BRB Nos. 05-0406
and 05-0406A

ABRAHAM GONZALEZ	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
TUTOR SALIBA	)	DATE ISSUED:
	)	10/26/2005<u>2005</u>
and	)	
	)	
AIG CLAIM SERVICES, INCORPORATED	)	
	)	
Employer/Carrier-	)	
Respondents	)	
Cross-Petitioners	)	
	)	

DECISION and ORDER

Appeals of the Decision and Order of Anne Beytin Torkington, Administrative Law Judge, United States Department of Labor.

Derek B. Jacobson (McGuinn, Hillsman & Palefsky), San Francisco, California, for claimant.

Michael W. Thomas (Laughlin, Falbo, Levy & Moresi, LLP), San Francisco, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Denying Benefits (2004-LHC-00192) of Administrative Law Judge Anne Beytin Torkington 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 on June 28, 2005, in San Francisco, California.

Claimant sustained a back injury on October 15, 2002, in the course of his employment. The injury occurred on a temporary construction trestle adjacent to the Richmond-San Rafael Bridge, which was being seismically retrofitted. Claimant is totally disabled and is receiving compensation pursuant to the California workers' compensation statute. The issues before the administrative law judge were whether claimant's employment satisfied the Act's status and situs requirements for coverage. 33 U.S.C. §§902(3), 903(a). The administrative law judge found that the status element was met, but that the situs element was not. Claimant appeals the finding that he was not injured on a covered situs and employer cross-appeals the finding that claimant was engaged in "maritime employment." For the reasons that follow, we affirm the administrative law judge's finding that claimant was not injured on a covered situs. Thus, we do not reach the issue of whether claimant was engaged in "maritime employment."

The trestle on which claimant was injured was a temporary structure erected between the east and west bound spans of the Richmond-San Rafael Bridge; the spans are four feet apart near the shore. The trestle was connected to both spans and consisted of timber mats supported by pilings. The trestle was constructed by driving piles through the bridge deck and into the bay and placing the mats on top of beams placed across the pilings. Its purpose was to allow cranes and other machinery access to the bridge, which was not closed to vehicular traffic during the construction project. The trestle originally extended over San Francisco Bay from the Marin County shoreline. It was 1200 feet long, 28 feet wide and two feet above the bridge deck. As work on the bridge progressed, the trestle could no longer be attached to the shoreline. It was moved down the length of the bridge span and eventually could be accessed only from the bridge. Most of the pilings supporting the trestle were temporary, but some were incorporated into the bridge on a permanent basis. Claimant worked on the trestle and the bridge; he welded, fitted, built and broke down the trestle, and assembled a handrail on the bridge. He wore a life jacket during this employment. The trestle was not used to load or unload vessels; all materials for the project were transported by truck onto the bridge. On the day of claimant's injury, he was working on the trestle over the bridge, after the mats attached to the shoreline had been removed, in order that they could be reinstalled at the other end of the trestle. Thus, the trestle was no longer connected to the shore.

The administrative law judge found that the trestle is not a covered situs, as it was an extension of the bridge, and a bridge is not a covered situs. She also found that the trestle is not like a "pier" because it did not extend over the water from the shore, and

therefore she found that the Ninth Circuit's decision in *Hurston v. Director, OWCP*, 989 F.2d 1547, 26 BRBS 180(CRT) (9th Cir. 1993), is not applicable.

On appeal, claimant first contends that he is entitled to the Act's coverage because his injury occurred on navigable waters. In this regard, claimant contends that the administrative law judge erred in finding that he was injured on a structure that was an extension of the bridge. Claimant avers that a temporary structure over navigable waters, like the trestle, is a covered situs. Claimant further contends that the administrative law judge erred in finding that his injury did not occur on a "pier" as defined by the Ninth Circuit in *Hurston*. Employer responds, urging affirmance of the administrative law judge's finding that claimant was not injured on a covered situs.

Section 3(a) of the Act states that,

> 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).

33 U.S.C. §903(a). Claimant first contends he was injured on a temporary structure over navigable waters and that therefore he is covered by virtue of an injury on navigable waters, pursuant to *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983).

San Francisco Bay is part of the navigable waters of the United States.[1] *See Nelson v. United States*, 639 F.2d 469 (9th Cir. 1980). The Supreme Court held in *Perini North Rivers Associates* that, unless an individual is expressly excluded from coverage under the Act, those claimants whose injuries would have been covered before the 1972 Amendments to the Act by virtue of an injury on navigable waters satisfy both the situs and status requirements of the 1972 Act. *Perini North River Associates*, 459 U.S. at 324,15 BRBS at 80CRT). Before the Act was amended in 1972, the situs element

[1] Employer asserts that claimant was not injured on navigable waters because the four-foot span between the two bridges is not "navigable." This is a disingenuous contention. While vessels cannot navigate under the portion of the bridge closest to land, as the bridge was too low at that point, ocean-going vessels use the navigation channel in the middle of the bridge. Tr. at 89. The bridge, therefore, is not an obstruction to navigation. *See generally Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005).

covered injuries occurring only "on the navigable waters of the United States (including any dry dock)." 33 U.S.C. §903(a) (1970). Under this statute, the Supreme Court held that structures permanently affixed to land, such as piers and bridges, were extensions of that land and injuries occurring thereon were not covered under the Act. *Nacirema Operating Co. v. Johnson*, 396 U.S. 347 (1969). Pursuant to this holding, the Board has held, in post-1972 cases, that injuries occurring on bridges do not occur on navigable waters because a bridge is permanently affixed to land, and is not otherwise a covered situs because a "bridge," unlike a pier or wharf, is not an enumerated site covered by virtue of the 1972 Amendments. *Kehl v. Martin Paving Co.*, 34 BRBS 121 (2000); *Crapanzano v. Rice Mohawk*, 30 BRBS 81 (1996); *Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992); *cf. LeMelle v. B.F. Diamond Constr. Co.*, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), *cert. denied*, 459 U.S. 1177 (1983) (work on a fixed section of drawbridge over James River approximately one mile from shore and eight to ten feet above the water is maritime employment pursuant to Section 2(3) because the bridge construction project was designed to aid both river and road navigation). On the other hand, if a claimant is injured while working on a bridge from a barge or other floating structure, the injury is covered under the Act. *Walker v. PCL Hardaway/Interbeton*, 34 BRBS 176 (2000).

In contrast to structures permanently affixed to land, *temporary* structures over navigable waters were covered under the pre-1972 Act. In *Michigan Mut. Liability Co. v. Arrien*, 344 F.2d 640 (2d Cir. 1965), *cert. denied*, 382 U.S. 835 (1965), the Second Circuit addressed a case in which a claimant was injured on a skid, which was a temporary removable wooden platform, extending over water between a vessel and the wharf. The skid was attached to both the vessel and the wharf when in use. When it was not in use, the skid was dismantled and stored on the wharf. In holding that the injury occurred "on navigable waters," the Second Circuit stated:

> We are persuaded that the temporary skid was not part of, and should not be analogized to, the wharf. A wharf or pier is usually built on pilings over what was navigable water. When the structure is completed, the water over which it is built is permanently removed from navigation as if the structure had been in the first instance built on land. In contrast, a skid like a gangplank is not a permanent structure and the waters under both are as navigable as they would be if a ship were moored in the same space and then sailed. . . . The skid occupied the position above the water only temporarily; it was removed from its space over the water and stored until needed again, much like a gangplank.

344 F.2d at 644. *See also Dixon v. Oosting*, 238 F.Supp. 25 (E.D. Va. 1965) (claimant injured on cap setting rig atop pilings in Chesapeake Bay; not connected to land or partially completed trestle; reached only by vessel); *Caldaro v. Baltimore & Ohio .Ry.*

Co., 166 F.Supp. 833 (E.D.N.Y. 1956); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996) (gangplanks covered as being part of a ship); *see generally The Admiral Peoples*, 295 U.S. 649 (1935); *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917).

While the administrative law judge did not address these cases, she made findings of fact that preclude their applicability. The administrative law judge found that the trestle was affixed to a non-covered permanent structure, the bridge. Claimant contends that the trestle was capable of self-support. This assertion is unproven in the record, and moreover, is irrelevant, in that the administrative law judge found that the trestle was, in fact, attached to both the bridge and the bed of the bay. Decision and Order at 8. Indeed, some of the pilings that connected the trestle to the bridge remained permanently in the bridge. Tr. at 79-83. Although the trestle was not to be an "everlasting," permanent structure, its characteristics and its connection to a permanent, non-covered site compel the conclusion that claimant was not injured on "navigable waters."

In *Parker v. South Louisiana Contractors, Inc.*, 537 F.2d 113 (5th Cir. 1976), *cert. denied*, 430 U.S. 906 (1997), the United States Court of Appeals for the Fifth Circuit addressed a case in which a claimant was attempting to bring a claim in admiralty pursuant to Section 5(b) of the Act, 33 U.S.C. §905(b). The claimant, a truck driver, was transported with his truck by barge to a bank of the Atchafalaya River. He was to drive his truck off the barge along a steel ramp designed for the loading and unloading of overland vehicles. The ramp, which weighed several tons, rested on land and had an apron extending over the water's edge; it could be raised and lowered by winches to permit ingress and egress from the barges. The claimant was injured when he fell on the ramp. The court distinguished the case from *Michigan Mut. Liability,* stating that the skid in that case could easily be dismantled and stored on the wharf when not in use, whereas the ramp in the case before the court rested on land and "removing it would involve a major undertaking calling for heavy equipment. Unlike a gangplank, it cannot reasonably be conceived as an appurtenance of the barges that use it for docking." *Parker*, 537 F.2d at 116. The court concluded that because the claimant was injured on an essentially land-based structure, his claim did not come within federal admiralty jurisdiction. *Id.*

Similarly, in *Johnsen*, 25 BRBS 329, the Board addressed a case in which the claimant painted the bridge support spans while suspended from scaffolding wholly attached to the top of the existing bridge. The Board held that the administrative law judge properly found that the bridge was permanently affixed to land and that therefore claimant's injury did not occur on navigable waters. *Johnsen,* 25 BRBS at 332-333, citing *Nacirema Operating Co.,* 396 U.S. 347. *See also Laspragata v. Warren George, Inc.*, 21 BRBS 132 (1988) (injury occurring on permanent sewage treatment plant in Hudson River did not occur on navigable waters).

In this case, the trestle is not like the "removable" skid or a gangplank that bridges a gap between a vessel and land, as it was not merely taken up and stored when not in use. The administrative law judge found that the trestle was attached to both causeways and supported by pilings. As in *Parker* and *Johnsen,* the trestle essentially is an extension of a land-based, non-covered structure. *See generally Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985*); Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969). Therefore, as the trestle is distinguishable from the temporary skid in *Michigan Mut. Liability* or a gangplank based on its essential characteristics, and as it was attached a bridge, which is a non-covered extension of land, we reject claimant's contention that he was injured on navigable waters.

Claimant next contends that the administrative law judge erred in finding that the trestle is not a "pier" as that enumerated site was discussed by the United States Court of Appeals for the Ninth Circuit in *Hurston v. Director, OWCP*, 989 F.2d 1547, 26 BRBS 180(CRT) (9th Cir. 1993). *See* 33 U.S.C. §903(a) (2000). In *Hurston,* the Ninth Circuit held that a pier is a covered situs, regardless of whether it is used for maritime purposes. The structure in question in *Hurston* was an oil production "pier" built on pilings extending from land over the water of the Santa Barbara channel. Oil was pumped from a nearby well and piped into the pier, where it was separated into water, gas, and crude oil. The crude oil was stored on the pier until it was pumped into a pipeline feeding tanker trucks. The Ninth Circuit held that the phrase in Section 3(a) "customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel" is not applicable to any of the enumerated sites, but only to "other adjoining areas." The court held that a "structure built on pilings extending from land to navigable water is an 'adjoining pier' within the meaning of 33 U.S.C. § 903(a). This is an essentially factual test which depends upon the structure's appearance and location." *Hurston*, 989 F.2d at 1553, 26 BRBS at 190(CRT); *cf. McGray Constr. Co. v. Director, OWCP*, 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999) (pile driver on this pier not engaged in maritime employment pursuant to Section 2(3) because the pier has no maritime purpose).

The administrative law judge discussed *Hurston,* as well as *Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied*, 525 U.S. 981 (1998),[2] and found that the trestle is not a "pier." Although the trestle was built on

[2] In *Fleischmann,* the Second Circuit adopted the *Hurston* definition of a "pier," and held that a bulkhead "built on pilings and extending into navigable water, constitutes a pier within the meaning of §903(a). That the bulkhead is not called a pier does not affect our determination." 137 F.3d at 139, 32 BRBS at 34(CRT). The purpose of that bulkhead was to prevent erosion of the land into the water. *Cf. Brooker v. Durocher Dock & Dredge*, 133 F.3d 1390, 31 BRBS 212(CRT) (11th Cir.), *cert. granted*, 524 U.S. 982, *cert. dismissed*, 525 U.S. 957 (1998) (Eleventh Circuit declines to rule on

pilings over navigable waters, the administrative law judge found that at the time of claimant's injury the trestle no longer extended over water from the land, but was attached only to the bridge. Decision and Order at 7. The administrative law judge also rejected claimant's contention that the trestle was a "pier under construction" and therefore a covered site pursuant to *Trotti & Thompson v. Crawford*, 631 F.2d 1214, 12 BRBS 681 (5th Cir. 1980). The administrative law judge reasoned that the trestle was not "under construction," as it would never become a pier, and in fact became less like a pier as it was dismantled, moved down the length of the bridge, and reassembled. Decision and Order at 7.

