

BRB No. 93-1753

HAROLD D. LUCAS)
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 Claimant-Petitioner)
)
 v.)
)
 WESTERN PACIFIC PILEDIVING) DATE ISSUED:
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 and)
)
 PACIFIC EMPLOYERS INSURANCE)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order of Alexander Karst, Administrative Law Judge, United States Department of Labor.

Gregory A. Bunnell (Pozzi, Wilson, Atchison, O'Leary & Conboy), Portland, Oregon, for claimant.

William M. Tomlinson (Lindsay, Hart, Neil & Weigler), Portland, Oregon, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (92-LHC-0227) of Administrative Law Judge Alexander Karst 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, a piledriver, sustained an injury to his left knee on November 8, 1990, during the course of his employment dismantling a steel and wood trestle which extended from land into the Pacific Ocean. Claimant continued to work following this incident until he was laid off in late November 1990. On December 19, 1990, claimant underwent surgery on his knee and returned to

work on February 18, 1991. Claimant, who has been paid compensation under the Oregon Workers' State Compensation Act for his temporary total disability, sought disability compensation under the Act for that period of time as well as an award under Section 8(c)(2), 33 U.S.C. §908(c)(2), for a 40 percent impairment to his left knee.

The trestle on which claimant was injured extended into the Pacific Ocean, was constructed of steel and wood, and contained no navigational aids, lights, or permanent boat hookups. The trestle was constructed in order to install a sewer pipe outfall from a sewage treatment plant; its purpose having been fulfilled, the trestle was being dismantled at the time of claimant's injury.

Before the administrative law judge, claimant asserted that, because he had been injured on the navigable waters of the United States, he satisfied both the situs and status requirements necessary to establish coverage under the Act, 33 U.S.C. §§903(a), 902(3). In his Decision and Order, the sole issue addressed by the administrative law judge was whether claimant had established coverage under the Act. The administrative law judge determined that the trestle on which claimant was injured was a structure affixed to land which neither could nor did float; the administrative law judge therefore found that claimant's injury did not occur on the navigable waters of the United States. After subsequently noting that claimant did not assert that his injury occurred on a situs enumerated in Section 3(a) of the Act, or that he was engaged in maritime employment, the administrative law judge concluded that his finding that the injury did not occur on navigable waters was dispositive of the coverage issue and thus denied the claim.

Claimant, on appeal, challenges the administrative law judge's finding that his injury did not occur on or over the navigable waters of the United States.¹ Employer responds, urging affirmance of the administrative law judge's decision.

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). Thus, in *Nacierema Operating Co. v. Johnson*, 396 U.S. 212 (1969), the Supreme Court held that injuries to longshoremen that arose while they worked on a pier permanently affixed to shore were not compensable under the Act based upon the reasoning that structures permanently affixed to land have long been construed as extensions of land and not within admiralty jurisdiction of the Act. In 1972, however, Congress amended the Act to add the status requirement of Section 2(3), 33 U.S.C. §902(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 held that in making these changes to expand coverage, Congress did not intend to withdraw coverage of the Act from workers injured on navigable waters who would have been covered by the

¹In his reply brief, claimant, citing *Hurston v. Director, OWCP*, 989 F.2d 1574, 26 BRBS 180 (9th Cir. 1993), summarily asserts for the first time that his injury occurred on an enumerated situs. However, as the administrative law judge stated, and our review of the record confirms, claimant neither raised this assertion below nor developed the record in this regard. *See* Decision and Order at 3. Accordingly, we will not address this new issue raised by claimant. *See Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 27 (CRT)(9th Cir. 1987).

Act before 1972. *Perini*, 459 U.S. at 315-316, 103 S.Ct. at 646, 15 BRBS at 76-77 (CRT). Accordingly, 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. *Perini*, 459 U.S. at 323-324, 15 BRBS at 80-81 (CRT). *See also Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992).

Unlike the claimant in *Perini*, claimant in the instant case was injured on a trestle which was affixed to both land and the Pacific Ocean floor. This case is therefore similar to that of *Laspragata v. Warren George, Inc.*, 21 BRBS 132 (1988), in which the Board, citing *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78 (CRT)(1985), affirmed the administrative law judge's conclusion that claimant, a core-driller who was injured while working on a platform of a sewage treatment plant which was affixed to the bedrock of the Hudson River, was not covered under the Act.² Claimant, therefore, was not injured on navigable waters because he was injured while on a trestle affixed to both land and the ocean floor. *See Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969); *Laspagata*, 21 BRBS at 132.

Moreover, we reject claimant's contention that since the structure upon which he was injured was temporary in nature, his injury should be considered to have occurred on navigable waters. Claimant has set forth no conclusive precedent in support of his assertion that the temporary nature of the structure at issue here changes its character. To the contrary, a review of case law reflects only a distinction between "floating," structures, which may be temporarily fixed in one place, and "stationary" structures. *Compare Perini*, 459 U.S. at 297, 15 BRBS at 62 (CRT) (wherein claimant was standing on a floating barge) with *Herb's Welding*, 470 U.S. at 414, 17 BRBS at 78 (CRT) (wherein claimant was injured while welding on a fixed offshore oil platform). In the instant case, it is uncontroverted that the trestle on which claimant sustained his injury was affixed to land and the ocean floor; accordingly, we affirm the administrative law judge's determination that claimant was not

²In *Herb's Welding*, the Supreme Court held that a claimant who was injured while welding on a fixed offshore oil platform was not injured on navigable waters.

injured on the navigable waters of the United States. *See generally* *Silva v. Hydro-Dredge Corp.*, 23 BRBS 123 (1989); *Laspragata*, 21 BRBS at 132.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge