BRB No. 93-1737

JOSEPH A. CRAPANZANO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
RICE MOHAWK, U. S. CONSTRUCTION COMPANY, LIMITED	)	DATE ISSUED:_____
	)	
and	)	
	)	
STATE INSURANCE FUND	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

George Poulos, Astoria, New York, for claimant.

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

Before: BROWN, DOLDER, and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (92-LHC-2462) of Administrative Law Judge Ralph A. Romano 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 worked as a journeyman ironworker constructing a bridge across Grassy Bay in New York.[1] His duties included: unloading a barge by hooking pre-cast concrete girders to the crane, climbing to the bridge structure, and "landing" the girders (positioning them onto the pile caps); positioning reinforcement beams; and bolting clips onto the girders and beams. Tr. at 15-18, 21-23, 36. On November 29, 1990, claimant tripped while walking along the girders on the bridge structure. He hit his head on a scaffold, was knocked unconscious, and fell to the ground below. Tr. at 35-37. Employer paid benefits under the New York workers' compensation law, but claimant seeks benefits under the Act.

The administrative law judge conducted a hearing solely on the issue of jurisdiction. He found that claimant's injury is not covered by the Act, as it did not occur over navigable waters, and as claimant failed to establish the status element required by the Act. 33 U.S.C. §902(3); Decision and Order at 4-5. Claimant appeals the decision, and employer responds, urging affirmance.

Claimant first contends his injury occurred over navigable waters. He avers that his case is indistinguishable from *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983) (*Perini*), except regarding the issue of "where the body falls." Specifically, claimant asserts that his injury occurred on the seaward side of the *Jensen* line.[2] *Id.* at 8. The administrative law judge rejected claimant's argument and held that claimant cannot invoke *Perini* to support his claim, as he was working on a bridge, which is an extension of land and is not considered to be "over navigable waters." Decision and Order at 4.

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), 3(a); *Perini*, 459 U.S. at 297, 15 BRBS at 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 jurisdiction exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id.* In *Perini*, the Supreme Court 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, such a claimant satisfies both the situs and status requirements and is covered under the Act, unless he is specifically excluded from coverage by another statutory provision. *Perini*, 459 U.S. at 323-324, 15 BRBS at 80-81 (CRT); *see also Pulkoski v. Hendrickson Brothers, Inc*, 28 BRBS 298 (1994); *Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992).

---

[1]The work site included the bridge structure, consisting of pre-cast concrete pilings and pile caps, a barge carrying a crane, and a barge carrying construction materials. Tr. at 13.

[2]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).

In this case, claimant was walking on the bridge structure, along the girders, towards the beach, when he tripped and fell, landing on the shore, 15 to 20 feet from the water. Although he stated he spent 95 percent of his time working over the water,[3] he testified that, on the day of the injury, he tripped at a point "on the land" but "close to the water." Tr. at 34-36. Contrary to claimant's contention, this significant fact distinguishes his case from the facts in *Perini*.[4] Moreover, as the administrative law judge found, a bridge is permanently affixed to land, is considered an extension of land, and is not within pre-1972 jurisdiction. *See Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969); *Johnsen*, 25 BRBS at 333. Therefore, we reject claimant's argument that his injury occurred over navigable waters. We also reject claimant's "where the body fell" distinction. The Board recently held that in determining whether an injury occurs on navigable waters, the place of inception is the critical element of an injury-causing occurrence. *Kennedy v. American Bridge Co.*, ___ BRBS ___, BRB No. 92-1966 (Jan. 23, 1996). In this case, claimant's injury began and ended on land.

The next inquiry is whether claimant fulfilled the status and situs requirements of the Act. Claimant contends he satisfies the Section 2(3) status test and is a maritime employee. He argues that, under *LeMelle v. B. F. Diamond Construction Co.*, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), *cert. denied*, 459 U.S. 1177 (1983), all bridge construction workers are considered maritime employees, regardless of whether the bridges on which they work aid navigation. He also asserts that his duties involved unloading vessels. The administrative law judge rejected claimant's argument that he is covered pursuant to *LeMelle*, finding the record devoid of evidence suggesting the bridge herein was being constructed to aid navigation. He also found that claimant's duties do not fall within the definition of "maritime employment." Decision and Order at 5.

Generally, bridge builders are not considered maritime employees because their work aids highway and not maritime commerce. *Nold v. Guy F. Atkinson Co.*, 9 BRBS 620 (1979) (Miller, J., dissenting), *appeal dismissed*, 784 F.2d 339 (9th Cir. 1986). In *LeMelle*, the United States Court of Appeals for the Fourth Circuit granted maritime status to a concrete finisher whose duties required him to work on a bridge one mile from the shore. Because evidence established that the bridge would aid navigation on the James River, the court determined that claimant LeMelle was engaged in maritime employment. *LeMelle*, 674 F.2d at 298, 14 BRBS at 613. Recently, the Board rejected the argument that *LeMelle* is broad enough to encompass all bridge workers, *Pulkoski*, 28 BRBS at 303, and although claimant asserts in his brief that the purpose of the new bridge is to aid in the navigation of the Grassy Bay, the administrative law judge correctly noted the lack of record evidence supporting such an assertion.

Further, we reject claimant's assertion that his duties constitute maritime employment. The

[3]The parties agree that Grassy Bay constitutes navigable waters. Decision and Order at 2.

[4]In *Perini*, claimant Churchill was working on a barge over navigable waters when he sustained his injuries. Consequently, he was covered under the Act, as he would have been covered prior to the 1972 Amendments. *Perini*, 459 U.S. at 297, 15 BRBS at 62 (CRT).

United States Court of Appeals for the Second Circuit, wherein jurisdiction of this case resides, has held that a construction worker whose duties involved occasionally unloading a barge carrying materials for construction of a structure which reaches from the shore to a point over the water was not engaged in maritime employment, as there is no significant relationship to navigation or commerce on navigable waters. *Fusco v. Perini North River Associates*, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981) (sewage disposal plant construction workers not maritime employees); *see also Laspragata v. Warren George, Inc.*, 21 BRBS 132 (1988) (sewage treatment plant construction worker not a covered employee). Although claimant in the instant case unloaded materials from a barge, those items were for the purpose of constructing a non-maritime structure over water; therefore, his employment has no relationship to maritime commerce under the case law of the Second Circuit.[5] *See Fusco*, 622 F.2d at 1113, 12 BRBS at 332; *see also Pulkoski*, 28 BRBS at 303 (bridge construction worker not a maritime employee); *Johnsen*, 25 BRBS at 335 (bridge painter not a maritime employee); *Laspragata*, 21 BRBS at 135. Consequently, claimant does not meet the Section 2(3) status requirement and cannot be classified as a maritime employee.

[5]Other circuits 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) (rig foreman involved with unloading construction materials from barge for bridge construction is a covered employee); *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 13 BRBS 1048 (5th Cir. 1981), *cert. denied*, 459 U.S. 1169 (1983) (construction worker unloading materials from barge for bridge construction is covered); *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) (Board noted that notion of "traditional cargo" is outdated, but distinguished between maritime and military cargo). *See also Kennedy*, slip op. at 4. In *Kennedy*, the Board followed the lead of the Fifth and Eleventh Circuits in a Third Circuit case and held that a bridge ironworker is covered because he loaded and unloaded construction materials to and from a barge (Board also held Kennedy covered because his injury occurred on a gangplank over navigable waters).

Claimant contends he has established that his injury occurred on a covered situs pursuant to Section 3(a).[6] Citing *Hurston v. Director, OWCP*, 989 F.2d 1547, 26 BRBS 180 (CRT) (9th Cir. 1993), he argues that the structure upon which he worked is actually a pier because it was not a completed bridge; therefore, it is a covered situs regardless of its use. Claimant also asserts that the 1972 Amendments extended the *Jensen* line landward thereby "overturning" *Nacirema*, 396 U.S. at 212.

Initially, we reject claimant's allegation that *Nacirema* has been overturned. In *Nacirema*, the claimants were injured while they were working on piers attaching railroad cargo to ships' cranes for loading onto the ships. The Supreme Court noted well-settled law which, prior to enactment of the Act, considered wharves, piers, and bridges permanently affixed to the land as extensions of land. The Court also acknowledged the language and purpose of the Act and concluded Congress specifically limited coverage under the Act to those injuries which occurred on the seaward side of the *Jensen* line. Consequently, it held that these claimants who were injured while working on piers were not employees within the meaning of the Act. *Nacirema*, 396 U.S. at 212. Although the piers and wharves referenced in *Nacirema* would now be covered under the Act as amended in 1972, *see* 33 U.S.C. §903(a) (1982); *Johnsen*, 25 BRBS at 332 n.1, the case still espouses good law regarding other extensions of land. In later cases, the Supreme Court acknowledged that the 1972 Amendments to the Act pertaining to jurisdiction were drafted in response to its holding in *Nacirema*; however, it has not stated that those Amendments made its decision null and void. *See Perini*, 459 U.S. at 316-318, 15 BRBS at 74-75 (CRT); *Caputo*, 432 U.S. at 249, 6 BRBS at 150. Thus, the notion that a structure, such as a bridge, is an extension of land and may not constitute a covered situs is still legal precedent. *See, e.g., Kennedy*, slip op. at 5; *Johnsen*, 25 BRBS at 332-333; *Laspragata*, 21 BRBS at 135.

We also reject claimant's reliance on *Hurston*. Claimant's insistence that the structure upon which he worked should be classified as a "pier" (an enumerated adjoining area) instead of a bridge (not an enumerated adjoining area) is not persuasive. In *Hurston*, the United States Court of Appeals for the Ninth Circuit determined that the sites enumerated in Section 3(a) are covered sites regardless of whether they possess a maritime nexus, whereas "other adjoining area[s]" must be "customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel[.]" 33 U.S.C. §903(a); *Hurston*, 989 F.2d at 1549-1550, 26 BRBS at 184-185 (CRT); *see also Johnsen*, 25 BRBS at 334-335. By labelling the structure a pier, using the *Hurston* definition ("a structure built on pilings extending from land to navigable waters"), claimant attempts to disregard the fact that the accident site in this case was not used for maritime activities. Despite claimant's assertion, the structure herein is a bridge over Grassy Bay. A bridge is not an enumerated situs; therefore, it must be shown to have a maritime nexus before it can be considered covered under the Act. *Id.* There is no evidence in the record that this work site was used for maritime purposes. Therefore, as a matter of law, claimant also fails to fulfill the situs requirement. Consequently, we affirm the administrative law judge's denial of benefits under the Act.

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

[6]The administrative law judge did not address whether claimant's work site constitutes a covered situs under the Act; however, we shall address this legal issue, as the facts involved are undisputed.

SO ORDERED.

_____

JAMES F. BROWN
Administrative Appeals Judge

_____

NANCY S. DOLDER
Administrative Appeals Judge

_____

REGINA C. McGRANERY
Administrative Appeals Judge