BRB No. 05-0885

WILLIAM D. QUINLAN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KOCH & SKANSKA, INCORPORATED	)	DATE ISSUED: 07/28/2006
	)	
and	)	
	)	
ST. PAUL FIRE AND MARINE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

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

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Francis M. Womack III (Field Womack & Kawczynski), Jersey City, New Jersey, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2005-LHC-0197) of Administrative Law Judge Ralph A. Romano 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 sustained injuries to his right arm, hand, wrist, shoulder and knee due to a fall that occurred while he was working for employer on December 15, 2003. In early

December 2003, employer assigned claimant to serve as foreman of a raising gang of ironworkers on its steel replacement project on the Williamsburg Bridge. Specifically, claimant was assigned to the area of the tower below the roadway on the Brooklyn side of the bridge, which was over water. A platform was built around the base of the leg of the bridge to secure a barge that housed a crane and stored materials required for the job. The crane was used to transfer materials between the barge and the bridge, and part of claimant's job occurred below the roadway, supervising the loading and unloading of the barge.

At the time of the incident, claimant was walking across a ramp. The ramp started at a seawall on land and sloped downward to a dirt landing. Then, a second ramp ran from the landing to the platform at the base of the bridge leg. Claimant testified that he slipped on the first ramp, about five to ten feet past the seawall, and fell onto the ground. Hearing Transcript (HT) at 29. Claimant stated that had he fallen to the other side, he would have landed in the water. Claimant also stated that in the five months that the ramp was in place, he had seen the East River spill over and lay on top of the ramp, and that at high tide the river would rise over the dirt backfill. HT at 50. A few days after his fall, claimant returned to work with his right arm in a sling that limited him to performing only supervisory functions rather than any manual labor. He continued to work in this capacity until February 2, 2004, when he stopped in order to undergo right shoulder surgery on February 4, 2004. After the surgical procedure, claimant did not return to work because he felt that he was unable to engage in the physical part of his job, *i.e.*, climbing, lifting and using tools. Claimant thereafter filed a claim seeking benefits for his work-related injuries.

In his decision, the administrative law judge found that claimant is "automatically covered under the Act" pursuant to Section 3(a), 33 U.S.C. §903(a), concluding that his injury occurred on navigable waters, as it occurred on a temporary ramp over the East River. He then determined that claimant is unable to return to his usual employment, and thus concluded that claimant is entitled to ongoing temporary total disability benefits from February 4, 2004, and to medical benefits under Section 7 of the Act, 33 U.S.C. §907.

On appeal, employer challenges the administrative law judge's finding that claimant is covered under the Act. Claimant responds, urging affirmance of the administrative law judge's decision and requesting an attorney's fee for work performed before the Board in the instant appeal.

Employer asserts that the administrative law judge erred in finding that claimant is covered under the Act since, contrary to his determination, claimant's injury, incurred while crossing a ramp from the seawall to a fixed platform attached to the base of the bridge, did not occur on navigable waters. Employer, citing the Board's recent decision

in *Gonzalez v. Tutor Saliba*, 39 BRBS 80 (2005), argues that coverage must be denied since the ramp upon which the incident occurred is land-based because it began on land, *i.e.*, the seawall, and ended on a fixed platform, neither of which is a covered situs. Employer also argues that, consistent with the Board's decision in *Crapanzano v. Rice Mohawk*, 30 BRBS 81 (1996), the temporary ramp in this case is analogous to a bridge in that it is a fixed structure and an extension of the land, and thus it cannot be considered a covered situs under the Act. Moreover, employer contends that the determining factor of coverage is the place of the inception of the fall, not the place that claimant landed, such that the administrative law judge erroneously focused on the nature of the area where claimant landed as opposed to the nature of the actual site of injury, *i.e.*, the ramp. Alternatively, employer argues that if the Board affirms the administrative law judge's finding that claimant was injured on navigable waters, coverage must nevertheless be precluded as claimant's crossing of the ramp "over navigable waters" to reach his fixed work platform was transient in nature and fortuitously placed claimant on navigable waters. We reject employer's contentions and affirm the administrative law judge's finding that claimant was injured on navigable waters.

