BRB No. 03-0149

LORRAINE MORGANTI (Widow of ROCCO MORGANTI	)	
Claimant-Petitioner	)	
v.	)	
LOCKHEED MARTIN CORPORATION	)	DATE ISSUED: Oct. 20, 2003
and	)	
ACE AMERICAN INSURANCE COMPANY	)	
Employer/Carrier-Respondents	)	
DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

Marc S. Moller, Daniel O. Rose and Brendan S. Maher (Kreindler & Kreindler), New York, New York, and Victoria E. Manes (Manes & Manes), Millwood, New York, for claimant.

Keith L. Flicker (Flicker, Garelick & Associates), New York, New York, for employer/carrier.

Joshua T. Gillelan II (Howard Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Mark Flynn, Acting Counsel for Longshore), Washington, D.C., for the Director, Office Of Workers= Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (2002-LHC-0659) of Administrative Law Judge Paul H. Teitler 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). The Board held oral argument in this case in New York, New York, on August 12, 2003.

Employer manufactures sonar transducers for the United States Navy. These devices, a certain percentage of which must be tested, are built in Syracuse, New York, and transported to Cayuga Lake, New York, which, because of its acoustic conditions, is a desirable testing location. Cayuga Lake is 38 miles long, two miles wide, and has a depth of up to 400 feet. Employer delivers the transducers to be tested to a pier at Portland Point, New York, whereupon they are transferred to the *Little Toot II* (the *Little Toot*), a 32-foot shuttle boat. The *Little Toot* then conveys the transducers to the *R/V Paganelli,* which is a 110 foot long, 34 foot wide, barge anchored on Cayuga Lake approximately a quarter of a mile from shore. The pier at Portland Point, the *Little Toot,* and the *Paganelli* are all owned by employer.

Decedent, claimant=s husband, was employed as a test engineer by employer. In this capacity, decedent worked approximately 70 percent of his time in Syracuse, New York, while the remaining 30 percent of his time was spent at Cayuga Lake, New York, where his employment responsibilities involved the testing of employer=s transducers. Upon his arrival at Cayuga Lake, decedent was required to use the *Little Toot* in order to reach his work station onboard the *Paganelli*. Once aboard the barge, decedent would utilize a computer to run the appropriate testing procedures on the transducers. Once the testing was completed, a process which took approximately one hour per transducer, the test results were printed and returned to employer=s Syracuse facility for analysis. On December 20, 2000, decedent finished his testing duties aboard the *Paganelli* and, while casting off a line that held the *Little Toot* to the barge in preparation for a return to the mainland, fell into the lake and drowned. Employer paid claimant death benefits under the New York state workers= compensation act; claimant subsequently sought benefits under the Longshore Act.

In his Decision and Order, the administrative law judge initially determined that decedent died on navigable waters; thus, the situs requirement of the Act, 33 U.S.C. ' 903(a), was satisfied. Next, the administrative law judge concluded that decedent was not a maritime employee under Section 2(3) of the Act, 33 U.S.C. ' 902(3). The administrative law judge

first found that claimant=s job duties did not involve maritime work. The administrative law judge also determined that since the *Paganelli* is a fixed work platform, and decedent spent less than one percent of his time on the *Little Toot*, decedent was transiently on navigable waters when he sustained his fatal accident and was not entitled to coverage on that basis. Lastly, the administrative law judge concluded that decedent=s computer work onboard the *Paganelli* was data processing work and, as such, is excluded from coverage under the Act pursuant to Section 2(3)(A) of the Act, 33 U.S.C. '902(3)(A). Accordingly, the administrative law judge denied claimant=s claim for death benefits under the Act.

On appeal, claimant challenges the administrative law judge=s conclusion that decedent is not covered under the Act. Employer responds, urging affirmance of the administrative law judge=s denial of benefits. The Director, Office of Workers= Compensation Programs (the Director), has filed a brief in support of claimant=s positions on appeal.

Navigable Water

We initially address employer=s challenge to the administrative law judge=s determination that Cayuga Lake is navigable water for purposes of establishing coverage under the Act.[1] Citing *Livingston v. United States*, 627 F.2d 165 (8th Cir. 1980), *cert. denied*, 450 U.S. 914 (1981), employer contends that the administrative law judge erred by failing to employ an economic viability test when considering whether Cayuga Lake is navigable for purposes of establishing coverage under the Act. In his Decision and Order, the administrative law judge specifically rejected employer=s reliance on *Livingston*, determining that, since Cayuga Lake has the physical capacity for seasonal interstate commerce, it is a navigable waterway for purposes of the Act=s situs requirement. Accordingly, the administrative law judge concluded that, as decedent=s injury and death occurred on navigable water, the Act=s situs requirement is satisfied. For the reasons that follow, we reject employer=s argument to the contrary, and we affirm the administrative law judge=s finding on this issue.

Before the enactment of the 1972 Amendments to the Act, in order to be covered by the Act, an employee had to establish that his injury occurred Aupon the navigable waters of

[1] Although this allegation of error has been raised by employer in its response brief, we will address it since it provides an alternate avenue for affirming the administrative law judge=s decision in this case. *See Farrell v. Norfolk Shipbuilding & Dry Dock Corp.*, 32 BRBS 283 (1998)(Decision and Order on Recon.).

the United States (including any dry dock) . . .@ 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 *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), the Supreme Court held that in making these changes to expand coverage, Congress did not intend to withdraw the coverage of the Act from workers injured on navigable water who would have been covered by the Act before 1972. *Perini*, 459 U.S. at 315-316, 15 BRBS 76-77(CRT). Accordingly, the Court held that when a worker is injured on actual navigable waters in the course of his employment on those waters, he is a maritime employee under Section 2(3) and his injury is on a covered situs under Section 3(a). Regardless of the nature of the work being performed, such an employee 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); *Morrissey v. Kiewit-Atkinson-Kenny*, 36 BRBS 5 (2002).

The Act, however, does not define Anavigable waters.@ The United States Supreme Court has held that the concept of Anavigability@ has different meanings in different contexts. *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). Relevant to admiralty jurisdiction, the Court in *The Daniel Ball*, 10 Wall. 557, 19 L.Ed. 999 (1871), stated that:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.

The Daniel Ball, 10 Wall. at 563. Thus, water is deemed navigable when it forms a highway over which commerce is or may be carried on with other states or foreign countries. *The Montello*, 20 Wall. 430, 22 L.Ed. 391 (1874).

Relying on the Supreme Court=s holding in *Kaiser Aetna*, the Board has held that the appropriate test for navigability under the Act is the Anavigability in fact@ test espoused by the Supreme Court in *The Daniel Ball* for admirality purposes. *See George v. Lucas Marine*

Constr., 28 BRBS 230 (1994), *aff=d mem. sub nom. George v. Director, OWCP*, 86 F.3d 1162 (9th Cir. 1996) (table). The United States Court of Appeals for the Second Circuit, wherein the instant case arises, has similarly held that

> a waterway at the situs in issue is navigable for jurisdictional purposes if it is presently used, or is presently capable of being used, as an interstate highway for commercial trade or travel in the customary modes of travel on water.

Leblanc v. Cleveland, 198 F.3d 353, 359 (2d Cir. 1999). Thus, a natural or artificial waterway which is not susceptible of being used as an interstate artery of commerce because of either natural or manmade conditions is not navigable for purposes of admiralty jurisdiction. *See Chapman v. United States,* 575 F.2d 147 (7th Cir. 1978) (*en banc*), *cert. denied*, 439 U.S. 893 (1978); *see Haire v. Destiny Drilling (USA), Inc.*, 36 BRBS 93 (2002)(Louisiana marsh not navigable due to vegetation=s impediment); *Rizzi v. Underwater Constr. Corp.*, 27 BRBS 273, *aff=d on recon.*, 28 BRBS 360 (1994), *aff=d*, 84 F.3d 199, 30 BRBS 44(CRT) (6th Cir.), *cert. denied*, 519 U.S. 931 (1996) (reservoir under a building not navigable, even though water entering reservoir is from a navigable river).

In the instant case, Mr. Donovan, a section superintendent with the New York State Canal System, testified that since Cayuga Lake is connected to the Erie Canal, it is accessible to any destination in the world; furthermore, Mr. Donovan opined that Cayuga Lake can accommodate over 90 percent of the existing fleet of vessels that travel through the inland waterways.[2] Moreover, as late as 1998, a business entity located on Cayuga Lake undertook a test project whereupon it transported its product via barge from the lake through the Erie Canal system. Based upon this evidence, and his finding that multiple circuit courts have rejected the economic viability test for navigation espoused by employer,[3] the administrative

[2] Employer agreed in its post-hearing brief to the administrative law judge that from a physical standpoint, commercial vessels are capable of traveling in and out of Cayuga Lake through the Erie Canal system.

[3] In *Finniseth v. Carter*, 712 F.2d 1041 (6th Cir. 1983), the United States Court of Appeals for the Sixth Circuit stated that *Livingston* appeared to be erroneously decided in light of the Supreme Court=s decisions in *The Daniel Ball* and *The Montello.* In *Richardson v. Foremost Ins. Co.,* 641 F.2d 314 (5th Cir. 1981), *aff=d*, 457 U.S. 668 (1982), the United States Court of Appeals for the Fifth Circuit invoked admiralty jurisdiction for an injury that occurred on the Amite River, since that waterway is capable of being used in commerce, even though the court found that the water is seldom if ever used for commercial activity. To hold otherwise, that admiralty jurisdiction extended only to navigable water that presently functions as a

law judge determined that Cayuga Lake meets that Act=s situs requirement as a navigable waterway. *See* Decision and Order at 26. As this finding is supported by Supreme Court, Second Circuit and Board caselaw, as well as the unchallenged evidence in the record that Cayuga Lake is capable of supporting interstate commerce, it is affirmed.

Coverage under *Perini*

commercial artery would, the court stated, introduce another note of uncertainty; jurisdiction, the court concluded, should be as readily ascertainable as courts can make it. 641 F.2d at 316.

Pursuant to the Supreme Court=s decision in *Perini*, 459 U.S. 297, 15 BRBS 62(CRT), a claimant who is injured or dies on actual navigable waters while in the course of his employment on those waters is a maritime employee under Section 2(3) unless he is specifically excluded from coverage by another statutory provision.[4] *Id.*, 459 U.S. at 323-324, 15 BRBS at 80-81 (CRT); *see also Walker v. PCL Hardaway/Interbreton*, 34 BRBS 176 (2000); *Caserma v. Consolidated Edison Co.*, 32 BRBS 25 (1997). The Court in *Perini*, however, expressed no opinion as to 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). In *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 908, 32 BRBS 217, 223(CRT) (5th Cir. 1999)(*en banc*), the United States Court of Appeals for the Fifth Circuit addressed this issue, holding that a worker injured upon navigable waters in the course of

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[4] In *Perini*, the Court, after addressing the legislative history of the 1972 Amendments to the Act, stated:

> There is nothing in these comments, or anywhere else in the legislative reports, to suggest, as Perini claims, that Congress intended the status language to require that an employee injured upon the navigable waters in the course of his employment had to show that his employment possessed a direct (or substantial) relation to navigation or commerce in order to be covered. Congress was concerned with injuries on land, and assumed that injuries occurring on the actual navigable waters were covered, and would remain covered.

Perini, 459 U.S. at 318-319, 15 BRBS at 76(CRT). Thus, as decedent=s death occurred on navigable waters, he was not required also to establish that he performed duties related to loading, unloading, building or repairing a vessel in order to be covered by Section 2(3), and we need not address the administrative law judge=s conclusions in this regard.

employment Ameets the status test only if his presence on the water at the time of injury was neither transient nor fortuitous.@

It is uncontested that decedent drowned while in the course of his employment on Cayuga Lake, and we have affirmed the finding that this lake is navigable water under the Act. Nonetheless, the administrative law judge denied decedent coverage under *Perini,* finding that his presence on water was transient. Initially, considering decedent=s work on the *Paganelli,* the administrative law judge determined that the *Paganelli* is not a vessel but is, rather, a fixed work platform and is thus like an island for coverage purposes. Accordingly, the administrative law judge concluded claimant=s work on the *Paganelli* was not performed on navigable water. The administrative law judge then considered whether decedent=s presence aboard the *Little Toot* was sufficient to convey coverage under the Act. After calculating that the decedent spent less than one percent of his work time on the *Little Toot* shuttling over navigable waters between the dock at Portland Point and the *Paganelli,* the administrative law judge applied the Fifth Circuit=s decision in *Bienvenu* and found that the decedent was aboard the *Little Toot* transiently when he sustained his fatal accident. Therefore, the administrative law judge concluded decedent did not meet the Act=s status requirement. *See* Decision and Order at 30. For the reasons that follow, we reverse the administrative law judge=s conclusions on this issue.

Initially, decedent=s death clearly occurred on navigable waters; he drowned in Cayuga Lake in the course of his employment. These facts establish decedent=s entitlement to coverage under *Perini,* unless he is otherwise excluded. *McCarthy v. The Bark Peking*, 716 F.2d 130, 15 BRBS 182(CRT) (2d Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984). The administrative law judge relied on the Fifth Circuit=s decision in *Bienvenu* to hold decedent was not covered under *Perini* because his presence on navigable waters was transient. In the present case, we need not determine whether *Bienvenu* should be followed in this case arising within the jurisdiction of the United States Court of Appeals for the Second Circuit, as it is clear that decedent=s presence on navigable waters was neither transient nor fortuitous.

In *Bienvenu,* the court held claimant covered because he spent approximately 8.3 percent of his time aboard a vessel working on equipment. The court concluded that this Anot insubstantial@ amount of time was sufficient to trigger coverage.[5] *Bienvenu,* 164 F.3d at 908, 32 BRBS at 223(CRT). Similarly, in the present case, decedent spent 30 percent of

[5] The court thus found it unnecessary to address whether the additional time claimant spent on the vessel in transit to various oil production platforms should be included in this calculation. *See Ezell v. Direct Labor, Inc.,* 37 BRBS 11 (2003).

his time performing work aboard the *Paganelli*, in addition to time spent traveling to it aboard the *Little Toot.* In finding decedent=s presence on navigable waters was transient, the administrative law judge discounted the time spent on the *Paganelli* by holding it was not a vessel but was a Afixed work platform@ and Alike an island.@ Decision and Order at 29. This conclusion cannot be upheld as it rests on an incorrect application of the law.

Relying on cases which address the issue of whether a floating structure was a Avessel in navigation@ for purposes of jurisdiction under the Jones Act,[6] the administrative law judge found that since the *Paganelli* had not been moved for 20 years, is connected to mooring buoys (which in turn are connected to anchors and sinkers), has no means of self-propulsion, and is physically connected to the land by electrical and cable lines, the *Paganelli* is a fixed work platform. Decision and Order at 29. The administrative law judge was mistaken in relying upon caselaw construing a Avessel in navigation@ under the Jones Act, when the issue presented was decedent=s coverage under the Longshore Act. Under the Jones Act, the key to seaman status is an employment-related connection to a Avessel in navigation.@ *See, e.g., McDermott Int=l Inc. v. Wilander,* 498 U.S. 337, 26 BRBS 75(CRT) (1991). The courts have developed tests for determining whether a floating structure is a Avessel in navigation@ or a work platform. *See, e.g., Tonnesen v. Yonkers Contracting Co., Inc.*, 82 F.2d 30, 36 (2d Cir. 1996).[7] A structure may be a vessel for other purposes, yet it

[6] Specifically, the administrative law judge cited *Green v. C.J. Langenfelder & Son,* 30 BRBS 77 (1996), a case involving the issue of whether claimant was a Amember of a crew@ of a vessel and therefore excluded from coverage under Section 2(3)(G) of the Act. He also cited *Bernard v. Binnings Constr. Co., Inc.,* 741 F.2d 824 (5th Cir. 1984), a case involving the issue of whether a floating work platform was a vessel in navigation within the meaning of the Jones Act.

[7] The test adopted by the Second Circuit in this regard considers: 1)

will not meet the Jones Act test unless it is Ain navigation.@ *Id.* An employee injured on a floating structure which is not a Avessel in navigation@ is thus not entitled to recover under the Jones Act but has his remedy under the Longshore Act as he is not excluded as a Amember of a crew@ under 33 U.S.C. ' 902(3)(G). *See Green v. C.J. Langenfelder & Son, Inc.*, 30 BRBS 77 (1996); *see also Harbor Tug & Barge Co. v. Papai*, 570 U.S. 548, 31 BRBS 34(CRT)(1997)(Longshore Act and Jones Act are mutually exclusive). As the test for distinguishing between a floating work platform and a vessel in navigation under the Jones Act is inapposite to the pertinent issue of coverage under *Perini,* the administrative law judge erred in relying on it.

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whether the structure, during a reasonable period of time preceding the injury, was being used primarily as a work platform; 2) whether the structure was moored or secured at the time of the accident; and 3) if the structure is capable of movement, whether the movement/transportation was merely incidental to its primary purpose of being used as a work platform (*i.e.,* is it capable of more than just lateral and perpendicular movement?). *Tonnesen v. Yonkers Contracting Co., Inc.,* 82 F.3d 30, 36 (2d Cir. 1996).

The Supreme Court=s holding in *Perini* grants coverage to employees who would have been covered prior to 1972 by virtue of an injury on navigable waters. 33 U.S.C. '903(a)(1970) (amended 1972). There is no requirement that an employee must be injured on a vessel in order to be covered under the Act. *See Perini*, 459 U.S. at 318-319, 15 BRBS at 76(CRT). Rather, coverage turns on whether the employee was afloat upon, over, or in actual navigable waters at the time of his work injury or death. *See Caserma*, 32 BRBS 25. The scope of *Perini* in this regard is apparent from the Second Circuit=s decision in *McCarthy*, 716 F.2d 130, 15 BRBS 182(CRT), which involved an employee injured while working aboard a museum vessel. Although the *Peking=s* rudder was welded in one position and she had not put to sea under her own power in many years, the court held claimant was a maritime employee under the Act, as his injury occurred on actual navigable waters. The court went on to hold that the museum was a Avessel@ for purposes of Section 5(b) of the Act, 33 U.S.C. '905(b),[8] but this classification was not necessary to its initial holding on claimant=s coverage under the Act. *See McCarthy*, 716 F.2d at 132-133, 15 BRBS at 186(CRT). As claimant was injured on a structure afloat on navigable waters, claimant was covered under the Act. Similarly, in the present case, claimant=s work on the *Paganelli* occurred on navigable waters, as there no dispute it is afloat upon Cayuga Lake.

The administrative law judge, however, also denied coverage because he found the *Paganelli* was a fixed platform and thus Alike an island,@ citing *Herb=s Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985). It is true that structures like docks and fixed oil platforms which are permanently affixed to land have consistently been held to be extensions of land, and thus, injuries upon them do not fall within pre-1972 Act jurisdiction.

[8] The court reasoned that under Section 3 of the General Provisions of the United States Code, 1 U.S.C. '3, the museum ship was a vessel since she had the capacity to return to the sea, if only in tow. *McCarthy*, 716 F.2d at 136, 15 BRBS at 190-191(CRT). In so holding, the court stated that a craft need not be actually engaged in navigation or commerce in order to come within the definition of Avessel@ as long as it has any capacity for seagoing transportation, citing numerous examples where crafts capable of being towed were considered vessels. *See M/V Marifax v. McCrory*, 391 F.2d 909 (5th Cir. 1968); *Miami River Boat Yard, Inc. v. 60' Houseboat*, 390 F.2d 596 (5th Cir. 1968); *Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621 (5th Cir. 1955); *Hudson Harbor 79th Street Boat Basin, Inc. v. Sea Casa*, 469 F.Supp. 987 (S.D.N.Y. 1979).

Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969); *Walker*, 34 BRBS 176; *Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992). In *Herb=s Welding,* 470 U.S. 414, 17 BRBS 78(CRT), the Supreme Court held that a claimant injured while working on a fixed offshore oil platform was not injured on navigable waters as such a structure is permanently affixed to the seabed and is thus akin to an island. *See also Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969)(stationary oil rigs, whose legs are permanently affixed to the ocean floor, are considered to be artificial islands); *Kehl v. Martin Paving Co.*, 34 BRBS 121 (2000)(a bridge permanently attached to land is not covered under the Act); *Laspragata v. Warren George, Inc.*, 21 BRBS 132 (1988)(claimant injured on the platform of a sewage treatment plant that was permanently affixed to land was not injured on navigable waters). In contrast to cases involving structures permanently affixed to land, floating platforms have been consistently treated as vessels. *See Herb=s Welding*, 470 U.S. at 416 n. 2, 17 BRBS at 79 n. 2 (CRT); *see also Producers Drilling Co. v. Gray*, 361 F.2d 432, 437 (5th Cir. 1966)(rigs classified as Avessels@ include structures capable of floating regardless of whether usually employed as a means of transport). Thus, the Board has affirmed an administrative law judge=s determination that a barge with jack-up legs is considered a vessel and not an artificial island or fixed platform because it can float; accordingly, a claimant injured on such a barge was injured Aover navigable waters.@ *Walker*, 34 BRBS 176; *see also Offshore Oil Co. v. Robison*, 266 F.2d 369 (5th Cir. 1959)(a movable drilling rig which is capable of floating and of movement when the legs are withdrawn is considered a vessel). Similarly, in *Caserma*, 32 BRBS 25, an employee was injured on a barge moored to a pier and holding gas powered generators; although stationary, the barge in question was capable of being disconnected and transported to dry docks for maintenance. As this barge was a floating structure not permanently connected to land, and as the employee was thus injured on a barge afloat on actual navigable water, the Board held that pursuant to *Perini,* claimant was covered under the Act. *Id.* at 28.

It is apparent that the *Paganelli* floats and is thus not akin to an island. It is not a fixed work platform for purposes of coverage under the Act, as there is no evidence it was permanently affixed to the floor of the lake or to its shore. Mr. Sanchez, a manager for employer, testified that the *Paganelli* floats on Cayuga Lake approximately 250-350 feet above the lake floor, and that while it has been moored 1,200 feet offshore by way of chains, anchors and sinkers since 1982, it can be unhooked and moved if necessary. Tr. at 174-188; Empl. Ex. H. The only evidence indicating that the *Paganelli* is permanently affixed to land is the fact that electrical, cable and telephone lines run from the shoreline to the barge. Regardless of the presence of these utility lines, the testimony of record clearly establishes that the *Paganelli* floats on the navigable waters of Cayuga Lake, and that while the barge is moored by anchor chains, it is not permanently connected to either the lakebed or the shore. The undisputed evidence of record thus establishes that the *Paganelli* is a barge afloat on the navigable waters of Cayuga Lake and is fully capable of being moved should such movement be required. Accordingly, we reverse the administrative law judge=s determination that the

decedent=s time aboard the *Paganelli* was not work time on navigable waters. *See Robison,* 266 F.2d 369; *Caserma,* 32 BRBS 25. As the parties agree that the decedent spent approximately 30 percent of his time onboard the *Paganelli* and the *Little Toot*, we additionally reverse the administrative law judge=s finding that decedent=s presence on navigable waters at the time of his injury and death was transient. Accordingly, pursuant to the Supreme Court=s decision in *Perini,* 459 U.S. 297, 15 BRBS 62(CRT), we hold that the decedent is covered under the Act unless he is specifically excluded by another statutory provision.

Clerical Worker Exclusion

Lastly, claimant challenges the administrative law judge=s determination that decedent is excluded from coverage under the Act pursuant to Section 2(3)(A), 33 U.S.C. ' 902(3)(A). In the 1984 Amendments to the Act, Congress specifically excluded certain employees from coverage. The subsection at issue in the instant case, Section 2(3)(A), provides:

> The term Aemployee@ means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any other harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not includeC
>
> (A) individuals employed *exclusively to perform office* clerical, secretarial, security, or *data processing work* [if such persons are covered by State workers= compensation laws];

33 U.S.C. ' 902(3)(A)(emphasis added); *see also* 20 C.F.R. ' 701.301(a)(12)(iii)(A). The legislative history of Section 2(3)(A) supports the conclusion that this provision is intended to exclude employees who perform clerical and similar services in an office setting. *See Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003). Specifically, the legislative history indicates that Section 2(3)(A) was not intended to exclude those employees who are subjected to traditional maritime dangers. This is readily apparent from the following passages:

> The Committee intends that this exclusion be applicable to [office clerical, secretarial, security or data processing] employees, because the nature of their work does not expose them to traditional maritime hazards. The Committee intends that this exclusion be read very narrowly.

H.R.Rep. No. 98-570, *reprinted in* 1984 U.S.C.C.A.N. 2734, 2736. As reported by Congressman Miller, the amendments to Section 2(3) were intended to Anarrowly exclud[e] from coverage certain employees who are not exposed to maritime hazards. . . .@ Thus, Congress intended that covered employees

> are to be distinguished from those other employees, such as office clerical, secretarial, security or data processing workers, who are not intimately concerned with the movement and processing of ocean cargo, and *who themselves are confined, physically and by function, to the administrative area* of the employer=s operations.

130 Cong. Rec. H9731 (Sept. 18, 1984)(emphasis added); *see also* H. Conf. Rep. No. 98-1027

reprinted in 1984 U.S.C.C.A.N. 2734, 2772 (Athis exemption reflects that these individuals are land-based workers . . . and their duties are performed in an office@). In *Boone*, 37 BRBS 1, the Board affirmed an administrative law judge=s finding that claimant=s employment as a materials supply clerk, although clerical in nature, did not fall within the Section 2(3)(A) exclusion because her work was performed in a warehouse rather than a business office.[9]

In addressing the decedent=s employment duties in this case, the administrative law judge determined that the decedent=s employment responsibilities as a test engineer onboard the *Paganelli* consisted of operating a testing program via a computer in order to perform two types of tests on the transducers manufactured by employer: 1) a transmit test for sound pressure in the water, and 2) a sensitivity test based on the voltage being sent out of the transducer. Decision and Order at 32. Decedent=s employment responsibilities required him to input the data necessary for the computer to run the appropriate test and thereafter print out the results. *Id.* at 33. Based upon this description of the decedent=s work duties, the administrative law judge concluded that the decedent was an employee who performed purely data collection and processing work while on the *Paganelli*, and that as such he was excluded from coverage under the Act by Section 2(3)(A). *Id.*

The administrative law judge=s decision that decedent was excluded by Section 2(3)(A) must be reversed for two reasons. Initially, decedent=s work aboard the *Paganelli* was not performed in a business office as is required by the plain language of Section 2(3)(A). Neither the *Paganelli* itself nor the decedent=s work station located on board can be deemed a business office, and the fact that decedent spent the majority of his time in employer=s offices in Syracuse is simply not relevant under this provision. *See* Clt. Ex. 6; Empl. Ex. J. As decedent spent 30 percent of his time on navigable water, he was not an employee confined to the administrative areas of employer=s business. *See Boone*, 37 BRBS 1. Rather, decedent=s regular work exposed him to traditional maritime hazards, leading to his death by drowning.

[9] In *Boone*, the Board had previously remanded the case for reconsideration in light of *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 47 F.3d 1166, 29 BRBS 75(CRT)(4th Cir. 1995)(table), *vacating* 28 BRBS 42 (1994), an unpublished decision in which the United States Court of Appeals for the Fourth Circuit held that the Board erred in applying the clerical exclusion without remanding for the administrative law judge to consider, *inter alia*, whether claimant=s duties were Aperformed *exclusively* in a business office.@ *Williams*, 29 BRBS at 78(CRT)(emphasis added).

Moreover, the record does not support the administrative law judge=s characterization of the decedent=s work as clerical and data processing work. *See Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990)(keypunch operator excluded as involved exclusively in data processing work). Specifically, Mr. Lehman, who performed the same job as the decedent on the *Paganelli*, described the employment duties involved in the testing of employer=s transducers as working at a computer terminal, entering the appropriate transducer test parameter information, and responding to computer-requested directions for information. *See* Tr. at 242-245. Additionally, the computer program information required to successfully perform the required tests had to be loaded during each procedure since the computer in use on the *Paganelli* has no hard drive. *Id.* at 244-245. Lastly, upon the completion of a test, the results would be printed and checked to verify the tests= validity. *Id.* at 248. Based upon this uncontroverted testimony regarding the nature of the employment duties performed by the decedent while he was onboard the *Paganelli*, the administrative law judge=s determination that the decedent performed purely clerical or data processing work lacks a rational basis. The mere fact that an employee utilizes a computer in his job and inputs data does not convert a professional engineer utilizing computer skills into a clerical worker. Accordingly, as the decedent did not work exclusively in a business office nor did his employment duties involve exclusively clerical functions, we reverse the administrative law judge=s determination that the decedent is excluded from coverage under the Act pursuant to Section 2(3)(A).

In summary, decedent is a maritime employee under Section 2(3) pursuant to the Supreme Court=s decision in *Perini*. He is not excluded from coverage under Section 2(3)(A). As it is undisputed that he also meets the Act=s situs requirement, decedent is covered by the Act.[10]

[10] In light of our reversal as a matter of law of the administrative law judge=s determination that decedent is not covered by the Act, we need not address the Director=s contention with regard to the application of the Section 20(a), 33 U.S.C. '920(a), presumption to the issue of coverage.

Accordingly, the administrative law judge=s finding the decedent is not covered under Section 2(3) is reversed. The case is remanded to the administrative law judge for consideration of the remaining issues. In all other respects, the administrative law judge=s Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge