BRB No. 10-0534

JAMES D. HOUGH	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
VIMAS PAINTING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
INTECH CONTRACTING, L.L.C.	)	DATE ISSUED: 05/24/2011
	)	
and	)	
	)	
TRAVELERS INDEMNITY COMPANY OF CONNECTICUT	)	
	)	
Employers/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Isaac H. Soileau, Jr., and Ryan A. Jurkovic (Soileau & Associates, L.L.C.), New Orleans, Louisiana, for claimant.

Joseph B. Guilbeau (Juge, Napolitano, Guilbeau, Ruli, Frieman & Whiteley), Metairie, Louisiana, for Vimas Painting Company, Incorporated.

Elton A. Foster (Waller & Associates), Metairie, Louisiana, for Intech Contracting, L.L.C., and Travelers Indemnity Company of Connecticut.

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

PER CURIAM:

Claimant appeals the Decision and Order (2009-LHC-1252) of Administrative Law Judge C. Richard Avery 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).

Claimant was hired by employer as a bridge vacuumer in June 2007.[1] He worked seven days per week and eight to ten hours per day, weather permitting. He testified that vacuuming took place in a containment area on the bridge and that his duties required him to vacuum the debris which fell into the containment area as a result of the blasting process used to clean the bridge. While in the containment area, claimant was to wear a respirator and other protective gear such as an air-fed hood. The debris to which claimant was exposed in the containment area consisted of things such as dust, pigeon droppings, and paint chips. Tr. at 50-58. The vacuum for this particular job was attached by hose to a recycler on a barge that was spudded below the bridge on the Ohio River.[2] Bags of debris were stored on an adjacent barge in a dumpster and were to be disposed of at the end of the project.

One day in October 2007, claimant's vacuum machine was shut down for repairs. Daniel Smallwood, the mechanic in charge of the equipment on the barge, obtained permission to allow claimant to help load materials needed to repair the vacuum machine onto the barge. In addition, claimant testified that he also assisted with cleaning the barge and moving debris bags from the recycler into the dumpster, that he did this barge work for approximately 18 hours over the course of three consecutive days, and that he was exposed on the barge to debris such as lead dust, pigeon droppings, and paint dust. Tr. at 59-61, 70-72; *see also* Decision and Order at 3, 6; Cl. Ex. 30 at 21. Claimant also

[1]Vimas Painting (employer), who hired claimant, was contracted by Intech Contracting to clean and paint the John F. Kennedy Bridge on the Ohio River between Kentucky and Indiana. Employer does not possess insurance for claims under the Act. Intech and its carrier, Travelers Indemnity Company of Connecticut, carry coverage under the Act and are standing in as carrier in the event claimant's injury is found covered.

[2]Mr. Frangopoulos, one of the owners of the company, testified that this was the first time employer had used a barge to stage equipment for a bridge project. Tr. at 232; *see* Decision and Order at 6.

testified that the debris was "spewed" from the machines on the barge or fell from the containment area above and that some of the bags of debris had holes in them.[3] Tr. at 70-72. Claimant testified that once the vacuum had been repaired he returned to work on the bridge; he worked for two days before he began feeling ill. He was hospitalized and eventually diagnosed with acute histoplasmosis. Tr. at 74-77. Claimant recovered with treatment and returned to work with another company. Following a meeting with his doctor, Dr. Kang, claimant believed he had to completely avoid dust, paint, etc., and, for a period of time, he ceased working altogether. Emp. Ex. 8; Tr. at 83-84, 91. Claimant filed a claim for benefits under the Act.[4]

The administrative law judge found that claimant contracted histoplasmosis while working on the bridge, not the barge. He stated that claimant's description of his working conditions to Dr. Larosa, the attending physician at the hospital, did not match the description of conditions on the barge, and he found that there was no debris falling on the barge because the containment area was not over the barge. He also found that other employees who had symptoms similar to claimant's were not barge workers. The administrative law judge found that the medical evidence supports this conclusion, as Drs. Kang and Emory stated that the gestation period for histoplasmosis is between one and three weeks and that prolonged exposure to large quantities of bird guano in a confined area is more likely to be the cause than open-air exposure. As the administrative law judge found that claimant contracted the disease while working on a bridge, he concluded that the injury did not occur on navigable waters and that claimant is not entitled to benefits under the Act pursuant to *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). Further, as a bridge is an extension of land, the administrative law judge stated it is not a covered situs under 33 U.S.C. §903(a). The administrative law judge also stated that, even if claimant contracted the disease on the barge, he is not a covered employee because his presence on the barge was too insubstantial and fortuitous to convey coverage. Decision and Order at 11-12. Finally, the administrative law judge rejected claimant's reliance on *Walker v. PCL Hardaway/Interbeton*, 34 BRBS 176 (2000), stating that claimant's arguments for coverage were tenuous and that working on the barge was not part of his usual duties. *Id.* at 13. Claimant appeals the administrative law judge's finding that he did not sustain his

[3]Mr. Smallwood testified that the bags weighed between 1,000 and 2,000 pounds and were moved from the recycler machines to the dumpster by crane. Cl. Ex. 30 at 41-42; Cl. Ex. 44; Emp. Ex. 5; Tr. at 158. He stated they sometimes tore and dust spilled out until the hole was secured with duct tape. Tr. at 163, 171, 174.

[4]Employer paid claimant under its Ohio state workers' compensation plan. It paid "self-pay," which is equivalent to claimant's salary at his base rate for 40 hours per week until the end of the project in December 2007. Tr. at 225-226.

injury while under the Act's coverage. Both employers respond, urging affirmance of the administrative law judge's decision. Claimant filed a reply brief.

Claimant contends the administrative law judge erred in finding that his injury is not covered under the Act. Specifically, he argues that the Section 20(a), 33 U.S.C. §920(a), presumption applies to presume he is covered by the Act and that employer has not rebutted the presumption. Claimant also asserts his injury is covered under *Perini*, as he states it is more probable than not that he contracted his disease while working on the barge without protective gear than in the containment area with protective gear. Claimant alternatively avers that he is covered because he loaded the barge with materials from the transport boat and while vacuuming debris from the bridge.

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), 903(a); *Perini*, 459 U.S. 297, 15 BRBS 62(CRT); *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 "situs" and the "status" 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); regardless of the nature of the work being performed, he satisfies both the situs and status requirements and is covered by the Act, unless he is specifically excluded from coverage by another statutory provision.[5] *Perini*, 459 U.S. at 323-324, 15 BRBS at 80-81(CRT); *see also Ezell v. Direct Labor, Inc.*, 33 BRBS 19 (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*, 101 F.3d 706 (9th Cir. 1996) (table); *Pulkoski v. Hendrickson Brothers, Inc*, 28 BRBS 298 (1994); *Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992).

[5]Prior to the enactment of the 1972 Amendments to the Act, in order to be covered by the Act, a 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 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).

The Supreme Court has also held that a bridge is permanently affixed to land, is considered an extension of land, and does not fall within pre-1972 Act jurisdiction.[6] *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969); *accord Kehl v. Martin Paving Co.*, 34 BRBS 121 (2000); *Johnsen*, 25 BRBS 329. 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 the 1972 Amendments were enacted, it has generally been 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. *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 13 BRBS 1048 (5th Cir. 1981), *cert. denied*, 459 U.S. 1169 (1983); *F.S. [Smith] v. Wellington Power Co.*, 43 BRBS 111 (2009); *Gonzalez v. Tutor Saliba*, 39 BRBS 80 (2005); *Kehl*, 34 BRBS at 121; *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 298; *Johnsen*, 25 BRBS 329. Where the employee is 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 do not involve inherently maritime work. *Id.*; *but see LeMelle v. B.F. Diamond Constr. Co.*, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), *cert. denied*, 459 U.S. 1177 (1983) (employee who assisted in the construction of a bridge designed, in part, to aid navigation, was a covered maritime employee under Section 2(3)).

In this case, the administrative law judge found that claimant contracted his disease due to exposure while working on the bridge and not on the barge. Claimant contends the administrative law judge erred in his application of Section 20(a) to the issue of claimant's exposure to injurious stimuli. It is undisputed that claimant contracted acute histoplasmosis during his employment with employer. The Center for Disease Control literature in the record explains that histoplasmosis is an infectious, but not contagious, disease caused by inhaling spores of a fungus called *Histoplasma capsulatum*. It is endemic in the United States with the highest number of infections occurring in the Mississippi and Ohio River Valleys. The disease can be contracted by disturbing accumulated contaminated bat and bird droppings. Histoplasmosis affects the lungs. Symptoms can be mild and flu-like or extreme, like claimant's, which included vomiting blood and shortness of breath. The gestation period for this disease is approximately three to 17 days, with an average of 10 days. Cl. Ex. 45.

[6]Moreover, a bridge is not an enumerated site pursuant to Section 3(a) as amended in 1972 and 1984.

Dr. Emory, employer's expert, explained that acute histoplasmosis is typically seen in people who have been exposed in confined spaces, as the lack of circulating air means there are higher concentrations of the fungus. He stated that the gestation period is anywhere from seven to 21 days and depends on the "inoculum," the amount of the exposure. Thus, if there was "enough inoculum," a person could contract the disease in two or three days. Emp. Ex. 6 at 33-36, 90. Dr. Kang, claimant's treating physician, stated that the gestation period for the disease is between seven and 17 days and that, if the exposure was large enough, a person could contract the disease with one exposure. Cl. Ex. 28 at 35-37.

The parties stipulated that claimant was exposed to pigeon droppings during the course of his employment and that he contracted histoplasmosis. Tr. at 6. Thus, claimant has established a *prima facie* case relating his injury to his employment. Claimant contends he contracted the disease during the three days he worked on the barge. As it is undisputed that claimant regularly worked on the bridge but spent some time on the barge, historically an uncovered situs and a covered situs, respectively, it was appropriate for the administrative law judge to assess whether the injury occurred on a covered situs.[7] Although Section 20(a) does not apply to the legal issues of coverage, *Cunningham v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42(CRT) (1st Cir. 2004); *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996), courts have held that it may apply to the factual issues related to the coverage provisions. *Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir.), *cert. denied*, 525 U.S. 981 (1998); *Textports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981). Here, a factual issue exists as to where claimant was exposed to the injurious stimuli, and he must have been exposed to the injurious stimuli on a covered situs in order for his claim to be compensable. *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001). Assuming, *arguendo*, the applicability of Section 20(a), it is employer's burden to rebut the Section 20(a) presumption with substantial evidence that claimant was not exposed to injurious stimuli on a covered situs. *Id.* Substantial evidence, which may be medical or other evidence, is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See, e.g., Rainey v. Director, OWCP*, 517 F.3d 632, 42 BRBS 11(CRT) (2d Cir. 2008) (quoting *Richardson v. Perales*, 402 U.S. 389, 401 (1971)). The evidence credited by the administrative law

[7]This case is analogous to cases involving "multi-purpose facilities" or manufacturing sites which required consideration of whether the exposure or injury occurred on covered or non-covered areas. *See Bianco v. Georgia Pacific Corp.*, 304 F.3d 1053, 36 BRBS 57(CRT) (11th Cir. 2002) (entire property need not be covered in mixed-use facilities); *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001); *Stroup v. Bayou Steel Corp.*, 32 BRBS 151 (1998); *Melerine v. Harbor Constr. Co.*, 26 BRBS 97 (1992).

judge constitutes substantial evidence that the injury occurred on the bridge and not the barge and, thus, is sufficient to rebut the Section 20(a) presumption.

In his analysis, the administrative law judge first addressed the lay descriptions of claimant's working conditions. Decision and Order at 11. He found that claimant's description to the attending physician at the hospital matched the conditions in which he worked on the bridge and not the conditions on the barge. Dr. Larosa's report indicated that claimant told Dr. Larosa that, prior to being sick, he had been standing in two feet of dead pigeons and pigeon droppings and there was a lot of dust floating in the air. Cl. Ex. 6 at 8. The administrative law judge found that this most closely represents claimant's description of the inside of the containment area on the bridge. Tr. at 50, 58. Similarly, while claimant described a lot of debris falling from the bridge overhead onto the barge and his helping to clean it up, Tr. at 72, claimant's co-workers on the barge, Daniel Smallwood and James Tambures, stated there was no debris falling onto the barge while claimant was present because production had been shut down for repairs and the containment area was not directly over the barge but was several hundred yards to the side. Cl. Ex. 30 at 15; Tr. at 167, 185, 199-200, 217. Additionally, Mr. Frangopoulos stated that several employees had similar flu-like symptoms about the same time claimant became sick. He specified, however, that none of them worked on the barge.[8] Tr. at 233. Mr. Smallwood also testified that barge operators wear respirators during production to protect themselves from lead poisoning but he has never had occasion to be protected from pigeon droppings. Tr. at 162-163, 182, 195, 198-199. He also testified that dust does not "spew" out of the machines because they are not under pressure when they are not operating and that he has never seen clouds of debris and dust when he opened the machines.[9] Tr. at 191-192, 204.

Next, the administrative law judge found that the medical evidence supports the finding that claimant contracted histoplasmosis while working on the bridge. Decision and Order at 12. The administrative law judge stated that both Drs. Kang and Emory agreed that the gestation period for histoplasmosis can be anywhere between one and

[8]Claimant is correct that significant weight should not be accorded to this information regarding other sick employees. There are no details as to their identities or illnesses. However, it is relevant that none of the regular barge workers, who were on the barge at the same time as claimant, got sick, as they would have been exposed to the same debris to which claimant alleges he was exposed.

[9]Mr. Frangopolous agreed, stating he had no knowledge of exposure to pigeon droppings on the barge and that the vacuum is a closed system. Tr. at 237-240; *see also* Tr. at 191-192.

three weeks, that contraction usually occurs after prolonged exposure in confined areas, and that the exposure had to be in large enough quantities. This accurately reflects the doctors' statements.[10] Therefore, the administrative law judge found that, based on the medical evidence, claimant would have to have had significant exposure to bird droppings on the barge in order to become sick within two days of leaving the barge.

Employer has presented substantial evidence, lay and medical, which a reasonable mind could accept as establishing that claimant was not exposed to injurious stimuli on the barge. *See, e.g., American Grain Trimmers, Inc. v. Director, OWCP [Janich]*, 181 F.3d 810, 33 BRBS 71(CRT) (7th Cir. 1999) (*en banc*), *cert. denied*, 528 U.S. 1187 (2000). Credited testimony from Mr. Smallwood establishes there was no activity on the barge that would have exposed claimant to bird droppings. Tr. at 182, 185, 200, 202, 238-239. Moreover, although the doctors could not definitively exclude exposure on the barge, Dr. Emory stated that the acute form of histoplasmosis, which claimant had, is found in people who have been exposed in confined spaces, as there will be less inoculum in outdoor spaces, such as the barge, where the air circulates. Emp. Ex. 6 at 33-36. Less inoculum equates to a longer gestation period, and the administrative law judge found that manifestation of claimant's disease within two days of working on the barge does not fit with the lack of or little exposure on the barge. In considering the evidence as a whole, the administrative law judge rationally determined that claimant's disease was related to his work on the bridge and not on the barge. Therefore, as it is supported by substantial evidence, we affirm the administrative law judge's conclusion that claimant's harmful exposure to bird droppings which caused his histoplasmosis occurred on the bridge and not on navigable waters. As a result, we affirm the administrative law judge's finding that claimant is not covered by the Act pursuant to *Perini*.[11] *Smith*, 43 BRBS 111; *Gonzalez*, 39 BRBS 80; *Kehl*, 34 BRBS 121.

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[10]We reject claimant's argument that the administrative law judge incorrectly ignored the shortest gestation period mentioned in the CDC literature. Both doctors credited, Drs. Emory and Kang, indicated there is a type of inverse relationship between exposure and gestation period such that the greater and more intense the exposure, the shorter the gestation period may be, and Dr. Emory stated that his estimate was "in the ballpark" with the CDC information. Cl. Exs. 28, 45; Emp. Ex. 6.

[11]As we have affirmed the administrative law judge's finding that claimant's injury occurred on the bridge, we need not address claimant's argument that his presence on the barge was not transient or fortuitous. *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir.1999) (*en banc*); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). Additionally, we reject claimant's assertion that the administrative law judge did not address all the evidence and that the exposure had to have occurred on the barge where he was not wearing protective

As claimant was not injured on navigable waters, he must satisfy both the status and situs requirements in order to be covered by the Act. *Caputo,* 432 U.S. 249, 6 BRBS 150. Claimant argues that he satisfies the status requirement because his job on the bridge involved "loading" the barge, as the vacuum sucked debris from the bridge and sent it, through hoses, to the machines on the barge. The administrative law judge dismissed claimant's "loading" argument as "tenuous at best" and did not address it further.[12] Decision and Order at 13. Although the administrative law judge did not address the issue, we shall, as it involves solely the legal issue of whether the undisputed facts of claimant's job satisfy the Act's coverage requirements. Upon review of the case law, we reject claimant's assertion and affirm the administrative law judge's denial of benefits.

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gear. The administrative law judge summarized the evidence and stated that his decision was based on the entire record. Decision and Order at 2-10; Tr. at 58, 107. Additionally, testimony from Mr. Smallwood, whose testimony the administrative law judge generally credited but did not discuss in this regard, supports the administrative law judge's conclusion that claimant was exposed on the bridge despite wearing a respirator. Mr. Smallwood stated that he, as claimant's roommate, saw claimant after work every day and often claimant's face was very dirty, indicating he may have taken his hood and/or respirator off or not worn it properly while in the containment area. Tr. at 196-197.

[12]We reject claimant's assertion that *Walker*, 34 BRBS 176, or *Pittman Mechanical Contractors, Inc. v. Director, OWCP [Simonds]*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994), supports his proposition. *Walker* did not involve this type of "loading." Rather, *Walker* involved a claimant's work on a platform suspended from a crane on a barge on navigable waters. Although the claimant was a bridge worker, he was injured on navigable waters, and his claim was covered under *Perini*. *Walker*, 34 BRBS at 178-179. We have already held that *Perini* is inapplicable in this case because claimant's injury did not occur on navigable waters. Similarly, *Simonds* is distinguishable from the instant case. In *Simonds*, the claimant was injured while installing and repairing a pipeline on a pier that transported steam, water, and fuel from land-based storage facilities over a pier and onto the docked ships. The United States Court of Appeals for the Fourth Circuit relied on the Supreme Court's decision in *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46, 23 BRBS 96, 98(CRT) (1989), to find the claimant covered because his work on a pier involved the maintenance and repair of equipment essential for loading vessels with materials necessary to perform their function in maritime commerce. *Simonds*, 35 F.3d 122, 28 BRBS 89(CRT); *see also Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, *reh'g denied*, 910 F.2d 1179 (3d 1990), *cert. denied*, 498 U.S. 1067 (1991). As there is no evidence of record to support claimant's statement that he was engaged in the maintenance of any equipment necessary to the loading process, Cl. Brief at 15, we reject his assertion that *Simonds* supports his claim of coverage in this way.

Section 2(3) of the Act specifically provides:

> The term "employee" means any *person engaged in maritime employment*, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker …

33 U.S.C. §902(3) (emphasis added). Congress did not define "maritime employment" but the Supreme Court has determined that the Act "cover[s] all those on the situs involved in the essential or integral elements of the loading or unloading process." *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46, 23 BRBS 96, 98(CRT) (1989); *Stowers v. Consolidated Rail Corp.*, 985 F.2d 292, 26 BRBS 155(CRT) (6th Cir.), *cert. denied*, 510 U.S. 813 (1993). In *Stowers*, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, stated:

> Thus, the definition of 'maritime employment' reaches not only traditional longshoreman-type work, but it also reaches railroad *workers who engage in tasks traditionally performed by longshoremen*. Applying the test liberally, the Supreme Court has held that workers performing even one integral part of the loading or unloading process are covered by the LHWCA.

Stowers, 985 F.2d at 294, 26 BRBS at 159(CRT) (emphasis added) (citing *Ford*, 444 U.S. 69, 11 BRBS 320)). Using this definition, the court held that the claimant, a railroad worker who brought railcars of coal to and from the dock for loading and unloading by dock personnel, was not engaged in maritime employment. The Sixth Circuit reasoned that the claimant's duties involved either the first or last stage of overland transportation of cargo and it was significant that he did not participate in either the actual loading or unloading of the ships at the dock. *Stowers*, 985 F.2d at 297, 26 BRBS at 162(CRT); *but see Warren Bros. v. Nelson*, 635 F.2d 552, 12 BRBS 714 (6th Cir. 1980) (a claimant who trucked gravel from shipside to a storage facility next to his employer's factory was integral to the unloading of the gravel from the barges because he engaged in the type of duties longshoremen usually perform in moving cargo from ship to storage); *see also Nelson v. American Dredging Co.*, 143 F.3d 789, 32 BRBS 115(CRT) (3d Cir. 1998) (injury while unloading dredged sand onto a beach was covered); *Loyd v. Ram Industries, Inc.*, 35 BRBS 143 (2001) (on-shore pipeline man hired to repair and maintain equipment necessary to unload debris from a dredge used to widen and deepen a ship channel was covered).

However, not all "loading" conveys coverage. In *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985), the Supreme Court addressed whether a welder who built and replaced pipelines on an offshore fixed platform was involved in maritime employment merely because he loaded and unloaded his tools and supplies from a boat. The Court acknowledged that "maritime employment" is not limited to the occupations enumerated in Section 2(3) but stated that the term cannot be read to eliminate the requirement that there be a connection with the loading or construction of ships. That is, the Supreme Court declined to extend the definition "beyond those actually involved in moving cargo between ship and land transportation." *Herb's Welding*, 470 U.S. at 423-424, 17 BRBS at 82-83(CRT). Thus, the Court held that the claimant was not covered because, despite having to unload his tools, his job as a welder on a fixed platform included no tasks that were "inherently maritime." *Id.*, 470 U.S. at 425, 17 BRBS at 83(CRT).

In a similar factual situation, the Fifth Circuit cited *Herb's Welding* in denying coverage in *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 27 BRBS 103(CRT), *reh'g en banc denied*, 8 F.3d 24 (5th Cir. 1993), *cert. denied*, 511 U.S. 1086 (1994). In *Munguia*, the court concluded that a claimant's duties loading and unloading supplies and tools from a boat and repairing the boat were incidental to his job as an oilfield worker. Specifically, the Fifth Circuit reasoned that "loading" and "unloading" alone did not warrant a conclusion that the employee was engaged in "maritime employment." Rather the court relied on the rationale espoused in *Fontenot v. AWI, Inc.*, 923 F.2d 1127, 1131, 24 BRBS 81, 85(CRT) (5th Cir. 1991) (internal footnotes omitted) (emphasis added) to find there is a limit to conferring coverage for "loading":[13]

> the unloading and loading, and construction activities that the [Supreme] Court recognizes as the focus of the maritime employment test . . . can be unconnected with maritime commerce. . . . For example, an employee might unload one train, and load another; or an employee might engage in construction activities, but build an airplane instead of a ship. Nothing intrinsic in any of these activities established their maritime nature; *rather it is that they are undertaken with respect to a ship or vessel. When the tasks are undertaken to enable a ship to engage in maritime commerce, then the activities become 'maritime employment.'*

[13]The discussion in *Fontenot* concerned the status of an oilfield worker who worked on platforms as well as vessels. The court concluded the claimant was covered because his injury occurred on a vessel on navigable waters.

Munguia, 999 F.2d at 813, 27 BRBS at 107(CRT); *see also Laviolette v. Reagan Equipment Co.*, 21 BRBS 285 (1988) (offloading a superstructure was incidental to the claimant's construction of a fixed offshore oil rig superstructure, which is not maritime work); *Alexander v. Hudson Engineering Co.*, 18 BRBS 78 (1986) (electrician fabricating fixed offshore oil facilities not maritime work).

The purpose of claimant's work in this case was to dispose of the debris that accumulated from the cleaning of the bridge. As with work on a fixed platform, work on a bridge is not inherently maritime. *Smith*, 43 BRBS 111; *Gonzalez*, 39 BRBS 80; *Kehl*, 34 BRBS 121; *Crapanzano*, 30 BRBS 81; *Kennedy*, 30 BRBS 1; *Pulkoski*, 28 BRBS 298; *Johnsen*, 25 BRBS 329. That the vacuum deposited the debris into a machine on a barge in this case was unique, as Mr. Frangopolous testified that this was the first time his company had ever used a barge to hold the bridge-cleaning equipment. Significantly, the debris was merely collected and stored on the barge until the end of the bridge cleaning project; the vacuumed debris did not "enable" the barge to "engage in maritime commerce." *See Munguia*, 999 F.2d at 813, 27 BRBS at 107(CRT); *see also Fontenot*, 923 F.2d at 1130, 24 BRBS at 84(CRT).[14] Neither the vacuumed debris nor claimant's role in vacuuming the debris was integral to any maritime purpose. *Compare with Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT). Because claimant's work was neither maritime in nature nor integral to maritime commerce, we conclude that claimant's vacuuming of debris from the bridge does not constitute "loading" as that term relates to coverage under the Act. *See Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT); *Munguia*, 999 F.2d at 813, 27 BRBS at 107(CRT); *Stowers*, 985 F.2d at 294, 26 BRBS at 159(CRT); *Bazemore v. Hardaway Constructors, Inc.*, 20 BRBS 23 (1987) (the claimant's duties cleaning up a storage yard, where materials used by the employer in a variety of maritime and non-maritime construction projects were stored, did not further maritime commerce in any way). Therefore, claimant was not engaged in "maritime employment," has not satisfied the Section 2(3) status requirement, and is not entitled to benefits under the Act.[15]

[14]The *Fontenot* court specified that if an employee is not injured on navigable waters, "then [he] is engaged in 'maritime employment' only if his work is directly connected to the commerce carried on by a ship or vessel" pursuant to the Supreme Court's decision in *Herb's Welding*. *Fontenot*, 923 F.2d at 1130, 24 BRBS at 84(CRT).

[15]In light of our conclusion, we need not address whether claimant's injury occurred on a covered situs pursuant to Section 3(a) of the Act.

Accordingly, we affirm the administrative law judge's Decision and Order denying benefits.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge