BRB No. 00-0285

ENOCH HOLLEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
PCL HARDAWAY/ INTERBETON	)	DATE ISSUED: Oct. 27, 2000
	)	
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Robert A. Rapaport (Clarke, Dolph, Rapaport, Hardy & Hull, P.L.C.), Norfolk, Virginia, for employer/carrier.

Before: SMITH and McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (99-LHC-0050) of Administrative Law Judge Fletcher E. Campbell, 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 if they 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 as a pile driver helper for employer and performed various duties in

the construction of a companion bridge to the existing Chesapeake Bay Bridge Tunnel.[1] In the course of his employment, claimant worked both on land and at the bridge work sites. When working at employer's yard, he loaded barges with material used in the bridge construction, including pieces of concrete highway. He also unloaded material from barges at the work sites, assisted in pile driving, placed caps onto pilings, and operated a circular saw in order to cut off the top portions of pilings which had been driven into the bed of the Chesapeake Bay. According to claimant, the saw was mounted on a platform, which was attached to the top of a crane, and the crane itself was situated on a work barge. On December 13, 1997, claimant was operating the saw when it slipped off the piling and threw him back, causing an injury to his right hand. He did not miss any time from work as a result of the injury, and voluntarily left employer on July 30, 1998. Employer voluntarily paid medical benefits under the state workers' compensation act. Claimant filed a claim under the Act in order to have a choice of a treating physician under Section 7 of the Act, 33 U.S.C. §907, for continuing problems with his hand.

In his decision, the administrative law judge found that claimant, as a bridge builder, was not a covered maritime employee under the Act, and therefore failed to establish the status element for coverage under Section 2(3) of the Act, 33 U.S.C. §902(3)(1994). As the administrative law judge found that claimant failed to establish status, he did not consider the issue of situs under Section 3(a) of the Act, 33 U.S.C. §903(a)(1994), and dismissed claimant's claim for benefits.

On appeal, claimant contends that the administrative law judge erred in denying benefits inasmuch as he was injured on navigable waters, and therefore covered under the Act pursuant to *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT)(1983). Employer responds, urging affirmance of the administrative law judge's decision. Specifically, employer disputes that claimant's injury occurred over navigable waters, asserting that the injury occurred while claimant was working on a fixed platform attached to a piling. Claimant replies, challenging this contention.

[1]It is undisputed that the construction of the new bridge was to aid land travel, not navigation.

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), 33 U.S.C. §902(3), and to expand the sites covered under Section 3(a) landward. In *Perini*, the Supreme Court of the United States determined that Congress, in amending the Act to expand coverage, did not intend to withdraw coverage from workers injured on navigable waters who would have been covered by the Act before 1972. *Perini*, 459 U.S. at 315-316, 15 BRBS at 76-77 (CRT). Thus, 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. *Id.*, 459 U.S. at 323-324, 15 BRBS at 80-81 (CRT).[2] *See also Ezell v. Direct Labor, Inc.*, 33 BRBS 19

[2]The *Perini* Court expressed no opinion whether coverage under the Act extends to workers injured while transiently or fortuitously upon navigable waters. *Perini*, 459 U.S. at 324 n.34, 15 BRBS at 80 n.34 (CRT). Following *Perini*, the Board has held that where an employee is required to perform his duties upon navigable waters and suffers an injury upon navigable waters, the status test is met under Section 2(3), as his work is inherently maritime in nature. *Caserma v. Consolidated Edison Co.*, 32 BRBS 25 (1998). In *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999)(*en banc*), the United States Court of Appeals for the Fifth Circuit held that a worker injured upon navigable waters is engaged in maritime employment and meets the status test if his presence on the water at the time was neither transient nor fortuitous. In *Bienvenu*, as the employee spent a portion of his time working on navigable waters, the court held him covered. The United States Court of Appeals for the Eleventh Circuit has held that the status test was not satisfied where claimant was injured when

(1999); *Caserma v. Consolidated Edison Co.*, 32 BRBS 25 (1997); *Nelson v. Guy F. Atkinson Constr. Co., Ltd.*, 29 BRBS 39 (1995), *aff'd mem. sub nom. Nelson v. Director, OWCP*, No. 95-70333 (9th Cir. Nov. 13, 1996). In *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78 (CRT)(1985), the Supreme Court, in holding that an employee who welded and maintained fixed offshore platforms in state territorial waters was not a covered maritime employee under the Act, noted the fact that the employee might have been covered had he been injured while traveling by boat to work on the platform. Declining to address this issue, the Court "noted in passing" that there is "a substantial difference between a worker performing a set of tasks requiring him to be both on and off navigable waters, and a worker whose job is entirely land-based but who takes a boat to work." *Id.*, 470 U.S. at 427 n.13, 17 BRBS at 84 n.13 (CRT).

The Supreme Court has also held that a structure 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 v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992). *See also Herb's Welding*, 470 U.S. at 414, 17 BRBS at 78 (CRT). With regard to bridge workers specifically, prior to 1972 employees engaged in bridge construction who were injured on navigable waters were held covered by the Act. *See Davis v. Dept. of Labor*, 317 U.S. 249 (1942); *Peter v. Arrien*, 325 F. Supp. 1361 (E.D. Pa. 1971), *aff'd*, 463 F.2d 252 (3d Cir. 1972); *Dixon v. Oosting*, 238 F.Supp. 25 (E.D. Va. 1965). Since 1972, the Board has generally held that employees engaged in bridge construction are covered by the Act only if they establish that their duties include working aboard, or loading or unloading materials from, vessels on navigable waters or that a particular bridge construction project will aid navigation. *Kehl v. Martin Paving Co.*, 34 121 (2000); *Crapanzano v. Rice Mohawk, U.S. Constr. Co., Ltd.*, 30 BRBS 81 (1996); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996); *Pulkoski v. Hendrickson Brothers, Inc.*, 28 BRBS 298 (1994); *Johnsen*, 25 BRBS at 329. Where the employees are working from a fixed structure, such as the bridge itself, the Board has generally held such employees are not covered because bridge projects aid overland commerce and thus do not involve inherently maritime work. *Id.* In *LeMelle v. B.F. Diamond Constr. Co.*, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), *cert. denied*, 459 U.S. 1177 (1983), the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction this case arises, held that an employee who assisted in construction of a bridge designed, in part, to aid navigation, was a covered maritime

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traveling by boat to a land-based work site, as the employee's presence on the water was merely transitory or incidental to his land-based employment. *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit.

employee under Section 2(3) of the Act.

In the present case, as the administrative law judge did not apply *Perini*, his decision cannot be affirmed. In rendering his decision, the administrative law judge considered whether claimant's overall employment duties satisfied the status requirement under Section 2(3) of the Act. The administrative law judge found that claimant was employed by employer as a bridge builder in the construction of a bridge that aided only land travel. Finding that bridge builders are not covered maritime employees under the Act, the administrative law judge determined that claimant failed to establish the status element for coverage under Section 2(3) of the Act, and dismissed the claim for benefits without considering whether claimant established the situs element under Section 3(a) of the Act.[3] However, in his decision, the administrative law judge did not consider whether claimant's injury actually occurred upon navigable waters, and thus, whether claimant established coverage under the Act pursuant to *Perini*. In this regard, claimant testified that the saw with which he was working at the time of his injury on December 13, 1997, was mounted onto the top of a crane, which was situated on a work barge upon the Chesapeake Bay. *See* Tr. at 16, 18-19, 22, 29-30. He further testified that he had been performing sawing activities on the barge for at least one month prior to the injury. *Id.* at 42. Employer contests claimant's version of the accident, and asserts that claimant's injury occurred while he was working on a platform which was attached to one of the pilings.[4] *See* Employer's Brief at 25-26. As the administrative law judge made no findings in this regard, we remand the case for the administrative law judge to consider whether claimant was injured upon navigable waters, and therefore, whether coverage is established pursuant to the Supreme Court's holding in *Perini*.

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[3]The administrative law judge rejected claimant's contention that his activities of loading and unloading barges conferred coverage, as the materials that were loaded on and off barges were pieces of highway and unrelated to maritime navigation. The administrative law judge further found that the record did not reflect how much time claimant spent performing loading and unloading activities. Contrary to the administrative law judge's finding, the loading and unloading of construction materials does constitute traditional longshoring activities. *See Browning v. B.F. Diamond Constr. Co.*, 676 F.2d 547, 14 BRBS 803 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 13 BRBS 1048 (5th Cir. 1981), *cert. denied*, 459 U.S. 1169 (1983); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996). However, claimant does not challenge the administrative law judge's findings in this regard.

[4]Employer submitted into evidence a diagram depicting a platform attached to and surrounding three pilings. *See* Emp. Ex. 1. Claimant initially testified that he would work on this platform when assisting in placing caps on the pilings after they had been cut, but on cross-examination, claimant stated that at the time of injury the saw was attached to this platform. *See* Tr. at 41, 59. On re-direct examination, claimant again testified that the saw and the crane on which it was attached were both situated on a work barge. *Id.* at 64-65.

Accordingly, the Decision and Order of the administrative law judge is vacated, and the case is remanded for reconsideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge