



BRB No. 19-0076

RICHARD J. WILSON	)	
	)	
Claimant-Petitioner	)	
	)	DATE ISSUED: 09/16/2019
v.	)	
	)	
CREAMER-SANZARI JOINT VENTURE	)	
	)	
and	)	
	)	
ARCH INSURANCE COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Dismissing Claim for Lack of Jurisdiction of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Nicholas P. Giuliano (Giuliano McDonnell & Perrone LLP), Mineola, New York, for claimant.

John J. Rabalais and Gabriel E.F. Thompson (Rabelais Unland), Covington, Louisiana, for employer/carrier.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Dismissing Claim for Lack of Jurisdiction (2018-LHC-00049) of Administrative Law Judge Lauren C. Boucher rendered on a claim filed pursuant to 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 rational, supported by substantial evidence, and 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 filed claims for benefits for work-related hearing loss against two employers, Creamer-Sanzari and Underpinning & Foundation Construction. The parties agreed in a joint stipulation that the only issues ripe for decision were coverage and responsible employer, and they elected to have a decision on the record without a hearing.<sup>1</sup>

Claimant started working as a dockbuilder in 1987 as a member of the Dockbuilders Local Union 1456. His usual duties involved doing foundation work, driving piles, welding, and pouring concrete. *See* EX 1 at 17. He worked on various construction projects, both land-based and marine, including the Route 3 bridge project that consisted of building a new bridge to replace an existing bridge over the Passaic River between Clifton and Rutherford, New Jersey.

Claimant’s work on the Route 3 bridge project commenced in 2010, and involved pile driving, drilling, welding, working on float stages, and building a cofferdam. EX 1 at 22-23. He explained that he worked on float stages, which are usually 4-feet by 24-feet wood planks bolted together to allow people to work from the water. *Id.* at 36. They were usually tied to the cofferdam but not fixed to the riverbed. He testified at his deposition that he saw boat traffic, consisting of crew boats, small motorboats, and some tugboats and barges about one-half mile down river from the bridge. EX 8 at 25-26. He also testified that he used tugboats and barges in 2000 or 2001, while working on a bridge north of the Route 3 bridge project. *Id.* at 26-28.

The administrative law judge found that claimant was injured on the waters of the Passaic River while working from float stages on the Route 3 bridge project. Decision and Order at 9. She noted that because claimant was actually injured while afloat on the water, he would satisfy the situs and status requirements for coverage under the Act provided the Passaic River was “navigable waters of the United States.” 33 U.S.C. §903(a); *see* Decision and Order at 10.

The administrative law judge relied on the Supreme Court’s definition of “navigable waters” as those which are “navigable in fact,” that is, “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

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<sup>1</sup> The administrative law judge found Creamer-Sanzari to be the responsible employer, Decision and Order at 7, and that finding has not been challenged on appeal.

of water.” Decision and Order at 11 (quoting *The Daniel Ball*, 77 U.S. 557, 563 (1871)). She defined the relevant inquiry as whether river mile (RM) 11.8 of the Passaic River—where claimant was injured—is capable of sustaining interstate commerce.<sup>2</sup> *Id.* at 12. She concluded claimant failed to establish that RM 11.8 is currently capable of sustaining commercial use and, consequently, that portion is not navigable water for purposes of the Act. *Id.* at 14-16. Therefore, she dismissed claimant’s claim for benefits for lack of coverage.

Claimant appeals the administrative law judge’s decision. Employer filed a response, urging affirmance. Claimant filed a reply brief.

On appeal, claimant first contends that the administrative law judge erred in not applying the Section 20(a) presumption to the issue of situs. Section 20(a) of the Act states, “it shall be presumed, in the absence of substantial evidence to the contrary that the claim comes within the provisions of this chapter.” 33 U.S.C. §920(a). Assuming, arguendo, that Section 20(a) applies to the issue of the navigability of the Passaic River, we agree with employer that any error the administrative law judge made in not applying the presumption is harmless as employer presented substantial evidence to rebut a presumption that RM 11.8 of the Passaic River is navigable in fact. *See generally Cunningham v. Director, OWCP*, 377 F.3d 98, 108, 38 BRBS 42, 48(CRT) (1st Cir. 2004); *Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir.), *cert. denied*, 525 U.S. 981 (1998). Employer submitted a 2008 Army Corps of Engineers Report (ACE Report) titled “Lower Passaic River Commercial Navigation,” as well as the testimony of the superintendent of the Route 3 bridge project, which is substantial evidence that the river is not navigable at the point of injury. *See discussion, infra.* Thus, claimant bore the burden of establishing that his injury occurred on navigable waters. *See generally Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43(CRT) (1994).

Claimant next challenges the administrative law judge’s finding that he did not establish the Passaic River is navigable in fact at the location of the Route 3 bridge project where he was injured. Section 3(a) of the Act states that compensation is payable in cases

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<sup>2</sup> The administrative law judge rejected employer’s argument that claimant did not meet the situs test because he was injured while working on the Route 3 Bridge and bridges are generally not covered under the Act. *See* Decision and Order at 9-10. She found that claimant was injured while working on float stages that were actually floating on the water of the Passaic River, not while working on an actual bridge. *Id.* Thus, she properly found the fact that claimant’s work was in furtherance of the ultimate building of a bridge was immaterial. *Id.*; *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983); *Walker v. PCL Hardaway/Interbeton*, 34 BRBS 176 (2000).

where “the disability or death results from an injury occurring upon the navigable waters of the United States....” 33 U.S.C. §903(a). Claimants who are injured on navigable waters satisfy both the situs and status requirements for coverage under the Act. *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983).

The test for navigability is whether a body of water is “navigable in fact” for admiralty purposes. *George v. Lucas Marine Constr.*, 28 BRBS 230, 234 (1994), *aff’d sub nom. George v. Director, OWCP*, 86 F.3d 1162 (9th Cir. 1996) (table) (quoting *The Daniel Ball*, 77 U.S. at 563). For admiralty purposes, “navigability” generally means “a present capability of waters to sustain commercial shipping, or contemporary navigability in fact.” *Cunningham v. Director, OWCP*, 377 F.3d 98, 108, 38 BRBS 42, 48(CRT) (1st Cir. 2004) (quoting *Livingston v. U.S.*, 627 F.2d 165, 169-70 (8th Cir. 1980)). The admiralty definition of navigability depends on the water’s capability of commercial use and not on the mode or extent of that use. *George*, 28 BRBS at 234 (citing *The Montello*, 20 Wall. 430, 22 L.Ed. 391 (1874)). A threshold requirement of navigability is the presence of an “interstate nexus” which allows the body of water to function as a continuous highway for commerce between ports. *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). A natural or artificial waterway not susceptible of being used as an interstate artery of commerce because of natural or manmade conditions (such as a dam) is not navigable for purposes of admiralty law. *Haire v. Destiny Drilling (USA), Inc.*, 36 BRBS 93 (2002). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, defined a navigable waterway as “one that, by itself, or by uniting with other waterways, forms a continuous highway capable of sustaining interstate or foreign commerce.” *Reeves v. Mobile Dredging & Pumping Co., Inc.*, 26 F.3d 1247, 1253 (3d Cir. 1994).

The administrative law judge reviewed the evidence concerning the navigability of RM 11.8 of the Passaic River. Claimant cited 33 C.F.R. §117, a provision pertaining to drawbridges across navigable waters, which mentions the bridge at RM 11.7 of the Passaic River, and a number of court cases describing the Passaic River as navigable.<sup>3</sup> See Decision and Order at 12. Claimant also relied on his deposition testimony that he saw crew boats and small motor boats within one-half mile of the Route 3 bridge project, see EX 8 at 25-26, and that in 2000-2001, tugboats and barges were in use north of the Route 3 Bridge. *Id.* at 26-28.

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<sup>3</sup> In his brief to the Board, claimant also cites the National Oceanic and Atmospheric Administration’s nautical charts for use by mariners. This chart, however, is not in the record and will not be considered by the Board. 20 C.F.R. §802.301.

In contrast, employer relied on the ACE Report, which focuses on the lowest 17 miles of the Passaic River from Dundee Dam at RM 17 to its confluence with Newark Bay. The Report states that the stretch of the Passaic River’s “authorized federal navigation channel” lies between the mouth of the river at Newark Bay and the Eighth Street Bridge in Wallingford, NJ (RM 15.4). EX 6 at 3. The Report further explains that the segment from RM 8.1 to RM 15.4, which includes the portion of the river where claimant worked, has a constructed depth of 10 feet mean low water and a width of 150 feet. *Id.* at 6. The Report states that the “commercially navigable portion of the Passaic River” has fourteen bridges,” the last of which is located at RM 8.1 and above which there are no berths. *Id.* at 10-11. The Report notes the limitations as to the vessels that are able to use the Passaic River because of depth and other dimension requirements. *Id.* at 12-13. Employer also submitted the deposition testimony of two employees who testified they did not use or see any barges or tugboats on the Passaic River during the Route 3 bridge project. EXs 12 at 33; 13 at 13-14. Only crew boats were used.

The administrative law judge determined that the evidence does not clearly establish that the Passaic River at RM 11.8 is capable of sustaining commerce. She noted the ACE Report’s conclusion that its depth would prevent any commonly-used large commercial ships to navigate the river at that point. Decision and Order at 14. She did not give weight to the sections of the federal regulations claimant submitted because it is unclear whether they are concerned with commercial navigation or simply recreational boat traffic.<sup>4</sup> She also did not accept as probative evidence the cases claimant cited because they did not address whether the Passaic River was navigable in fact and were decided more than 50 years ago. *Id.* at 15. She found that the only affirmative evidence of navigability in fact is claimant’s testimony that almost a decade prior he used barges and tugboats when he worked on the bridge north of the Route 3 Bridge and more recently saw barges and tugboats used south of the bridge project. She concluded that claimant’s testimony is not specific enough to establish contemporary commercial use of the river at RM 11.8. *Id.* at 15-16. She therefore found claimant did not meet his burden to prove that he was injured on “navigable waters.” *Id.* at 16.

Substantial evidence supports the administrative law judge’s conclusion that claimant failed to establish that the Passaic River is navigable at the point of injury. The ACE Report notes that the depth of the river at RM 11.8 limits its use for commercial

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<sup>4</sup> Similarly, the administrative law judge found insufficient to establish commercial navigability in fact other evidence offered by claimant, namely the Route 3 Bridge permit and the Eighth Street Bridge public notice referring to the Passaic River as navigable, and the tide chart and bridge clearance chart for the site of the Route 3 Bridge. Decision and Order at 14 (citing CXs N, M).

navigation and also makes clear that further dredging would be necessary in order to make that section of the river navigable by ships of a certain size or ships commonly used for commercial purposes. EX 6 at 10. A showing of present commercial use or susceptibility for future commercial use is necessary to find a waterway navigable. *See George*, 28 BRBS at 236-237 (affirming finding that American River where claimant was injured is not currently navigable because a dam precluded travel upstream even though it was once used for commerce). The administrative law judge permissibly found claimant's testimony that he saw barges and tugboats on the river while he was working on the Route 3 bridge project and several years prior insufficient to establish current commercial use of the river at RM 11.8 because claimant did not describe the vessels or their purpose with any particularity. *See generally Bath Iron Works Corp. v. Director, OWCP [Hutchins]*, 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001). She also acted within her discretion in giving no weight to the sections of the federal regulations claimant submitted, permissibly concluding that they do not address the types of vessels that can navigate the river at RM 11.8. In addition, the use of vessels, such as crew boats, supporting a bridge construction project is not sufficient to establish navigability in fact if the vessels are not otherwise used in interstate commerce. *See O'Donnell v. Nautilus Marine Protection, Inc.*, 48 BRBS 67 (2014) (affirming finding that the Los Angeles River is not navigable at the site of claimant's injury because the small skiffs employer used for its project were not used in interstate commerce).

Contrary to claimant's contention, the ACE Report does not support a finding that the Passaic River is navigable in fact. It states that there are no berths for commercial navigation above mile 8.1 of the river, which includes the section of the river where claimant was injured. It further states that navigability is limited at RM 11.8 and it cannot be navigated by any commonly-used large commercial ships. Decision and Order at 14 (citing EX 6 at 12, 26). We reject claimant's assertion that the Report's description of the stretch of the Passaic River as part of the "authorized federal navigation channel" constitutes a tacit admission that the river is navigable. The administrative law judge permissibly concluded that with respect to RM 11.8 the Report establishes limitations to commercial navigability, no use by commonly-used large ships, and does not address or identify use by smaller vessels. Decision and Order at 14. It is the administrative law judge's prerogative to weigh the evidence and draw inferences therefrom. *See Bath Iron Works Corp. v. Director, OWCP [Shorette]*, 109 F.3d 53, 31 BRBS 19(CRT) (1st Cir. 1997); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961). Claimant has not established error in the administrative law judge's conclusion that the ACE report is not affirmative evidence of navigability at the point of injury.

Claimant's reliance on *Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006), is equally unavailing. *Morganti* addressed the navigability of Cayuga Lake in New York, which is connected to

the Erie Canal and thus to the Great Lakes. *Id.*, 412 F.3d at 413, 39 BRBS at 41(CRT). The United States Court of Appeals for the Second Circuit held that navigability should focus on whether it is physically possible for a commercial vessel to travel on the waterway. *Id.* In this case, the administrative law judge permissibly found the evidence indicates that the physical depth of the river at the location where claimant was injured severely restricts its use by commercial vessels and would need significant changes to make navigation feasible.<sup>5</sup> Unlike *Morganti*, the evidence does not show that “it is possible at any time for an interstate commercial vessel” to navigate the Passaic River at RM 11.8. *Id.*; *see also Haire*, 36 BRBS at 96 (affirming that a bayou was not navigable because floating vegetation prevented vessels other than some air boats from using it).

Although the Passaic River may be navigable at its southern end, several miles below where claimant was injured, coverage under the Act requires that the site at which claimant was injured be “upon the navigable waters.” *See O’Donnell*, 48 BRBS at 68. The administrative law judge’s finding that the evidence does not establish that the stretch of the Passaic River where claimant was injured is navigable in fact is rational, supported by substantial evidence, and in accordance with law. We therefore affirm the conclusion that claimant’s injury is not covered by the Act as his injury did not occur on navigable waters. Thus, we affirm the administrative law judge’s denial of benefits.

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<sup>5</sup> The ACE Report concludes that “commercial navigation on the Lower Passaic River is constrained by several factors,” the most significant of which “are the channel dimensions of the river.” EX 6 at 26. As noted by the administrative law judge, channel depth in particular “has been constrained [for the last 25 years] by accretion from the natural siltation process in the system combined with a lack of maintenance dredging.” *Id.*; Decision and Order at 14.

Accordingly, the administrative law judge's Decision and Order Dismissing Claim for Lack of Jurisdiction is affirmed.

SO ORDERED.

JUDITH S. BOGGS, Chief  
Administrative Appeals Judge

GREG J. BUZZARD  
Administrative Appeals Judge

JONATHAN ROLFE  
Administrative Appeals Judge