BRB No. 04-0225

VINCENT MAROLDO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
YONKERS CONTRACTING	)	
	)	DATE ISSUED: Oct. 13, 2004
and	)	
	)	
LIBERTY MUTUAL INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Granting Employer and Carrier's Motion for Summary Decision and the Order denying reconsideration of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Vincent Maroldo, Attica, New York, *pro se*.

Thomas C. Fitzhugh III and Bradley T. Soshea (Fitzhugh, Elliott & Ammerman, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Decision and Order Granting Employer and Carrier's Motion for Summary Decision and the Order denying reconsideration (2003-LHC-1632) 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). In an appeal by a claimant without legal representation, we will review the administrative law judge's decision to determine if the findings of fact and conclusions of law 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). If they are, they must be affirmed.

Claimant was injured in September 1991 while operating a jackhammer on Cross Bay Veterans Memorial Bridge, spanning Jamaica Bay and connecting Rockaway Peninsula to Queens in New York City. His job was to operate a jackhammer to break up the concrete and thereby demolish the old bridge. On his first day of work, within ½ hour of starting, claimant sustained a low back injury. He was immediately taken to the doctor and treated with medication and therapy. According to claimant, the MRI revealed disc damage. Exh. C. at 11, 13, 15-16; Exh. D.[1] Employer voluntarily paid disability and medical benefits under the Act from September 24, 1991, through November 2, 1992. Exh. B.

On November 2, 1992, claimant was arrested and charged with two counts of second-degree murder. On February 28, 1994, he was convicted and began his sentence of 50 years to life in the Attica Correctional Facility. He claimed in his deposition that he did not question employer's decision to stop benefits when he was arrested. However, he later researched the issue and now believes he is entitled to benefits until the date of his conviction. Exh. B; Exh. C at 17-18, 20-21, 27-28, 36-37. Employer filed a motion for summary decision; claimant did not respond within the 10 days allotted by the rules. Decision and Order at 2; 29 C.F.R. §18.40.

The administrative law judge first set forth the facts regarding the answers to interrogatories, the deposition, and the history of the bridge. Decision and Order at 2-3. He then discussed pre-1972 coverage law, *id.* at 3-4, and found that claimant was injured on a bridge that fails to satisfy the pre-1972 coverage requirement. *Id.* at 4. He also found that claimant's work as a jackhammer operator on a bridge was not a maritime activity and that at no time during his employment with employer did claimant load or unload ships. Thus, the administrative law judge determined there is no genuine issue of fact and claimant's employment was not maritime. Because he determined that claimant failed the status test, he concluded there was no need to address the post-1972 situs requirement. Accordingly, the administrative law judge granted employer's motion for summary decision and rejected claimant's claim. Decision and Order at 4-5. The administrative law judge then summarily denied claimant's motion for reconsideration.

On appeal of both decisions, claimant, without the assistance of counsel, contends he is entitled to benefits until the date of his conviction. Specifically, he asserts he was promised that he would be paid but that those promises were broken, even to the extent that his answers to questions, presumably his deposition, were used to deny his claim.

[1]The record consists of employer's motion for summary decision with attached exhibits. Exhibit A is the set of interrogatories, Exhibit B contains claimant's answers, Exhibit C is claimant's deposition (dated 7/25/03), and Exhibit D is information about Cross Bay Bridge.

Therefore, he contends he is entitled to benefits for the time between his arrest and his conviction. Employer responds, urging affirmance, and arguing that claimant is not entitled to any benefits under the Act. We affirm the denial of benefits.

We first reject claimant's argument that employer either stipulated to coverage or somehow waived the coverage issue by "making promises" or by voluntarily paying benefits under the Act until claimant's arrest in 1992. Initially, there is no support for claimant's allegation of a stipulation or waiver by employer in this case, and, in any event, a stipulation based on an incorrect application of law is not binding, *Puccetti v. Ceres Gulf*, 25 BRBS 24 (1990). Moreover, the voluntary payment of benefits does not waive any of an employer's defenses, nor does it establish coverage under the Act. *Foster v. Davison Sand & Gravel Co.*, 31 BRBS 191 (1997). To the extent claimant may be entitled to benefits beyond those which he has been paid for his work-related injury, in light of our conclusions below, claimant must seek recourse through the state workers' compensation act.

Next, we hold that the administrative law judge applied the correct law to the undisputed facts and thus properly concluded that claimant is not a covered employee. For a claim to be covered by the Act, a claimant must establish that the injury occurred upon the navigable waters of the United States, including any dry dock, or that the injury occurred on a landward area covered by Section 3(a) and that the work is maritime in nature and is not specifically excluded by the Act. 33 U.S.C. §§902(3), 3(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 coverage exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id.* In *Perini*, the Supreme Court of the United States 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), as there was no legislative intent to withdraw coverage from an employee who would have been covered before 1972. Such a claimant satisfies both the situs and status requirements and is covered by 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).

The Supreme Court stated definitively that structures such as piers, wharves and bridges are permanently affixed to land, are considered extensions of land, and do not fall within pre-1972 Act jurisdiction. Injuries occurring thereon were not compensable under the Act because they did not occur on "navigable waters." *See Nacirema Operating Co. v. Johnson*, 396 U.S. 212, 214-215 (1969); *see also Herb's Welding, Inc. v. Gray*, 470 U.S.

414, 17 BRBS 78(CRT) (1985); *Johnsen*, 25 BRBS at 333. As it is undisputed that claimant was injured while working on a bridge, which is considered an extension of land and is not a covered situs under the Act as it existed prior to the 1972 Amendments, we affirm the administrative law judge's determination that claimant does not satisfy the pre-1972 coverage requirements. *Perini*, 459 U.S. 297, 15 BRBS 62(CRT); *Nacirema*, 396 U.S. 212; *Kehl v. Martin Paving Co.*, 34 BRBS 121, 126 (2000); *Johnsen*, 25 BRBS at 333.

With regard to the post-1972 status requirement, generally bridge workers are not engaged in maritime work, because bridges are instruments of land transportation, unless such workers can establish either that their duties included working on or loading or unloading materials from vessels on navigable waters or that the bridge is being constructed to aid navigation. *See LeMelle v. B.F. Diamond Constr. Co.*, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), *cert. denied*, 459 U.S. 1177 (1983); *Kehl*, 34 BRBS 121; *Crapanzano v. Rice Mohawk, U.S. Constr. Co., Ltd.*, 30 BRBS 81 (1996); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996); *Pulkoski*, 28 BRBS 298; *Johnsen*, 25 BRBS 329; *Nold v. Guy F. Atkinson Co.*, 9 BRBS 620 (1979) (Miller, dissenting), *dismissed*, 784 F.2d 339 (9th Cir. 1986). Again, the facts are undisputed: claimant used a jackhammer to break up concrete, and he was not involved in the loading or unloading of ships. Further, he was working on a bridge at the time he was injured, and the bridge was used to aid highway transportation, not navigation. Exhs. C, D. Therefore, we affirm the administrative law judge's determination that claimant's employment was not maritime, and it does not satisfy the Section 2(3) status requirement of the Act. *Crapanzano*, 30 BRBS at 82; *Pulkoski*, 28 BRBS at 302-303; *Johnsen*, 25 BRBS at 333. Because claimant failed to satisfy the status requirement, there is no need, as the administrative law judge found, to address whether he satisfied the post-1972 situs requirement.[2]

There being no genuine issue of material fact – claimant was a bridge worker who was injured during the course of his employment using a jackhammer on a bridge, and his employment did not involve loading or unloading of vessels – the administrative law judge properly granted employer's motion for summary decision and rejected the claim under the Act. 33 U.S.C. §§902(3), 903(a); 29 C.F.R. §18.40.

[2]We note that the Act, as amended in 1972, specifically covers injuries occurring on piers and wharves; however, bridges were not similarly enumerated in this amendment. Thus, *Nacirema Operating Co. v. Johnson*, 396 U.S. 212 (1969), remains the controlling law for bridges, *Kehl v. Martin Paving Co.*, 34 BRBS 121, 126 (2000); *Crapanzano v. Rice Mohawk, U.S. Constr. Co., Ltd.*, 30 BRBS 81 (1996), and a bridge is not a covered situs unless it is an adjoining area used for the loading, unloading, construction or repair of ships. *See id.*; 33 U.S.C. §903(a).

Accordingly, the administrative law judge's Decision and Order and Order denying reconsideration are affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge