the concrete foundation of the bridge, and his body then fell into the water. Employer voluntarily paid death benefits under the state workers= compensation act. Claimant, decedent=s widow, filed a claim for death benefits under the Act. *See* 33 U.S.C. '909.

Administrative Law Judge E. Earl Thomas found, based on *LeMelle v. B.F. Diamond Construction Co.*, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), *cert. denied*, 459 U.S. 1177 (1983), that decedent was a covered worker because his work required him to work Aover navigable water.@ Decision and Order at 5. Judge Thomas was Aalso . . . impressed@ by the fact that life preservers were available to decedent and his co-workers. Additionally, Judge Thomas acknowledged that evidence established that carpenters, similar to decedent, sometimes worked in boats, although he recognized there was no evidence of record to show that decedent did so. *Id.* Employer appealed Judge Thomas=s decision to the Board; however, the case was administratively affirmed on September 12, 1996, pursuant to Public Law 104-134. Employer then appealed to the United States Court of Appeals for the Eleventh Circuit.

The Eleventh Circuit remanded the case for additional fact-finding on both the status and situs issues. The court stated that, as decedent was not injured on an enumerated situs, 33 U.S.C. '903(a), claimant must establish that decedent was injured on actual navigable waters of the United States in order to satisfy the Act=s situs requirement. The court further held that because decedent was not engaged in the loading, unloading or building of ships, his work fails the status requirement, 33 U.S.C. '902(3), unless his employment duties required him to work on actual navigable waters. The court concluded that, as Judge Thomas=s findings on these relevant issues were minimal, the case must be remanded for more detailed findings of fact. Moreover, the court stated that it was not precluding the administrative law judge from inquiring as to other relevant facts. *Martin Paving Co. v. Kehl*, No. 96-3566 (11th Cir. July 30, 1998).

[1]Part of the bridge was complete and two lanes were open to traffic. The other half of the bridge, separated from the lanes of traffic by jersey barriers, was still under construction. Jt. Exs. 5, 6 at 18.

On remand, Administrative Law Judge Pamela Lakes Wood (the administrative law judge) recounted the facts established before Judge Thomas, noting the poorly developed record, but determined that she need not re-open the record because of the basis upon which she was rendering her decision. Decision and Order on Remand at 2 n.2. The administrative law judge determined that the span of bridge on which decedent was working when he fell was incomplete and, therefore, was not permanently affixed to land. Because the bridge was still under construction, she determined that the water thereunder was not removed from navigation. Consequently, the administrative law judge found that decedent=s fall occurred while he was upon navigable waters and that the situs test was satisfied. Decision and Order on Remand at 8. Next, the administrative law judge found that decedent=s job required him to work over navigable waters every day, and she inferred that the bridge under construction was Alogically intended to aid navigation.@ Decision and Order on Remand at 10-11. Therefore, she concluded that decedent=s job on navigable waters satisfied the status test, and it was not necessary to consider whether he may have loaded and unloaded vessels in connection with his work. *Id.* at 11. Employer appeals the decision on remand, and claimant responds, urging affirmance.

For a claim to be covered by the Act, a claimant must establish that the injury occurred upon the navigable waters of the United States, including any dry dock, or that the injury occurred on a landward area covered by Section 3(a) and that the work is maritime in nature and is not specifically excluded by the Act. 33 U.S.C. ''902(3), 3(a); *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). Thus, in order to demonstrate that coverage exists, a claimant must satisfy the Asitus@ and the Astatus@ requirements of the Act. *Id.* In *Perini*, the Supreme Court of the United States 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). Thus, such a claimant satisfies both the situs and status requirements and is covered by the Act, unless he is specifically excluded from coverage by another statutory provision. *Perini*, 459 U.S. at 323-324, 15 BRBS at 80-81(CRT);[2] *see also Pulkoski v. Hendrickson Brothers, Inc.*, 28 BRBS 298 (1994); *Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992). The Supreme Court has also held that a structure

[2]The Eleventh Circuit has held that the status test is not satisfied by virtue of an injury occurring on actual navigable waters if the employee=s presence on the water is merely transitory or incidental to his land-based employment. *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *but see Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir.1999) (*en banc*) (employee who regularly performed work on navigable waters was covered even though that work represented only a small portion of his overall time). The Supreme Court, in *Perini*, declined to address this issue. *Perini*, 459 U.S. at 323 n.34, 15 BRBS at 80 n.34.

which is permanently affixed to land is considered an extension of land and does not fall within pre-1972 Act jurisdiction. *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969). *Accord Johnsen*, 25 BRBS at 333. *See also Herb=s Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985).

With regard to bridge workers, the Board has generally held that such employees are not on covered situses and are not engaged in maritime work, because bridges aid highway commerce, unless they can establish either that their duties included working or loading or unloading materials from vessels on navigable waters or that the bridge is being constructed to aid navigation. *Crapanzano v. Rice Mohawk, U.S. Constr. Co., Ltd.*, 30 BRBS 81 (1996); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996); *Pulkoski*, 28 BRBS at 298; *Johnsen*, 25 BRBS at 329; *Nold v. Guy F. Atkinson Co.*, 9 BRBS 620 (1979) (Miller, dissenting), *dismissed*, 784 F.2d 339 (9th Cir. 1986). Similarly, in *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 13 BRBS 1048 (5th Cir. 1981), *cert. denied*, 459 U.S. 1169 (1983), the United States Court of Appeals for the Fifth Circuit held that because the claimant, a bridge construction foreman, was injured while unloading pilings from a barge upon navigable waters, he was covered by the Act. In *LeMelle*, 674 F.2d at 296, 14 BRBS at 609, the United States Court of Appeals for the Fourth Circuit held that a construction worker injured while building a bridge over navigable waters was covered because record evidence established that the bridge was designed to aid navigation. *See* discussion *infra*.

Initially, employer contends this case involves only the question of whether decedent=s injury occurred on navigable waters, as the Eleventh Circuit held the record was insufficient to establish post-1972 Act coverage pursuant to Sections 2(3) and 3(a). Employer is correct. The Eleventh Circuit specifically held that decedent was not killed on an enumerated situs, such as a pier or dry dock, and that the only way to satisfy the situs requirement was if the injury to decedent occurred on navigable waters.[3] *Kehl*, slip op. at 4.

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[3]Section 3(a), as amended, 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).

The court did not mention Aother adjoining area,@ and the administrative law judge stated that her finding that the injury occurred over navigable waters negated any reason to address whether the bridge was an Aother adjoining area.@ *Kehl*, slip op. at 4-6; Decision

With regard to status, the court stated that because decedent was not engaged in traditional maritime employment, he failed the status test unless he was injured on actual navigable waters and his duties required him to work upon those waters. *Id.* at 6-7. The Eleventh Circuit then remanded the case for further fact-finding, specifically stating it was not limiting the administrative law judge=s inquiry. On remand, however, the administrative law judge elected not to re-open the record and, thus, was limited to the same information originally before Judge Thomas and the Eleventh Circuit B the same evidence the Eleventh Circuit found insufficient to establish post-1972 Act coverage. 33 U.S.C. ''902(3), 903(a); *Kehl*, slip op. at 4-7. Consequently, as employer asserts, the only way to establish coverage is by showing that decedent=s injury occurred upon navigable waters in the course of his employment on those waters. *Perini*, 459 U.S. at 323-324, 15 BRBS at 80-81(CRT); *Caserma v. Consolidated Edison Co.*, 32 BRBS 25 (1998). As no party disputes that decedent worked on a bridge and was killed in the course of his employment on that bridge, that the bridge was at least partially under construction, that the bridge spanned the navigable waters of the Intracoastal Waterway, or that decedent=s death occurred before he fell into the water, we need resolve only the legal issue of whether decedent=s death on this bridge occurred Aupon the navigable waters of the United States@ pursuant to Section 3(a) of the Act.

The administrative law judge found that the structure from which decedent fell was not permanently attached to land because it was a portion of the bridge which was still under construction. We hold that the administrative law judge was in error in concluding that the bridge in question was not permanently attached to land on the ground that it was under construction. Undisputed testimony in this case establishes that the bridge was in use for highway traffic over the Intracoastal Waterway at the time in question, notwithstanding the construction project. Pedestrians and construction workers alike could also access and cross the bridge on foot. Jt. Ex. 6 at 18, 66-67. The administrative law judge=s conclusion that the bridge was not permanently attached to land is unfounded in light of this testimony that it was being used by vehicles and foot traffic. *See Johnsen*, 25 BRBS at 333. The administrative law judge=s conclusion, therefore, is reversed. *See, e.g., Goins v. Noble Drilling Corp.*, 397 F.2d 392 (5th Cir. 1968); *Howell v. Einbinder*, 350 F.2d 442 (D.C. Cir. 1965).

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and Order on Remand at 8. In any event, the record contains no evidence showing that the bridge was Acustomarily used@ for loading and unloading, or other maritime purpose, as is required for non-enumerated sites. 33 U.S.C. '903(a); *Turk v. Eastern Shore Railroad*, 34 BRBS 27, 30 n.12 (2000); *Rhodes v. Healy Tibbits Constr. Co.*, 9 BRBS 605 (1979).

In 1969, the Supreme Court stated definitively that structures such as piers, wharves and bridges are permanently affixed to land and are extensions of land, and injuries occurring thereon are not compensable under the Act.[4] *Nacirema*, 396 U.S. at 214-215. The Court stated that the phrase Aupon navigable waters@ does Anot cover injuries on a pier even though a pier, *like a bridge*, extends over navigable waters.@ *Id.* at 215 (emphasis added). Rather, the Supreme Court declined to interpret the 1927 Act as if Asitus@ coverage was based on the broader aspect of an employee=s Astatus,@ *i.e.*, his maritime employment contract, concluding that the language of the Act left little doubt that Congressional intent in providing compensation was narrower than covering all workers with maritime contracts who worked over navigable waters. *Id.* at 215. The Court stated:

> We reject [the lower court=s alternative holding] that all injuries on these piers, despite settled doctrine to the contrary, may now be considered injuries on navigable waters. * * * Piers, *like bridges*, are not transformed from land structures into floating structures by the mere fact that vessels may pass beneath them.

Id. at 215 n.6 (emphasis added). Thus, the scope of coverage of the pre-1972 Act was limited to those injured on navigable waters or any dry dock. *See* 33 U.S.C. ' 903(a) (1970).

For example, in *Johnsen*, 25 BRBS at 329, the Board held that an employee engaged to paint an existing bridge, who was injured on that bridge in the course of his employment, was not injured on navigable waters. The Board affirmed the administrative law judge=s reliance on *Nacirema* and the long-standing precedent that structures permanently attached to land are extensions of land and are not within pre-1972 Act coverage. *Johnsen*, 25 BRBS at 332-333. Thus, the claimant=s injury *over* navigable waters while working on the bridge was not an injury *upon* navigable waters and did not bring him within the scope of the pre-1972 coverage of the Act. *Id.*

In *Crapanzano*, 30 BRBS at 81, the Board affirmed the administrative law judge=s determination that an ironworker employed in constructing a bridge was not injured on a covered situs. Specifically, as the claimant fell from the bridge structure and landed on the ground below, his injury did not occur on navigable waters and did not fall within the pre-1972 Act=s coverage. Additionally, the Board affirmed the administrative law judge=s finding that the claimant was not injured on a covered situs within the meaning of Section 3(a), as amended. *Crapanzano*, 30 BRBS at 82-83. In so holding, the Board discussed the precedential status of the Supreme Court=s decision in *Nacirema*, concluding that it remains

[4]The Act, as amended in 1972, however, specifically covers injuries occurring on piers and wharves. *See* n.3, *supra*. Bridges were not similarly enumerated in this amendment.

binding legal precedent with regard to extensions of land, such as bridges, which were not incorporated into coverage by the 1972 Amendment to Section 3(a). *Id.* at 84.

Employer contends the administrative law judge=s decision disregards this precedent. In response, claimant argues that this precedent does not apply to the instant case, as the structure upon which decedent was killed was not permanently attached to land. Therefore, she argues, this case should be decided in accordance with the decision of the United States Court of Appeals for the Fourth Circuit in *LeMelle*, 674 F.2d at 296, 14 BRBS at 609. *LeMelle*, however, is an anomaly, as it addresses only the status requirements for coverage under the Act. *See infra*. Moreover, because we have held that the uncontradicted evidence of record establishes that the structure in question was permanently affixed to land, we reject claimant=s assertions.

LeMelle involved circumstances in which a concrete finisher employed in constructing a bridge over navigable waters was injured while he was working on a fixed section of a draw bridge approximately one mile from shore. The Fourth Circuit determined that the claimant, who was transported to his work site by boat, who worked eight to ten feet above navigable waters on a bridge which both the Coast Guard and the Department of Highways stated was designed, in part, to aid navigation, and who was required to wear a life vest while working over the water, was a covered employee. Significantly, the parties had stipulated that the situs requirement was satisfied, so the court addressed only the status issue, holding that the work the claimant performed was maritime in nature because it served to aid navigation, thereby conveying coverage. *LeMelle*, 674 F.2d at 297, 14 BRBS at 610-612. However, in holding that the claimant satisfied the Section 2(3) status requirement, the court stated:

> It is not necessary to relate again the tortured history of employee coverage under the LHWCA, *except to note that bridge construction and demolition workers employed over navigable water were covered prior to the 1972 amendments*. *Davis v. Dept of Labor*, 317 U.S. 249 (1942); *Hardaway Contracting Co. v. O=Keeffe*, 414 F.2d 657 (5th Cir. 1968); *Peter v. Arrien*, 325 F.Supp. 1361 (E.D. Pa. 1971), *aff=d*, 463 F.2d 252 (3d Cir. 1972).

LeMelle, 674 F.2d at 297, 14 BRBS at 613 (emphasis added). It is on this statement which claimant relies to establish coverage. We reject this interpretation of the cases cited in *LeMelle*. Despite the fact that the employees= injuries in *Davis, Hardaway*, and *Peter* were all deemed covered by the Act, it was the circumstances of their injuries which were determinative, not the fact that they worked on bridge projects.

In *Davis*, a structural steel worker hired to help dismantle an abandoned drawbridge fell off the barge on which he was working and drowned. *Davis*, 317 U.S. at 250-251.

According to the Supreme Court, had this claim been processed under the Longshore Act instead of through the state forum, deference to the fact-finder and application of the Section 20(a), 33 U.S.C. '920(a), presumption would have resulted in coverage under the Act. *Davis*, 317 U.S. at 256-258. In *Hardaway*, the Fifth Circuit held that the decedent, a laborer employed to assist in building a bridge, was a covered employee because he was transported to work by boat, was transferring diesel fuel tanks from one vessel to another when he slipped, fell and drowned, and was not a Amember of a crew@ and, therefore, was not excluded from coverage under the Act. *Hardaway*, 414 F.2d at 658-659. In *Peter*, a crane operator under contract to demolish an existing bridge drowned when the crane he operated from a temporary causeway toppled into the moving current. The court held that he was killed on navigable waters because the structure was temporary and demolition of the bridge and the removal of the causeway would return the river to its original state, thereby aiding navigation. *Peter*, 325 F.Supp. at 1364-1365. In *Dixon v. Oosting*, 238 F.Supp. 25 (E.D.Va. 1965), a pile driver operator, employed to assist in the construction of a trestle bridge was injured approximately 1.5 miles from land on equipment which rested on previously made pilings that had no physical connection with the land or the bridge under construction. *Dixon*, 238 F.Supp. at 26-27, 29. The court concluded that the claimant was working on navigable waters when he was injured, noting that he could move only a few feet horizontally without falling into the water. Given the circumstances, the court stated that the claimant=s injury was irrefutably covered under the Act, and it reversed the deputy commissioner=s decision to the contrary. *Id.* at 29.

While it is true the bridge workers in *Davis, Peters, Hardaway,* and *Dixon* were found to be covered by the Act, the cases are distinguishable from the instant case and from *LeMelle*. Initially, it was not the designation of those employees as Abridge workers@ or their work on a bridge itself which conveyed coverage. Rather, it was the circumstances of the injuries, deaths and employment upon actual navigable waters which determined the applicability of the Act. Thus, a broad conclusion that all bridge construction and demolition workers were covered prior to 1972 is not supported by the law. Further, in the above-cited cases, unlike *LeMelle*, situs was at issue, as it is here, and although each employee was found covered, that finding was based on their location upon navigable waters; none of the employees was injured on a bridge, which is an extension of land. *Nacirema,* 396 U.S. at 215. Accordingly, as *LeMelle* did not address the situs inquiry and as *Davis, Peters, Hardaway,* and *Dixon* did not involve incidents on bridge structures, those cases are not controlling herein.[5]

[5]The administrative law judge also cited *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 12 BRBS 681 (5th Cir. 1980), and *Travelers Ins. Co. v. Shea*, 382 F.2d 344 (5th Cir. 1967), *cert. denied by McCollough v. Travelers Ins. Co.*, 389 U.S. 1050, *reh=g denied*, 393 U.S. 903 (1968), to support her conclusion that decedent=s death occurred upon navigable waters. Both cases can be distinguished. In *Trotti*, the employee was injured on a pier in

1973, an enumerated situs following the 1972 amendments, and was found to be covered. The court noted that this injury would not have been compensable prior to the 1972 amendments. *Trotti*, 631 F.2d at 1217, 1219-1220. In *Shea*, the employee was injured on a permanently anchored floating pier prior to the 1972 amendments, so his injury was not covered, regardless of the fact that water Aebbed and flowed@ under the pier. *Shea*, 382 F.2d at 347, 349. Thus, *Shea* actually supports a result contrary to that reached by the administrative law judge.

As employer correctly contends, the administrative law judge erred in discounting the Supreme Court=s precedent, established in *Nacirema*, that bridges are permanently attached to land and are not covered sites under Section 3(a). In light of our determination that the administrative law judge erred in finding that the bridge herein was not permanently affixed to land, we hold that the administrative law judge also erred in concluding that decedent=s death occurred upon navigable waters. The mere fact that navigable waters flow beneath the bridge does not transform it into a covered situs. *Nacirema*, 396 U.S. at 215; *Johnsen*, 25 BRBS at 332-333. Decedent was a bridge construction worker, working on a bridge structure, who fell and was killed by the impact with the base of that structure. *See Crapanzano*, 30 BRBS at 81; *see also Kennedy*, 30 BRBS at 1; *Pulkoski*, 28 BRBS at 298. As it is well-established that a bridge is considered an extension of land, we reverse the administrative law judge=s determination that decedent=s death is compensable under the Act, as claimant has not satisfied the situs requirement of Section 3(a).[6] *Nacirema*, 396 U.S. at 215; *Shea*, 382 F.2d at 347, 349; *Crapanzano*, 30 BRBS at 82; *Johnsen*, 25 BRBS at 334.

[6]We also reject claimant=s argument that denial of coverage under the Act results in a Awalking in and out of coverage@ problem. Unlike the real problem which existed prior to the 1972 amendments where workers were potentially excluded from coverage under both state and federal laws, *see Herb=s Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985); *Reynolds v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 788 F.2d 264, 19 BRBS 10(CRT) (5th Cir. 1986), *cert. denied*, 479 U.S. 885 (1986), decedent here is covered under state law, and claimant has received benefits accordingly.

Accordingly, the administrative law judge=s Decision and Order on Remand Awarding Benefits is reversed.[7]

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[7]Employer also contends the administrative law judge made inappropriate inferences regarding decedent=s work on a barge and whether the Ahigh rise@ bridge is an aid to navigation. In light of our determination that the situs requirement has not been met, we need address neither the status issue nor these inferences as they pertain to the status issue.