Section 3(a) of the Act states that,

> 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). The United States Supreme Court held in *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), that, unless an individual is expressly excluded from coverage under the Act, those claimants whose injuries would have been covered before the 1972 Amendments to the Act by virtue of an injury on navigable waters satisfy both the situs and status requirements of the 1972 Act. Before the Act was amended in 1972, the situs element covered injuries occurring only "on the navigable waters of the United States (including any dry dock)." 33 U.S.C. §903(a) (1970). Under this section, the Supreme Court held that structures permanently affixed to land, such as piers and bridges, were extensions of that land and injuries occurring thereon were not covered under the Act. *Nacirema Operating Co. v. Johnson*, 396 U.S. 347 (1969). Pursuant to this holding, the Board has held in post-1972 cases that injuries occurring on bridges do not occur on navigable waters because a bridge is permanently affixed to land, and is not otherwise a covered situs because a "bridge," unlike a pier or wharf, is not an enumerated site covered by virtue of the 1972 Amendments. *Kehl v. Martin Paving Co.*, 34 BRBS 121 (2000); *Crapanzano*, 30 BRBS

81; *Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992); *cf. LeMelle v. B.F. Diamond Constr. Co.*, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), *cert. denied*, 459 U.S. 1177 (1983) (work on a fixed section of drawbridge over James River approximately one mile from shore and eight to ten feet above the water is maritime employment pursuant to Section 2(3) because the bridge construction project was designed to aid both river and road navigation). On the other hand, if a claimant is injured while working on a bridge from a barge or other floating structure, the injury is covered under the Act because the injury occurred on navigable waters. *Walker v. PCL Hardaway/Interbeton*, 34 BRBS 176 (2000).

We reject employer's contention that claimant was injured on a permanent land-based structure; claimant was injured in a temporary structure extending from the shore over navigable waters and the cases employer cites are thus distinguishable from the facts in this case. In *Gonzalez*, 39 BRBS 80, the claimant was injured while on a temporary construction trestle which was erected to allow cranes and other machinery access to the Richmond-San Rafael Bridge during a retrofitting project. The trestle originally extended over San Francisco Bay from the Marin County shoreline, but as the project progressed, it was moved down the length of the bridge span such that it was no longer attached to the shoreline and could be accessed only from the bridge.[1] At the time of his injury, claimant was working on the trestle over the bridge, after the mats attached to the shoreline had been removed, in order that they could be reinstalled at the other end of the trestle. Thus, the trestle was no longer connected to the shore. The administrative law judge found that the trestle was not a covered situs, "as it was an extension of the bridge, and a bridge is not a covered situs." Additionally, the administrative law judge found that the trestle was not like a "pier" since it did not extend over the water from the shore.

In affirming the administrative law judge's finding, the Board rejected claimant's assertions that he was covered by virtue of an injury on navigable waters, and/or because the trestle was a "pier." With regard to the first contention, the Board observed that the administrative law judge found that the trestle was affixed to a non-covered permanent structure, the bridge, and further held that although it "was not to be an 'everlasting,' permanent structure, its characteristics and its connection to a permanent, non-covered site [the bridge] compel the conclusion that claimant was not injured on 'navigable waters.'" 39 BRBS at 83. The Board distinguished the trestle from a removable skid or gangplank that bridges a gap between a vessel and land. In this regard, the Board specifically relied on the administrative law judge's finding that "the trestle was attached

[1] It was constructed by driving piles through the bridge deck and into the bay and placing the mats on top of beams placed across the pilings.

to both causeways and supported by pilings," and as such it is essentially "an extension of a land-based, non-covered structure." 39 BRBS at 83-84. In *Crapanzano*, 30 BRBS 81, the Board affirmed the administrative law judge's finding that an ironworker employed in constructing a bridge was not injured on a covered situs. The Board specifically held that since the claimant fell from the permanent bridge structure and landed on the ground below, his injury did not occur on navigable waters and did not fall within the pre-1972 Act's coverage.

In *Kehl*, 34 BRBS 121, the Board engaged in a detailed discussion of the circumstances under which a bridge worker's injuries would be covered under the Act. In distinguishing those cases where bridge builders were covered from those in which they were not,[2] the Board observed "it was the circumstances of the injuries, deaths and employment upon actual navigable waters which determined the applicability of the Act." *Kehl*, 34 BRBS at 125. In those cases, each employee was found covered "based on their location upon navigable waters; none of the employees was injured on a bridge." *Id.* at 125-26. Furthermore, in *Walker*, 34 BRBS 176, the Board, in distinguishing *Crapanzano*, 30 BRBS 81, again noted "it is not the designation of claimant as a 'bridge worker' or his work on a bridge itself which conveys coverage. Rather, it is his employment on actual navigable waters at the time of injury which determines applicability of the Act." *Walker*, 34 BRBS at 179.

[2] The cases finding coverage under the Act, as discussed by the Board in *Kehl*, 34 BRBS at 125, were those cited by the Fourth Circuit in its decision in *LeMelle v. B.F. Diamond Constr. Co.*, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), *cert. denied*, 459 U.S. 1177 (1983), in support of its notation "that bridge construction and demolition workers employed over navigable waters were covered prior to the 1972 amendments." *LeMelle*, 674 F.2d at 297, 14 BRBS at 613. Specifically, those cases are as follows: *Davis v. Dep't of Labor*, 317 U.S. 249 (1942) (a structural steel worker hired to help dismantle an abandoned drawbridge fell off the barge on which he was working and drowned); *Hardaway Contracting Co. v. O'Keeffe*, 414 F.2d 657 (5th Cir. 1968) (the decedent, a laborer employed to assist in building a bridge, was a covered employee because he was transported to work by boat, and was transferring diesel fuel tanks from one vessel to another when he slipped, fell and drowned); *Peter v. Arrien*, 325 F.Supp. 1361 (E.D. Pa. 1971), *aff'd*, 463 F.2d 252 (3d Cir. 1972) (a crane operator under contract to demolish an existing bridge drowned when the crane he operated from a temporary causeway toppled into the moving current); *Dixon v. Oosting*, 238 F.Supp. 25 (E.D. Va. 1965) (a pile driver operator, employed to assist in the construction of a trestle bridge was injured approximately 1.5 miles from land on equipment which rested on previously made pilings that had no physical connection with the land or the bridge under construction). The Board contrasted these decisions from those in *Crapazano*, 30 BRBS 81, and *Kehl*, 34 BRBS at 125-126, where the claimants were bridge construction workers who were injured while working on the actual bridge structure.

In contrast to these cases where the claimants' injuries occurred on structures permanently affixed to land, claimants injured on temporary structures over navigable waters were held to have met the pre-1972 Act situs requirement. In *Michigan Mut. Liability Co. v. Arrien*, 344 F.2d 640 (2d Cir. 1965), *cert. denied*, 382 U.S. 835 (1968), the United States Court of Appeals for the Second Circuit, in whose jurisdiction this case arises, held covered an injury occurring on a temporary, removable skid that extended over water between a vessel and a wharf. The court analogized the skid to a gangplank over navigable waters, as the navigability of those waters was not permanently affected by the use of the skid. Moreover, the fact that the skid was attached on one side to a land-based structure, a wharf, which was not covered under the pre-1972 Act, did not compel a finding that the skid was not a covered situs. *See also Dixon v. Oosting*, 238 F.Supp. 25 (E.D. Va. 1965).

In *Fusco v. Perini North River Associates*, 601 F.2d 659, 10 BRBS 624 (2d Cir. 1979), the Second Circuit addressed the question of whether two construction workers, claimants Fusco and Sullivan, were covered under 1972 version of the Act. Claimant Fusco was injured as he "descended a swinging ladder from a concrete form [on a sewage treatment plant project] to a raft, and the ladder twisted and threw him against the form, causing him to fall, perhaps but not certainly into the water." *Fusco*, 601 F.2d at 663, 10 BRBS at 629-30. Claimant Sullivan was injured while he was "installing beams about 150 feet from the shore and was standing about 12 inches above the water." *Fusco*, 601 F.2d at 663, 10 BRBS at 630. Based on facts regarding the sewage treatment plant under construction, the court stated that, although it did not know on what Sullivan was standing when he was injured, the court could "not suppose that at the time of the accident, while installing beams hanging over water, Sullivan was standing on a structure permanently affixed to land." *Id.* The Second Circuit, in finding the situs element satisfied, held that both claimants' injuries "occurred 'upon navigable waters'" as that term is used "under both the 1927 [Longshore Act] and the 1972 amendments."[3] *Id.*

[3] We note that because the *Fusco* decision was issued prior to the Supreme Court's decision in *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), the Second Circuit proceeded to discuss the status element of Section 2(3), finding it satisfied. However, in light of its decision in *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979), the Supreme Court remanded, 444 U.S. 1028 (1980), and on remand, the Second Circuit held the status element was not met. 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981). Nevertheless, the court's holding concerning the claimants' injuries on navigable waters pursuant to Section 3(a) remains good law, and, in view of the Supreme Court's subsequent decision in *Perini*, 459 U.S. 297, 15 BRBS 62(CRT), would alone have entitled Claimants Fusco and Sullivan to coverage by virtue of injuries on navigable waters.

In light of these cases discussing the difference between permanent and temporary structures over navigable waters, we reject employer's assertion that the ramp on which claimant was injured is analogous to a bridge. The administrative law judge found that the ramps were temporary structures, and this finding is supported by substantial evidence, as claimant answered affirmatively to the question, "Are they [the ramps] both temporary for the purpose of the construction?" HT at 36. The ramps are affixed to a seawall on one end,[4] and extend over navigable waters ultimately ending at a platform. The platform was "built all around the base of the leg of the bridge" over the East River in order to accommodate a barge and to store material necessary for the steel replacement project. *Id.* at 23-25. The barge housed a crane which was used to lift the new material from the barge initially onto the work platform and then into place on the bridge. *Id.* at 24-27, 37-38. The crane was also used to remove the old material from the bridge back onto the barge or work platform. *Id.* Claimant supervised the transfer of materials to and from the barge and was responsible for the placement of the materials so as to preserve the stability of the barge. *Id.* at 27-28.

In view of the uncontroverted evidence that the ramp upon which claimant was injured was temporary, employer's argument that it is a "fixed structure" or analogous to a bridge must be rejected.[5] It is not part of the bridge structure, as there is no evidence that the ramp or platform is permanently affixed to the bridge. The ramp is similar to the temporary skid in *Michigan Mut. Liability Co.* 344 F.2d 640, and the facts in *Fucso*, 601 F.2d 659, 10 BRBS 624. Accordingly, employer's attempt to characterize claimant's injury as occurring on the bridge or a similar permanent structure is rejected.

[4] Employer characterizes the seawall as a non-maritime structure, citing *Silva v. Hydro Dredge Corp.*, 23 BRBS 123 (1989). Since claimant in that case was injured on the seawall, he was not injured on navigable waters. As it is not disputed that claimant's injury here did not occur on a seawall, this case is inapposite. Moreover, a seawall may be a covered situs under Second Circuit precedent. *See Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied*, 525 U.S. 981 (1998). Based on our disposition of this case, we need not address whether the seawall or ramp would be a covered landward area under amended Section 3(a).

[5] In view of the temporary nature of the structure in this case, employer's reliance on *Crapanzano v. Rice Mohawk*, 30 BRBS 81 (1996), is misplaced. Moreover, while the trestle at issue in *Gonzalez v. Tutor Saliba*, 39 BRBS 80 (2005), was also temporary, it bears no other similarity to the ramps here. In any event, the Second Circuit has addressed the issue of injury on navigable waters in its case precedent, and its holdings are controlling in this case.

An injury occurring on a temporary structure over navigable waters is considered to have occurred upon navigable waters. *Michigan Mut. Liability Co.*, 344 F.2d 640; *see Perini*, 459 U.S. 297, 15 BRBS 62(CRT). Claimant testified without contradiction that the ramp is over the river itself at high tide, and that both the ramp and the ground where he fell are covered with water at times. HT at 36, 50. The area encompassed by "navigable waters" in tidal areas does not change with the ebb and flow of the tide but rather extends to the mean high water mark at all times. *Hassinger v. Tideland Electric Membership Corp.*, 871 F.2d 1022 (4th Cir. 1986), *cert. denied*, 478 U.S. 1004 (1986). Additionally, the administrative law judge properly observed that the Board has held that it takes a permanent, as opposed to a temporary, withdrawal of water to divest a site of coverage under the Act. *Ransom v. Coast Marine Constr., Inc.*, 16 BRBS 69 (1984); *see also Motteler v. J.A. Jones Constr. Co.*, 457 F.2d 917 (7th Cir. 1972); *Jeffers v. Foundation Co.*, 85 F.2d 24 (2d Cir. 1936). In the instant case, claimant testified that, at high tide, the East River would "come over the top [of the ramp] and lay in there [the area in which claimant fell]." HT at 36, 50. Consequently, as the area underneath the ramp, as well as the ramp itself, was covered with water at high tide, the underlying area is deemed navigable waters and thus the ramp is, as the administrative law judge properly determined, "on navigable waters."[6] *See Hassinger*, 871 F.2d 1022; *Ransom*, 16 BRBS 69.

We also reject employer's contention that claimant was "transiently and fortuitously" on the ramp at the time of injury, precluding coverage under the Act pursuant to *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir. 1999)(*en banc*). In *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003), the Board held that an employee who is regularly assigned by his employer during the course of his employment to travel on navigable waters is covered under *Perini*. In this regard, the Board held that such an employee is not "transiently or fortuitously" on navigable waters, but is there because it is a regular part of his job assignment. The Board specifically observed that the definitions of the terms "transient," *i.e.*, "passing through or by a place with only a brief stay or sojourn," and "fortuitous," *i.e.*, "occurring by chance," must turn on factors such as whether claimant's presence on navigable waters is a regular part of his job assignments or a matter of chance, whether it happens frequently or is a rare occurrence, and whether it lasts for an extended period of time. *Ezell*, 37 BRBS at 17; *see also Morganti v. Lockheed Martin Corp.*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied* 126 S.Ct. 2319 (2006) (Second Circuit notes that it need not decide whether to adopt the "transient and fortuitous" exception, since the court held, as a matter

[6] Thus, as both the ramp and the ground where claimant landed is "on navigable waters," we need not address employer's contention that the administrative law judge erred in finding that the ground where claimant landed controls the situs determination.

of law, that the site of decedent's injury and resulting death was not a fixed platform and therefore the 30 percent of his time spent on that site was time on navigable waters).

Applying these factors, we hold that claimant's presence on the ramp was a regular part of his job. While claimant's time on the actual ramp may have been brief each day, he testified that after he arrived at work and parked his car, he had to cross the ramp to reach the platform and the barge.[7] HT at 29, 45, 49. Consequently, given this daily requirement of claimant's employment, his presence on navigable waters cannot be deemed transient and fortuitous such that coverage under the Act would be foreclosed. *See Morganti v. Lockheed Martin Corp.*, 37 BRBS 126 (2003), *aff'd*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 126 S.Ct. 2319 (2006) (Board reversed the administrative law judge's finding that decedent's presence on navigable waters at the time of his injury and death was transient based on the parties' agreement that decedent spent approximately 30 percent of his time onboard a site held situated on navigable waters).

Consequently, we affirm the administrative law judge's finding that claimant's injury occurred on navigable waters as it is rational, in accordance with law, and supported by substantial evidence. *Perini*, 459 U.S. 297, 15 BRBS 62(CRT); *Fucso*, 601 F.2d 659, 10 BRBS 624; *Michigan Mut. Liability Co.*, 344 F.2d 640. Specifically, the undisputed facts in this case establish, as the administrative law judge found, that the ramp where claimant was injured was a temporary structure over navigable waters. We therefore affirm the administrative law judge's finding that claimant is covered under the Act, as well as his consequent award of benefits.

Claimant's counsel has filed a petition for an attorney's fee for work performed before the Board in connection with employer's appeal in this case. He seeks a total fee of $3,050, representing 15.25 hours of work at an hourly rate of $200. Employer has not filed an objection to the fee petition. We award the entire requested fee of $3,050, as it is reasonable for the necessary work done before the Board in defending employer's appeal. *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996).

[7] Claimant also testified that he "had to work with the tides" on a daily basis for "if the water was too rough . . . you would have to shut down probably for an hour or two, you know, while the tide changed." HT at 48.

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed. Claimant's counsel is awarded a fee of $3,050 for work performed before the Board, payable directly to counsel by employer. 33 U.S.C. §928; 20 C.F.R. §802.203.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge