BRB No. 97-0770

VINCENT CASERMA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CONSOLIDATED EDISON COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Dismissing the Claim of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

Daniel J. Savino, Jr. (Caruso, Spillane, Contrastano & Ulaner, P.C.), New York, New York, for claimant.

David L. Wecker (Foley, Smit, O'Boyle & Weisman), New York, New York, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Dismissing the Claim (96-LHC-1036) of Administrative Law Judge Robert D. Kaplan 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

The facts involved in this case are not in dispute. Employer supplies electricity to consumers. In 1969, employer began to generate electricity from gas turbine powered generators located on barges at two sites along Upper New York Bay in Brooklyn, New York known as Gowanus and the Narrows. Each barge has two 12-ton spud beams which affix the barge to a pier by 10 stud bolts. The barges can be disengaged from the pier and transported by tugboat to dry dock for maintenance and repairs; moreover, the barges can be removed and transported by water to other locations to supply needed electricity to other parts of New York City.

Claimant worked as a mechanic for employer at the Gowanus location; his responsibilities included repairing employer's generating equipment and disconnecting the

barges from the pier so that they could be moved to dry dock. Claimant suffered a work-related injury to his knee on July 13, 1993, while working on a barge at the Gowanus site. Employer voluntarily paid temporary total disability compensation to claimant from September 20, 1993 through November 7, 1993. 33 U.S.C. §908(b). Claimant returned to work on November 8, 1993, but subsequently retired on disability. The parties stipulated, *inter alia*, that the Gowanus site is located on a navigable waterway, and that claimant suffered a 35 percent permanent partial disability to his left leg under the schedule. *See* 33 U.S.C. §908(c)(2).

The only issue before the administrative law judge was whether claimant satisfied the situs and status requirements for jurisdiction under the Act. In his Decision and Order, the administrative law judge found that the barge on which claimant was injured served as a stationary platform for employer's electrical generation equipment, that the barge did not function as a vessel, and that the fact that the barge was situated over a navigable body of water was irrelevant. Thus, citing to the United States Supreme Court's holding in *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT)(1983), the administrative law judge determined that the barge on which claimant sustained his work-related injury was not a covered situs pursuant to Section 3(a) of the Act, 33 U.S.C. §903(a). Moreover, the administrative law judge found that claimant failed to satisfy the status element contained in Section 2(3) of the Act, 33 U.S.C. §902(3). Accordingly, the administrative law judge dismissed claimant's claim for benefits.

The sole contention raised by claimant on appeal is that the administrative law judge applied an incorrect legal standard in dismissing his claim. Specifically, claimant asserts that, pursuant to the Supreme Court's holding in *Perini*, he satisfied both the situs and status elements for jurisdiction since his injury occurred upon actual navigable waters. Employer, in urging affirmance of the administrative law judge's dismissal of claimant's claim, argues that the barge on which claimant was injured is not a vessel, and that claimant's injury therefore did not occur upon navigable water within the meaning of the Act since it was Congress' intent that a "vessel" be involved for jurisdiction to be found.[1] For the reasons that follow, we reverse the administrative law judge's decision.

[1]Employer also asserts that jurisdiction cannot be found since claimant's work has no connection with maritime employment.

Prior to the enactment of the 1972 Amendments to the Act, in order to be covered by the Act, 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) and to expand the sites covered under Section 3(a) landward. In *Director, OWCP v. Perini North River Associates,* 459 U.S. 297, 15 BRBS 62 (CRT)(1983), the United States Supreme Court determined that Congress, in amending the Act to expand coverage, did not intend to withdraw coverage under the Act 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). Thus, the 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. *Id.*, 459 U.S. at 323-324, 15 BRBS at 80-81 (CRT).[2] *See also Crapanzano v. Rice Mohawk, U.S. Const. Co., Ltd.,* 30 BRBS 81 (1996); *Nelson v. Guy F. Atkinson Const. Co., Ltd.,* 29 BRBS 39 (1995), *aff'd mem. sub nom. Nelson v. Director, OWCP,* No. 95-70333 (9th Cir. Nov. 13, 1996); *Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992).

In the instant case, the administrative law judge accepted the parties' stipulation that the barge upon which claimant was injured was located on navigable waters. *See* Decision and Order at 2; Tr. at 17-18. Nevertheless, the administrative law judge determined that since claimant's injury did not occur on a "vessel" on navigable waters, he did not satisfy, pursuant to *Perini*, the requirements for coverage under the Act. Contrary to the administrative law judge's determination, however, the Supreme Court in *Perini* never imposed the requirement that an employee must be injured on a vessel on navigable waters in order to be covered under the Act. Indeed, the Court, after discussing the legislative history of the 1972 Amendments to the Act, stated:

> There is nothing in these comments, or anywhere else in the legislative Reports, to suggest, as Perini claims, that Congress intended the status language to require that an employee injured upon the navigable waters in the course of his employment had to show that his employment possessed a direct (or substantial) relation to navigation or commerce in order to be covered. Congress was concerned with injuries on land, and assumed that injuries occurring on the actual navigable waters were covered, and would remain covered.

[2]Contrary to the administrative law judge's discussion, the Supreme Court recognized the continued validity of *Perini* in its decision in *Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 424 n.10, 17 BRBS 78, 83 n.10 (CRT)(1985). *See Center v. R & D Watson, Inc.*, 25 BRBS 137 (1991). In *Herb's Welding,* claimant worked and was injured on a fixed platform and there was no argument that his injury occurred on a floating structure. *Herb's Welding,* 470 U.S. at 416-417 n.2, 17 BRBS at 79 n.2 (CRT).

Perini, 459 U.S. at 318-319, 15 BRBS at 76 (CRT). Thus, the Court held that when a worker is injured on actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in Section 2(3), and is covered under the Act, provided he is not excluded by any other provision of the Act. The Court considered "these employees to be 'engaged in maritime employment' not simply because they are injured in a historically maritime locale, but because they are required to perform their employment duties upon navigable waters."[3] *Perini*, 459 U.S. at 324, 15 BRBS at 80 (CRT).

[3]While the Court expressed no opinion whether coverage under the Act would be conferred for workers injured while fortuitously upon navigable waters, *see Perini*, 459 U.S. at 324 n.34, 15 BRBS at 80 n.34 (CRT), the holding in *Perini* dictates that where, as in the instant case, an employee is required to perform his duties upon navigable waters and suffers an injury upon navigable waters, the status test is met under Section 2(3), as his work is inherently maritime in nature.

Contrary to the decision of the administrative law judge, neither the courts nor the Board have interpreted Section 3(a) of the Act as requiring that an employee's injury upon navigable waters occur while on a vessel in order to confer coverage under the Act. Rather, controlling case law indicates otherwise. In his decision in the instant case, the administrative law judge distinguished *McCarthy v. The Bark Peking*, 716 F.2d 130, 15 BRBS 182 (CRT) (2d Cir. 1983), *cert. denied,* 465 U.S. 1078 (1984), from the case at bar, stating that the employee in *McCarthy* maintained and repaired a vessel in navigation, while claimant herein was not engaged in maritime employment. In *McCarthy*, the United States Court of Appeals for the Second Circuit, wherein jurisdiction of the instant case arises, held that, pursuant to *Perini*, an employee injured while working aboard a museum vessel was a covered employee under the Act, as his injury occurred on actual navigable waters.[4] The court ended its inquiry regarding jurisdiction under the Act at this point, and thus claimant was found to be covered under the Act regardless of his employment duties. Although the court subsequently considered whether the museum was a "vessel," this issue was addressed solely to determine whether the claimant could recover damages for "the negligence of a vessel" under Section 5(b) of the Act.[5] *See* 33 U.S.C. §905(b); *McCarthy*, 716 F.2d at 132-133, 15 BRBS at 186 (CRT).[6] Thus, where a claimant is injured on navigable waters, the Second Circuit determined that the claimant is covered under the Act. In *Zapata Haynie Corp. v. Barnard*, 933 F.2d 256, 24 BRBS 160 (CRT)(4th Cir. 1991), the United States Court of Appeals for the Fourth Circuit held that an aircraft pilot injured

[4]In *McCarthy*, the rudder of the museum vessel in question had been welded in one position; thus, the museum had not been put to sea under her own power for 50 years. *McCarthy*, 716 F.2d at 132, 15 BRBS at 184 (CRT).

[5]The court went on to hold that under Section 3 of the General Provisions of the United States Code, 1 U.S.C. §3, the museum ship was a vessel since she had the capacity to return to the sea, if only in tow. *McCarthy*, 716 F.2d at 136, 15 BRBS at 190-191 (CRT). In so holding, the court reasoned that a craft need not be actually engaged in navigation or commerce in order to come within the definition of "vessel" as long as it has any capacity for seagoing transportation, citing numerous examples where crafts capable of being towed were considered vessels. *See M/V Marifax v. McCrory,* 391 F.2d 909 (5th Cir. 1968); *Miami River Boat Yard, Inc. v. 60' Houseboat*, 390 F.2d 596 (5th Cir. 1968); *Pleason v. Gulfport Shipbuilding Corp.*, 221 F.2d 621 (5th Cir. 1955); *Hudson Harbor 79th Street Boat Basin, Inc.*, *v. Sea Casa*, 469 F.Supp. 987 (S.D.N.Y. 1979). In the instant case, it is undisputed that the barges at employer's Gowanus site can be transported by tugboat to dry dock for maintenance, or to other generator locations to supply needed electricity. Thus, even if claimant needed to show that his injury occurred on a vessel in navigation, it appears that this element could be met. *Cf. Tonnesen v. Yonkers Contracting Co.*, *Inc.*, 82 F.3d 30 (2d Cir. 1996)(case remanded to determine whether barge is "vessel in navigation" under Jones Act).

[6]Subsequent to the *McCarthy* decision, Congress specifically excluded museum workers from coverage under the Act pursuant to the 1984 Amendments. *See* 33 U.S.C. §902(3)(B)(1994).

while performing work-related fish spotting duties "over" navigable water was injured upon navigable waters, and thus, was covered under the Act. In *Ransom v. Coast Marine Const., Inc.*, 16 BRBS 69 (1984), the Board held that the status requirement under Section 2(3) was met when the claimant was injured in a cofferdam, a watertight enclosure from which water is pumped to expose the bottom of a body of water to permit construction. In rendering its decision, the Board stated that although the injury occurred on temporarily dry ground, the area where claimant was injured was a part of the Columbia River, a navigable body of water. Relying on pre-1972 cases that a permanent withdrawal of water is necessary to defeat federal jurisdiction, the Board held claimant's injury occurred on navigable water and was thus covered under *Perini.* Similarly, in *Center v. R & D Watson, Inc.*, 25 BRBS 137 (1991), the Board held that a claimant who was injured while standing in navigable waters was covered under the Act pursuant to *Perini*. Thus, the courts and the Board have determined coverage under *Perini* based not on whether employees sustained their injuries while on a vessel, but whether they were afloat upon, over, or in actual navigable waters. The administrative law judge's stated requirement that claimant's injury occur on a "vessel" is thus not in accordance with law.

Moreover, in dismissing claimant's claim, the administrative law judge distinguished the instant case from *Perini* by characterizing *Perini* as holding that the claimant therein was covered under the Act since he was a maritime construction worker. The Court in *Perini,* however, did not address whether claimant's particular occupation, which involved the construction of a sewage treatment plant, was covered maritime employment; rather, the Court held that claimant was covered under the Act since the barge upon which he was injured was located on navigable waters. *See Perini*, 459 U.S. at 324, 15 BRBS at 80 (CRT). *Cf. Laspragata v. Warren George, Inc.,* 21 BRBS 132 (1988)(worker injured while standing on platform of same sewage treatment plant was not covered by the Act). In a decision subsequent to *Perini*, the Board similarly considered whether a claimant who did not perform traditional maritime duties was nevertheless covered under the Act because she was injured on navigable waters. In *Cefaratti v. Mike Fink, Inc.*, 17 BRBS 95 (1985), *aff'd sub nom. Mike Fink, Inc. v. Benefits Review Board*, 785 F.2d 309 (6th Cir. 1986)(table), a restaurant worker on board a decommissioned steamboat was injured when she fell through a gap in the gangplank and landed in navigable waters. The Board, subsequently affirmed by the Sixth Circuit, held that the claimant was covered under the Act since, under *Perini*, a worker's occupational status is not generally relevant when the injury occurs on navigable waters, as the Supreme Court unambiguously held that workers injured on actual navigable waters in the course of their employment are covered on this basis without any regard to whether their work is otherwise maritime nature. *Id.*, 17 BRBS at 98.[7]

[7]The Board noted that Congress recognized the illogical results that might flow from

Perini by enacting the 1984 Amendments to the Act, which, *inter alia*, expressly excluded from coverage restaurant workers and other employees in similarly non-maritime occupations. *See* n. 6, *supra.* In the instant case, no party contends that claimant falls within any of the exclusions to coverage enumerated in Section 2(3). *See* 33 U.S.C. §902(3)(A)-(H)(1994).

In the instant case, the parties stipulated that the barge on which claimant sustained his work-related injury was located on navigable waters. Claimant and his supervisor, Robert Skladany, testified that barges at the Gowanus site could be removed from the piers and transported by water to dry dock for maintenance, or to other locations to supply needed electricity. Tr. at 15-16, 19, 38-40. Indeed, in May 1996, employer removed two barges from the Gowanus site to a site in Astoria, Queens, in order to supply needed electricity in that area. Tr. at 13, 38-39. Claimant stated that generator barges would have to be moved to dry dock every one and one-half years to two and one-half years, and the fuel barges needed to be moved every 16 or 17 months. Tr. at 15-16. Mr. Skladany indicated that in 1991 the barges began to be transported to dry dock on a 15 year cycle. Tr. at 39-40. In either event, it is clear from the record that employer's barges are floating structures which are not permanently connected to land. Therefore, as claimant was injured on a barge afloat on actual navigable water, he was injured on navigable water. Since's claimant's injury occurred on navigable waters, we hold that, pursuant to *Perini,* claimant has satisfied the situs and status elements of Sections 2(3) and 3(a), and is covered under the Act.[8] The administrative law judge's dismissal of claimant's claim is therefore reversed.

Accordingly, the Decision and Order Dismissing the Claim of the administrative law judge is reversed. Inasmuch as the parties have stipulated that claimant has suffered a 35 percent impairment to his left leg, *see* Cl. Ex. 1, the case is remanded to the administrative law judge for an entry of an award of permanent partial disability benefits under the schedule, based on a 35 percent impairment to claimant's left leg. 33 U.S.C. §908(c)(2).

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY

[8]As we hold that claimant's employment with employer is covered under the Act, employer's contention that it is not a statutory employer under Section 2(4) of the Act, 33 U.S.C. §902(4), is rejected. Where an employer has an employee engaged in covered maritime employment, the employer is a statutory employer under Section 2(4). *See Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997); *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991); *Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984).

Administrative Appeals Judge