BRB No. 92-1966

MARTIN KENNEDY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AMERICAN BRIDGE COMPANY	)	
	)	
and	)	
	)	
GREAT AMERICAN INSURANCE COMPANY	)	DATE ISSUED:_____
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Award of Benefits and the Decision and Order on Motion for Reconsideration of Joel R. Williams, Administrative Law Judge, United States Department of Labor.

Richard A. Cooper (Fischer Brothers), New York, New York, for employer/carrier.

Marianne Demetral Smith (Thomas S. Williamson, Jr., Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order - Award of Benefits and the Decision and Order on Motion for Reconsideration (91-LHC-2438) of Administrative Law Judge Joel R. Williams awarding benefits 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 an ironworker hired to aid in the renovation of a railroad bridge, four sections of which had been removed from its New York site and brought on barges to employer's New Jersey facility.[1] In the course of his employment, claimant worked both on land and on the barges. He unloaded new steel and gears from trucks to the docks and old bridge pieces from the barges, and he loaded new steel, pieces, and gears onto the barges. Tr. at 10-12, 14. As an ironworker, he also bolted the new beams into place. *Id.* at 19-21. On December 11, 1989, claimant and his co-workers built a new motor house for the bridge and put in a new central gear box.[2] Upon disembarking from the barge for a coffee break with his co-workers, claimant slipped on the gangplank. To avoid falling into the water, he dove for the dock, landing on and shattering both elbows. Tr. at 18-19. Claimant has not worked since this incident. *Id.* at 27.

Claimant filed a claim for compensation, and employer filed a notice of controversion disputing coverage under the Act. Emp. Ex. 4. Relying on *West v. Erie Railroad Co., Inc.*, 163 F.Supp. 879 (S.D.N.Y. 1958), *Ford v. Parker*, 52 F.Supp. 98 (D.C. Md. 1943), and *Richards v. Monahan*, 17 F.Supp. 252 (D.C. Mass. 1936), the administrative law judge determined that claimant's injury occurred on navigable waters, as a gangplank is considered to be part of a vessel. Therefore, the administrative law judge found that claimant is a maritime employee covered by the Act under the rationale of *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983). The administrative law judge awarded claimant temporary total disability benefits from December 12, 1989, and continuing, less employer's credit for amounts paid under the state workers' compensation act. Decision and Order at 2-3. On reconsideration, he affirmed his original decision. Employer appeals both decisions, and the Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's finding that claimant is covered under the Act, but on different grounds than that found by

[1]The bridge sections were brought to New Jersey on barges via tugboats and they remained on the barges tied to the docks while they were renovated. Tr. at 12. To access the barges, the workers had to walk across a single plank with no hand rails. The angle of the plank increased with the tide. Tr. at 18-19, 24-26.

[2]The bridge is a truss bridge with a swing span. The motor house, which sits approximately 50 feet over the roadway, enables the span to turn, allowing passage of water traffic. Emp. Ex. 7 photo. 9; Tr. at 23, 30.

the administrative law judge. Claimant has not responded to this appeal.

Employer contends the administrative law judge erred in determining that claimant sustained an injury upon navigable waters. Specifically, employer maintains that claimant was not injured over navigable waters because he did not sustain a physical harm until he hit the ground on the dock. Alternatively, employer argues that claimant's employment does not satisfy the requirements of Section 2(3), 33 U.S.C. §902(3), as he was strictly an ironworker engaged in the repair of a bridge structure. In response, the Director urges the Board to uphold the administrative law judge's decision because claimant was engaged in maritime employment. The Director asserts that claimant's loading and unloading of construction materials is sufficient to satisfy the requirements of Section 2(3). We affirm the administrative law judge's decisions.

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 his injury occurred on a landward area covered by Section 3(a) and that his 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 jurisdiction exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id.*

Initially, we will address employer's contention that claimant's job duties do not fall within the scope of "maritime employment" under Section 2(3) of the Act,[3] since claimant may be covered on this basis regardless of whether his injury occurred on actual navigable waters. Specifically, employer contends that claimant's loading duties do not constitute the loading and unloading of "cargo" in maritime commerce. It concedes that claimant carried construction materials, tools, and his lunch on and off the barge but argues that none of these items can be considered "cargo." The Director contends the administrative law judge's decisions should be affirmed on this basis because the evidence establishes that claimant's work was maritime in nature, fulfilling the provisions of Section 2(3).

[3]Although the administrative law judge did not address whether claimant's loading duties are covered under Section 2(3), we note that there are no factual disputes, the findings regarding claimant's loading and unloading duties are supported by substantial evidence, and the standard of review concerning the question of claimant's status is for legal errors. Consequently, as employer and the Director agree, remand for the resolution of this issue is unnecessary. *See generally Stancil v. Massey*, 436 F.2d 274, 278 (D.C. Cir. 1970).

Generally, a claimant satisfies the "status" requirement if he is an employee engaged in work which involves loading, unloading, constructing, or repairing vessels. *See* 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46, 23 BRBS 96 (CRT) (1989); *Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992). Moreover, to satisfy this requirement, he need only "spend at least some of [his] time in indisputably longshoring operations." *Caputo*, 432 U.S. at 273, 6 BRBS at 165. As previously stated, claimant was an ironworker hired to repair bridge segments contained on a barge adjacent to a dock in New Jersey. The administrative law judge recited in his summary of the facts that claimant "assisted in the removal and placement of the steel parts on and off the barge and had helped to load gears on a barge for transport to the bridge site." Decision and Order at 1-2. The parties do not dispute these facts; moreover, the record contains substantial evidence to support the administrative law judge's findings. *See* Tr. at 10, 12, 14, 19-21.

Although employer agrees with the description of claimant's job duties, it challenges the classification of the construction materials and bridge segments as "cargo." Employer's argument is unpersuasive. Neither *Schwalb* nor *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112 (CRT) (3d Cir. 1992), as employer avers, restricts loading and unloading to traditional "cargo." Instead, those cases hold that a covered employee is one who is vital to the loading and unloading process, including those employees who contribute to the loading and unloading of vessels and the repair and maintenance of equipment used in the process. *Schwalb*, 493 U.S. at 47-48, 23 BRBS at 98-99 (CRT); *Rock*, 953 F.2d at 67, 25 BRBS at 121-122 (CRT). Additionally, "cargo" is defined as freight carried by a transport vehicle, such as a ship or airplane. *Webster's II New Riverside University Dictionary* (1984). The freight carried by the barge in this case was the bridge structure, and the freight loaded and unloaded by claimant consisted of bridge parts and construction materials. Despite employer's assertions, United States Courts of Appeals have held that the loading and unloading of construction materials constitutes traditional longshoring activities. *Browning v. B.F. Diamond Construction Co.*, 676 F.2d 547, 14 BRBS 803 (11th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 13 BRBS 1048 (5th Cir. 1981), *cert. denied*, 459 U.S. 1169 (1983); *Smith v. Universal Fabricators, Inc.*, 21 BRBS 83 (1988), *aff'd*, 878 F.2d 843, 22 BRBS 104 (CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *cf. Wilson v. General Engineering & Machine Works*, 20 BRBS 173, 176 n.4 (1988) (notion of "traditional cargo" is outdated, but Board distinguishes between maritime and military cargo). As there is no dispute regarding claimant's duties, and as the loading and unloading of construction materials constitutes maritime employment, claimant fulfills the status requirement of Section 2(3). Therefore, we reject employer's contention, and we affirm the administrative law judge's conclusion that claimant's claim falls within the jurisdiction of the Act.[4]

Further, we agree with the administrative law judge's conclusion that claimant qualifies as a

[4]Although the administrative law judge did not specifically discuss the application of Section 3(a), 33 U.S.C. §903(a), it is clear that claimant's work site, a barge adjacent to a dock on the Hackensack River in New Jersey, constitutes a covered situs under the Act. As a matter of law, claimant has also satisfied the situs requirement. *See, e.g., Boudlouche v. Howard Trucking Co., Inc.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981).

maritime employee under the Supreme Court's holding in *Perini North River Associates* because his injury on the gangplank occurred over navigable waters. Employer argues that claimant's injury is land-based because impact with the dock, and not the gangplank, caused the harm to claimant's person. Moreover, employer asserts that the rationale of the cases relied upon by the administrative law judge has been overruled in principle by *Calbeck v. Travelers Insurance Co.*, 370 U.S. 114 (1972), and *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969). We reject this argument.

It is well-established that a gangplank used for ingress and egress of a vessel is considered part of the vessel. *The Admiral Peoples*, 295 U.S. 649 (1935); *Ford*, 52 F.Supp. at 100. Well-settled law also provides that injuries occurring on gangplanks or ladders allowing ingress and egress of vessels arise within the limits of admiralty law. *The Admiral Peoples*, 295 U.S. at 652-653 (injury to steamship passenger who fell while stepping from gangplank to dock covered under admiralty law); *see generally Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917) (injury occurring on gangway between vessel and pier is not covered by state law). In this case, the administrative law judge relied upon cases wherein the employees were injured on either a gangplank or a ladder allowing access to the ships and were permitted to recover under the Act. *West*, 163 F.Supp. at 881; *Ford*, 52 F.Supp. at 98; *Richards*, 17 F.Supp. at 253. According to each district court, the injuries occurred over navigable waters and were covered by the Act regardless of where the employees landed and actually sustained their injuries. *West*, 163 F.Supp. at 882 (railroad employee injured on gangplank); *Ford*, 52 F.Supp. at 100 (watchman boarding tanker fell from ladder to concrete dock below); *Richards*, 17 F.Supp. at 253 (ship's machinist fell from ladder to wharf); *see also The Admiral Peoples*, 295 U.S. at 652-653.

In *Nacirema*, three claimants were injured on piers in individual accidents. A fourth claimant, whose case was heard in the lower courts with the other three but not by the Supreme Court, was knocked into the water from the pier. The United States Court of Appeals for the Fourth Circuit awarded compensation to all four claimants. *See Nacirema*, 396 U.S. at 214 n.3; *see also Ford*, 444 U.S. at 71 n.2, 11 BRBS at 321 n.2. The Supreme Court reversed the three awards before it and held that longshoremen who are injured on a pier are not covered under the Act, as the pier is considered an extension of land. *Nacirema*, 396 U.S. at 214-215, 223-224. The Court concluded that Congress specifically chose to adhere to the rule that injuries occurring on the landward side of the "*Jensen* line" are covered under state workers' compensation acts.[5] The Court cited its decision in *Swanson v. Marra Bros., Inc.*, 328 U.S. 1 (1946), as support for this proposition.[6] Questions

[5]In *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), the Supreme Court established what is called the "*Jensen* line," which is the line where water meets land. It marks the limit of admiralty jurisdiction. *See Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 216 (1969).

[6]In *Swanson*, the Supreme Court held that neither the Jones Act nor the Longshore Act covered a longshoreman injured on the docks even if his injury was caused by a vessel on navigable waters. *Swanson*, 328 U.S. at 7. In 1948, Congress enacted the Extension of Admiralty Jurisdiction Act (EAJA) which extended admiralty and maritime jurisdiction to "include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such

concerning injuries initiated on the seaward side of the "*Jensen* line" were not addressed.

Earlier Supreme Court cases relied on the "substance and consummation" of an occurrence to ascertain where a cause of action arose. *Martin v. West*, 222 U.S. 191 (1911) (vessel damaged a bridge); *Johnson v. Chicago & Pacific Elevator Co.*, 119 U.S. 388 (1886) (vessel damaged a building). This analysis required inspection of the "locality and character of the thing injured . . . at the time of the collision." *Martin*, 222 U.S. at 197. The Supreme Court considered the substance and consummation of the wrongs in *Johnson* and *Martin* to have occurred on land because bridges and buildings are land-based entities. *Martin*, 222 U.S. at 197; *Johnson*, 119 U.S. at 397. Following *Johnson* and *Martin*, the Supreme Court issued its decision in *T. Smith & Son v. Taylor*, 276 U.S. 179 (1928). In *Taylor*, a longshoreman was struck by a sling loaded with cargo, being lowered by a vessel's winch, and knocked from the wharf into the water where he drowned. Although Taylor's death occurred in the water, the Supreme Court held that the cause of action was land-based because the blow from the sling "was given and took effect" while he was on land. *Taylor*, 276 U.S. at 182. Because the Court considered the "substance and consummation" in *Taylor* and *Martin* to be identical, it held that the resulting actions from the *Johnson*, *Martin*, and *Taylor* injuries properly were brought in the state courts. *Taylor*, 276 U.S. at 182; *Martin*, 222 U.S. at 197; *Johnson*, 119 U.S. at 397.

From *Taylor*, we can ascertain that an injury-causing incident may occur on either the landward or the seaward side of the "*Jensen* line." Thus, the issue which arises is whether the injury occurs and jurisdiction attaches at the inception or the conclusion of an incident. In *Taylor*, the accident began on land and ended when claimant drowned, and jurisdiction vested with the state. In *The Admiral Peoples*, 295 U.S. at 649, the Supreme Court determined that admiralty law applied where a steamship passenger slipped on a gangplank and fell onto the dock. *The Admiral Peoples*, 295 U.S. at 652-653. By comparing *Taylor* to

The Admiral Peoples, it is clear that the place of inception is the critical element of an occurrence.

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damage or injury be done or consummated on land." 46 U.S.C. §740; *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963); *Pryor v. American President Lines*, 520 F.2d 974 (1975). The Supreme Court, in *Nacirema*, noted that the EAJA was not intended to amend or affect the Longshore Act or to overrule *Swanson* but was enacted to permit civil litigants into admiralty (*e.g.*, cases of unseaworthiness). Further, the Court stated that even if the EAJA was construed to amend the Longshore Act, "longshoremen injured on a pier by pier-based equipment would still remain outside the Act." *Nacirema*, 396 U.S. at 222-223.

Contrary to employer's contention, *Nacirema* does not overrule *Johnson* and its successors.[7] Rather, it follows the Court's determination that jurisdiction is contingent upon where the injury-causing incident was initiated. *Nacirema*, 396 U.S. at 219-224; *see The Admiral Peoples*, 295 U.S. at 652-653; *Taylor*, 276 U.S. at 182; *Martin*, 222 U.S. at 197; *Johnson*, 119 U.S. at 397; *see also Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128 (1930); *West*, 163 F.Supp. at 882; *Ford*, 52 F.Supp. at 100; *Richards*, 17 F.Supp. at 253. Unlike the case herein or the cases relied upon by the administrative law judge, the actions which led to injuries in *Nacirema* transpired entirely on land. In the case presently before the Board, the incident resulting in claimant's broken elbows commenced on the gangplank and ended upon claimant's impact with the dock. In light of the Supreme Court's decisions in *The Admiral Peoples* and *Taylor*, claimant's injury in this case is not land-based and is properly brought under admiralty law.[8] We therefore hold that the administrative law judge committed no error in following *West*, *Ford*, and *Richards*, as those cases accord with the rationale espoused by the Supreme Court. Consequently, we affirm the administrative law judge's conclusion that an injury initiated on a vessel's gangplank over navigable waters falls within the jurisdiction of the Act.

Accordingly, the administrative law judge's decisions are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[7]Employer's reliance on *Calbeck* is misplaced. In *Calbeck*, the Supreme Court held that Congress intended to exercise its full jurisdiction on the seaward side of the *Jensen* line, covering all injuries on navigable waters, regardless of whether state compensation is also available. *Calbeck*, 370 U.S. at 114; *see also Nacirema*, 396 U.S. at 220-221.

[8]The Act derives its legitimacy from Article III of the United States Constitution, concerning federal court jurisdiction over admiralty and maritime cases. U.S. Const. art. III, §2, cl. 1; *Nogueira v. New York, N.H. & H.R. Co.*, 281 U.S. 128 (1930).