We affirm the administrative law judge's finding that the trestle is not a "pier" pursuant to *Hurston*. The Ninth Circuit emphasized in *Hurston* that a pier is "a structure built on pilings extending from land to navigable water," and that "[t]his is an essentially factual test which depends upon the structure's appearance and location." *Hurston*, 989 F.2d at 1553, 26 BRBS at 190(CRT). In addition, the situs inquiry, unlike the status inquiry, is concerned with the nature of the site at the moment of injury. *See, e.g., Nelson v. v. Guy F. Atkinson Constr. Co.,* 29 BRBS 39 (1995), *aff'd mem. sub nom. Nelson v. Director, OWCP*, 101 F.3d 706, 1996 WL 660878 (9th Cir. 1996). The administrative law judge's finding of fact that, at the time of injury the trestle did not extend from land on pilings but was built only between the two spans of the bridge, is supported by substantial evidence and is affirmed. *See* Tr. at 59-60, 85. This finding precludes the legal conclusion that the trestle is a "pier" pursuant to *Hurston.*

The administrative law judge's rejection of claimant's contention that the trestle was an enumerated site under construction similarly is rational, supported by substantial evidence, and in accordance with law. As the administrative law judge found, the trestle was never going to become a pier but was used only for the bridge-retrofitting project. In its decision in *Tarver v. Bo-Mac Contractors, Inc.*, 37 BRBS 120 (2003), *aff'd*, 384 F.3d 180, 38 BRBS 71(CRT) (5th Cir. 2004), *cert. denied*, 125 S.Ct. 1696 (2005), the Board extensively discussed cases, including *Trotti & Thompson* cited by claimant herein, involving the construction of "new" covered situses, such as piers, *etc*. The law essentially requires that in order to be a covered situs while under construction, the site of the new construction must have been a covered site prior to the project, *i.e.*, navigable waters or an area within a port facility.[3] *Id.*, 37 BRBS 120. The trestle in question here,

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applicability of *Hurston* because the seawall at issue does not look like a pier and is not used as a pier).

[3] The Board's discussion in *Tarver* included a case that arose in the Ninth Circuit, *Nelson v. Guy F. Atkinson Constr. Co.,* 29 BRBS 39 (1995), *aff'd mem. sub nom. Nelson v. Director, OWCP*, 101 F.3d 706, 1996 WL 660878 (9th Cir. 1996). The claimant was engaged in a project to construct a lock on a dam project on the Columbia River. This

while over navigable waters, is not an enumerated site and would never have a maritime purpose, such as use in loading, unloading, building or dismantling a vessel. Therefore, as the trestle is not a "pier" pursuant to Section 3(a) or an "adjoining area customarily used" for a maritime purpose, we affirm the administrative law judge's finding that claimant's injury does not fall within the Act's coverage and the consequent denial of benefits.

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construction involved the preparation and excavation of dry land; eventually, the navigable waters of the river would cover the area, but the land had never been part of the river before the project began. The Board affirmed the administrative law judge's finding that claimant was not injured on actual navigable waters. The Board distinguished the case from those in which navigable water is removed from the site on a temporary basis on the ground that the site in question had never been a part of navigable waters. *Nelson*, 29 BRBS at 40-41. The Board further held that the area was not an adjoining area under Section 3(a) because the area did not have a current maritime use, and because the situs test is not met merely because the injury occurred adjacent to water. *Id.* at 41. The Ninth Circuit affirmed the Board's decision in an unpublished opinion, stating that claimant identified no authority holding that dry land that has never been submerged can be "navigable waters," and that the area is not an "adjoining area" because it was not customarily used for loading, unloading, *etc*. *Nelson*, 1996 WL 660878 at **2.

Accordingly, the administrative law judge's Decision and Order denying benefits 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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BETTY JEAN HALL
Administrative Appeals Judge