BRB No. 14-0147

DANIEL O'DONNELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NAUTILUS MARINE PROTECTION, INCORPORATED	)	
	)	
	)	DATE ISSUED: Nov. 21, 2014
and	)	
	)	
STATE COMPENSATION INSURANCE FUND	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Daniel O'Donnell, Apple Valley, California, *pro se.*

Gary M. Spero (State Compensation Insurance Fund), Santa Ana, California, for employer/carrier.

Before: HALL, Acting Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Denying Benefits (2010-LHC-01099) of Administrative Law Judge Larry W. Price 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). In an appeal by a claimant who is not represented by counsel, the Board will review the findings of fact and conclusions of law of the administrative law judge to determine if they are rational, supported by substantial evidence, and in accordance with law. If they are, they must be affirmed. 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 in August 2000 to work on a project to fabricate a trash collection boom and install it into the Los Angeles River. The boom was to be set across the river and used to deflect trash and debris into a containment area.[1] Claimant's duties on land included the building of a staging area for the boom, installing metal screens on the bottom of the boom and equipment maintenance at the land-based work site. HT at 8-10. The work site sat adjacent to the 710 Freeway, where it intersects Anaheim Street, approximately two miles south of the West Pacific Coast Highway Bridge and about four miles from the mouth of the river at Long Beach Harbor. *Id.* at 10-11. The work site held storage containers, the pipe rack, a fork lift and crane, and skiffs for installing the boom. *Id.* As boom sections were completed, they were "air checked" and then lifted by crane and placed into the river just below Anaheim Street. *Id.* at 15. Once each 50-foot constructed section was in position, claimant would take the skiff onto the river in order to connect the individual sections and anchor them in place in the river. *Id.* Claimant testified that when he was on the skiff, it was for about an hour or hour-and-a-half per day. *Id.* at 16. While the boom was still under construction,[2] and in the performance of his land-based duties for employer, on October 30, 2000, claimant was struck by a falling, 30-foot container used to store tools. This accident resulted in the loss of both of claimant's legs and significant internal injuries. Claimant filed a claim seeking benefits under the Act. Employer controverted the claim,[3] contending that there is no coverage under the Act as the situs requirement has not been met.

The administrative law judge found that claimant is not covered by the Act, as his injuries did not occur on a covered situs. 33 U.S.C. §903(a). Claimant, without the

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[1]In 1938, the United States Army Corps of Engineers began a nearly 30-year project to completely encase the Los Angeles River's bed and banks in concrete. *See* http://thelariver.com/about/history-of-the-river/. It is undisputed that the section of the river in which the boom was placed is encased in concrete. HT at 65; Post-Hearing Deposition (PH Dep.) of Jerry Jeppesen at 40. It appears, but it is not entirely clear, that there is a "man-made" storm channel off the Los Angeles River, and that the collection boom was intended to deflect debris into the channel.

[2]At the time of claimant's injury, approximately six or seven sections of the boom remained to be installed. PH Dep. at 19-20.

[3]Employer has been paying total disability and medical benefits since the date of injury pursuant to California's Workers' Compensation Act. Employer does not dispute that claimant is totally disabled as a result of his work injuries and that he reached maximum medical improvement for those injuries on November 21, 2007.

assistance of counsel, appeals, and employer responds, urging affirmance of the administrative law judge's denial of the claim.

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or that it occurred on a landward area covered by Section 3(a), and that the employee's work is maritime in nature and is not specifically excluded by the Act. 33 U.S.C. §§902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Thus, in order to demonstrate that coverage under the Act exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id.*; *see also Crapanzano v. Rice Mohawk, U.S. Constr. Co., Ltd.*, 30 BRBS 81 (1996).

Section 3(a) of the Act states:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a). A site must be an enumerated situs adjoining navigable water (pier, wharf, dry dock, etc.), or an "other adjoining area" customarily used for a maritime purpose. *Hurston v. Director, OWCP*, 989 F.2d 1547, 26 BRBS 180(CRT) (9th Cir. 1993). To be covered by the Act, a site must have a functional and geographic nexus with navigable waters, but it need not be used exclusively or primarily for maritime purposes. *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). Claimant was not injured while he was working "upon" the river or on an enumerated site; thus, the issue is whether claimant's injury occurred on an "other adjoining area."

The administrative law judge framed the issue in this case as whether the work site at which claimant was injured is an "adjoining area" to "navigable waters." It is well established that the question of whether a body of water is navigable is one of fact to which the applicable legal standard must be applied. *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940); *United States v. Utah*, 283 U.S. 64 (1931). The Board has held that the applicable definition of "navigability" under the Act is the

"navigable in fact" test.[4] *George v. Lucas Marine Constr.*, 28 BRBS 230, 234 (1994), *aff'd mem. sub nom. George v. Director, OWCP*, 86 F.3d 1162 (9th Cir. 1996) (table); *see also Haire v. Destiny Drilling (USA), Inc.*, 36 BRBS 93 (2002); *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. 1996), *cert. denied*, 519 U.S. 931 (1996); *Lepore v. Petro Concrete Structures*, 23 BRBS 403 (1990). The threshold requirement of navigability in admiralty law and under the Act is the presence of an "interstate nexus" which allows the body of water to function as a continuous highway for commerce between ports. *Lepore*, 23 BRBS at 406; *see also Rizzi*, 27 BRBS at 277. A natural or an artificial waterway incapable of being used as an interstate artery of commerce because of natural or man-made conditions is not considered navigable for purposes of coverage under the Act. *Lepore*, 23 BRBS at 407; *see also Williams v. Pan Marine Constr.*, 18 BRBS 98 (1986) *aff'd sub nom. Williams v. Director, OWCP*, 825 F.2d 246, 20 BRBS 25(CRT) (9th Cir. 1987).

The administrative law judge first determined that the record does not support a finding that the waterway near which claimant worked was navigable in fact. Properly noting that navigability under the Act depends on actual present navigability or susceptibility to future navigability with reasonable improvements, the administrative law judge found that there is no evidence that any commercial activity occurred on either the storm channel or the Los Angeles River, or that either is used as a "commercial highway." Decision and Order at 5. In this regard, the administrative law judge found that the storm channel is a man-made section that feeds rain run-off into the Los Angeles River, is only 16 feet deep, is not used for any commercial activity, and that there are no piers, wharves, or docking areas at employer's work site near the 710 Freeway. *Id.* Additionally, the administrative law judge found that the Los Angeles River itself does not appear to be navigable above the red and white buoys which are located several hundred yards downstream from the collection boom where the injury occurred. *Id.* He thus concluded that claimant's injury did not occur adjacent to or near "navigable" water.

The finding that the storm channel and Los Angeles River are not navigable near the site of claimant's land-based injury is supported by substantial evidence and is in

[4]Thus, the fact that the United States Coast Guard and the Army Corps of Engineers have declared that the Los Angeles River is navigable at the point of claimant's accident is not dispositive of the "navigability in fact" inquiry under the Act. *George v. Lucas Marine Constr.*, 28 BRBS 230, 234 (1994), *aff'd mem. sub nom. George v. Director, OWCP*, 86 F.3d 1162 (9th Cir. 1996)(table) (the appropriate test for navigability under the Act is the "navigability in fact" test established in admiralty law); *see also Haire v. Destiny Drilling (USA), Inc.*, 36 BRBS 93 (2002).

accordance with law. The fact that employer deployed small skiffs on the water is not sufficient to satisfy the Act's "navigability" test, as the boats are not used in interstate commerce. *See George*, 28 BRBS 234. Further, there is no evidence of any present commercial use of this section of the Los Angeles River or of its susceptibility for future commercial use as an interstate artery of commerce.[5] PH Dep. at 42-43, 50-51. Thus, employer's land-based worksite along the Los Angeles River did not adjoin "navigable waters," and we affirm the administrative law judge in this regard. *See Cunningham v. Bath Iron Works Corp.*, 37 BRBS 76 (2003) (Hall, J., concurring in relevant part and dissenting on other grounds), *aff'd sub nom. Cunningham v. Director, OWCP*, 377 F.3d 98, 38 BRBS 42(CRT) (1st Cir. 2004); *Haire*, 36 BRBS 93; *George*, 28 BRBS 230; *Bennett v. Matson Terminals, Inc.*, 14 BRBS 526 (1981), *aff'd mem. sub nom. Motoviloff v. Director, OWCP*, 692 F.2d 87 (9th Cir. 1982).

The administrative law judge also concluded, applying the "functional relationship" test in terms of the *Herron* factors, that employer's work site is not an "adjoining area."[6] Decision and Order at 5-7. Specifically, the administrative law judge found that the facility at which claimant worked was not an integral part of any maritime operation. *Id.* at 7. In this regard, the administrative law judge found that the work site was a temporary facility created for the purpose of placing a boom to collect trash and, thus, it was not used in "loading, unloading, repairing, dismantling, or building a vessel."

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[5]Claimant and Mr. Jeppesen both stated that they had not seen any vessels in the river near employer's work site. HT at 66, 70-71; PH Dep. at 40-41. Mr. Jeppesen stated that there is a red and white buoy marker downstream from the work site, which is there to warn ships not to go beyond that point. PH Dep. at 42-43. Mr. Jeppesen testified on deposition that while the Los Angeles River is considered "navigable," "it is not meant to navigate ships on." *Id.* at 50. Rather, he opined that the purpose of the navigability determinations by the Coast Guard and Army Corps of Engineers is that the river "is set aside, so down the road, if the federal government wants to take that piece of land out and make a harbor out of it or whatever, they own it." *Id.* at 50-51.

[6]In *Herron*, 568 F.2d at 141, 7 BRBS at 411, the Ninth Circuit stated that consideration should be given to the following factors, among others, in determining if a site is an "adjoining area:"

> the particular suitability of the site for the maritime uses referred to in the statute; whether adjoining properties are devoted primarily to uses in maritime commerce; the proximity of the site to the waterway; and whether the site is as close to the waterway as is feasible given all of the circumstances in the case.

Additionally, the administrative law judge found that there is no evidence of neighboring properties used in maritime commerce, or that the construction of the trash collection boom required a site particularly suited for maritime uses. Rather, the administrative law judge found that the boom site is well upstream from the last channel marker buoys, through which commercial vessels might be able to pass. Moreover, the administrative law judge found that employer and its facility lack any relationship with Long Beach Harbor, which is more than four miles downstream. Consequently, the administrative law judge concluded that claimant was not injured on an "other adjoining area" pursuant to Section 3(a).

Substantial evidence supports the administrative law judge's finding that employer's worksite was not customarily used for maritime activity. The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has held that the phrase "other adjoining area" contained in Section 3(a) of the Act is qualified so as to require a relationship to maritime activity; specifically the area must have a functional relationship and geographical relationship with navigable waters, which, though it need not depend on physical contiguity with navigable waters, must be "customarily used by employer in loading, unloading, repairing, dismantling, or building a vessel." *See Hurston*, 989 F.2d at 1578, 26 BRBS at 184(CRT). Thus, the situs test is not met merely because the injury occurred adjacent to water. *See Melerine v. Harbor Construction Co.*, 26 BRBS 97 (1992). Absent customary maritime activity, an area cannot be a covered "adjoining area" within the meaning of Section 3(a). 33 U.S.C. §903(a); *Silva v. Hydro-Dredge Corp.*, 23 BRBS 123 (1989); *see also R.V. [Villaverde] v. J. D'Annunzio & Sons*, 42 BRBS 63 (2008), *aff'd mem. sub nom. Villaverde v. Director, OWCP*, 335 F. App'x 79 (2d Cir. 2009); *Nelson v. Guy F. Atkinson Constr. Co.*, 29 BRBS 39 (1995), *aff'd mem. sub nom. Nelson v. Director, OWCP*, 101 F.3d 706 (9th Cir. 1996) (table); *Pulkoski v. Hendrickson Bros., Inc.*, 28 BRBS 298 (1994).

The purpose of employer's business was to place a boom across the Los Angeles River to collect trash and other debris. CXs 3, 4; PH Dep. at 9. In this regard, a letter issued by Harry W. Stone, Director of Public Works for the County of Los Angeles, in conjunction with the project, noted that the purpose of project was to "test new technology for removing vegetation and urban trash and debris from the Los Angeles River." CX 4. Additionally, that document notes that "[r]emoval of vegetation, urban trash, and debris at the mouth of the Los Angeles River will improve navigation in the Port of Long Beach, reduce deposition onto recreational areas and aquatic habitats, and improve water quality and visual aesthetics." *Id.* Mr. Jeppesen clarified that "the primary purpose [of the boom] was to take the massive tonnage of green hervanta bamboo off the river that ends up on the beach," such that it was "very much" for an environmental purpose. PH Dep. at 47-48. Mr. Jeppesen stated that employer's project had no relationship to the loading and unloading of vessels. *Id.* Thus, the administrative law judge rationally found that there is no evidence that employer's temporary facility

was being used for the maritime purposes of the Act, i.e., the loading, unloading, repairing, dismantling, or building of a vessel, or that it had any relationship to such activities at the Port of Long Beach. As for the nature of the neighboring properties, the record contains little evidence on this issue. However, claimant, when asked whether there are "any stevedoring companies or container terminals on the branch of that storm channel," responded "No. No sir, there isn't." HT at 72. Consequently, as the evidence is insufficient to establish that employer's temporary facility had any functional nexus with the maritime purposes of the Act, we affirm the administrative law judge's finding that the site of claimant's injury is not an "adjoining area." *See Villaverde*, 42 BRBS 63; *Nelson*, 29 BRBS 39; *Pulkoski*, 28 BRBS 298; *Silva*, 23 BRBS at 126. We therefore affirm the administrative law judge's finding that claimant's injuries did not occur under the Act on a covered situs and the consequent denial of benefits. 33 U.S.C. §903(a).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge