BRB No. 01-0413

PHYLLIS L. JERNIGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Jan. 18, 2002
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (98-LHC-1577) of Administrative Law Judge Fletcher E. Campbell, Jr., denying 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 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).

This is the second time that this case has come before the Board. Claimant was working for employer as a cleaner when, on February 2, 1996, she injured her back when she slipped and fell while salting the steps leading to employer's yard after it had snowed. Claimant subsequently sought temporary total disability benefits from October 25, 1997, to

July 7, 1998. At the formal hearing, claimant testified that she works in employer's recycling building and goes out into the yard when it is her turn to respond to a call requesting that something be cleaned up. Tr. at 24. In describing her work for employer, claimant testified that her duties consist of recycling oil, paper and cardboard from all over the shipyard, salting steps in the winter, cleaning blood from industrial accidents occurring on shipyard property, including aboard ships and in warehouses, Tr. at 32, and cleaning oil spills on roads, docks and piers from equipment that leaked oil or from barrels that were leaking or knocked over. Tr. at 16. The paper and cardboard which comes off the ships consists of computer paper and boxes which held items such as parts. Tr. at 16. Claimant stated that her duties also include picking up iron and wood from under ship skids, and other cleaning duties, including picking up debris, such as wood, steel, welding rods and trash left after shipbuilders finish working, or left after a christening or tour, and that she drove a forklift to carry out some of her duties. Tr. at 13-18, 32. Claimant's recycling duties comprise her principal job and take place in Building 4687, inside the gate of employer's shipbuilding facility. Tr. at 18. Claimant testified that she spent most of her time in the recycling building shredding paper, and on occasion would go out in the yard. Tr. at 24.

In his initial Decision and Order, the administrative law judge determined that claimant was not covered under Section 2(3) of the Act, 33 U.S.C. §902(3), because her general cleaning duties do not have a sufficiently strong nexus with loading, unloading, or shipbuilding. Consequently, the administrative law judge denied claimant's claim for temporary total disability compensation under the Act.

On appeal, the Board vacated the administrative law judge's denial of benefits, and remanded the case for the administrative law judge to determine whether the tasks claimant performed in the yard were essential to the building and repairing of ships or integral to the shipbuilding process. *See Jernigan v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 99-0884 (May 23, 2000)(unpublished).[1] On remand, neithet party offered new evidence; rather, the parties filed briefs in support of their respective positions. In his Decision and Order on Remand, the administrative law judge considered the totality of the evidence regarding claimant's employment duties and concluded that those duties were not integral or essential to employer's shipbuilding, loading or unloading processes.

[1]The Board noted that claimant's work in the recycling building shredding and recycling paper could not be considered integral to shipbuilding as "it is immaterial how the waste is disposed of once it is removed from the yard." *Jernigan,* slip op., n.8.

Accordingly, the administrative law judge concluded that claimant was not covered by the Act, and he again denied the benefits sought by claimant.

On appeal, claimant challenges the administrative law judge's finding that she did not meet the status test. Specifically, claimant argues that the administrative law judge erred in failing to focus his consideration on how claimant's cleaning duties affect the shipbuilding process pursuant to the United States Court of Appeals for the First Circuit's decision in *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981). As claimant contends that her duties with employer were an essential link in ensuring that employer's shipbuilding process ran smoothly, she consequently asserts that her employment duties were integral to employer's operations and thus satisfy the status element of the Act. Employer responds, urging affirmance of the administrative law judge's decision.

Generally, a claimant satisfies the "status" requirement if she is an employee engaged in work which involves loading, unloading, constructing, or repairing vessels. *See* 33 U.S.C. §902(3);[2] *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989); *Shives v. CSX Transportation, Inc.*, 151 F.3d 164, 32 BRBS 125(CRT)(4th Cir. 1998), *cert. denied*, 525 U.S. 1019 (1998). In *Schwalb*, the Supreme Court upheld coverage for two laborers performing janitorial and housekeeping jobs whose duties included cleaning spilled coal from loading equipment in order to prevent equipment malfunctions and for a machinist whose job was to maintain and repair loading equipment, on the rationale that employees "who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act." *Schwalb*, 493 U.S. at 47, 23 BRBS at 99(CRT). The Court stressed that coverage "is not limited to employees who are denominated 'longshoremen' or who physically handle the cargo," *id.*, and held that "it has been clearly decided that, aside from the specified occupations [in Section 2(3)], land-based activity . . . will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." 493 U.S. at 45, 23 BRBS at 98(CRT); *see P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 82, 11 BRBS 320, 328 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). The Court further stated that "[e]quipment cleaning that is necessary to keep machines operative is a form of maintenance and is only different in degree from repair work." *Schwalb*, 493 U.S. at 48, 23 BRBS at 99(CRT).

[2]Section 2(3) provides that "the term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker. . . ." 33 U.S.C. §902(3)(1998).

Similarly, the Fourth Circuit's decision in *White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980), held that an employee who received pipe for use in shipbuilding and marked it for identification was covered by the Act, finding this work was "integral" to the shipbuilding process. *See also Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Sea-Land Service, Inc. v. Rock,* 953 F.2d 56, 25 BRBS 112(CRT) (3d Cir. 1992);[3] *Coloma v. Director, OWCP,* 897 F.2d 394, 23 BRBS 136(CRT) (9th Cir. 1990), *cert. denied,* 498 U. S. 818 (1991).[4] Moreover, to satisfy the status requirement, claimant need only "spend at least some of [her] time in indisputably longshoring operations." *Caputo*, 432 U.S. at 273, 6 BRBS at 165. The key factor in the inquiry is the nature of the work to which claimant could be assigned. *See Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 23(CRT) (1st Cir. 1984); *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997).

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[3]In *Rock*, the Third Circuit evaluated its prior case law in light of the Supreme Court's decision in *Schwalb* and found it to be consistent in requiring an integral relationship between loading, unloading or shipbuilding; thus, the court deemed activities "maritime" if they are "an integral or essential part of the chain of events leading up to the loading, unloading, or building of a vessel." *Rock*, 953 F.2d at 67, 25 BRBS at 121(CRT). Accordingly, the court held that a courtesy van driver was not covered under the Act as his work, although helpful, was not indispensable to the loading process itself.

[4]In *Coloma,* the Ninth Circuit held that, since a messman/cook's duties were not essential or integral to the loading and unloading process, claimant was not engaged in "maritime employment" under the Act. *Coloma*, 897 F.2d at 400, 23 BRBS at 144 (CRT).

Contrary to claimant's contention, the administrative law judge did not err in finding the instant case distinguishable from the decision of the First Circuit in *Graziano.* In *Graziano*, the First Circuit held that an employee's overall masonry work on shipyard facilities was sufficient to establish coverage under the Act because maintenance and repair of shipyard facilities was essential to the building and repairing of ships. In rendering this decision, the court reasoned that the claimant's work was a necessary link in the chain that resulted in the building and repairing of ships; specifically, the court found that although the employer's shipbuilding process would not have come to an immediate halt if claimant's duties were not successfully discharged, a failure to perform routine maintenance would have eventually led to a stoppage or curtailment of shipbuilding and repairs. *Graziano*, 663 F.2d at 343, 14 BRBS at 56.

In contrast to *Graziano,* the administrative law judge in the case at bar rationally found that the record did not support a finding that claimant's work maintained any kind of structures or equipment essential to employer's shipbuilding, loading, or unloading processes. *See* Decision and Order on Remand at 6. The administrative law judge recognized that under *Schwalb,* cleaning duties could be covered if necessary to keep equipment operational. The administrative law judge, however, distinguished the instant case from *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT), on the basis that claimant did not present evidence that her failure to perform the clean-up duties she was occasionally assigned would impede or bring to a halt employer's operations. Decision and Order on Remand at 7. Contrary to claimant's assertion on appeal, the administrative law judge was not required to infer from the evidence that the failure of claimant to perform these duties would hinder employer's activities.[5] *See Gonzalez v. Merchants Building Maintenance,* 33 BRBS 146

[5]In this case, claimant spent most of her time in the recycling shed performing duties which we previously held were not essential to shipbuilding. *Jernigan,* slip op., n.8. Claimant testified that when called upon to do so, she went into the yard and picked up materials such as iron and wood from under ship skids, picked up debris including wood, steel, welding rods and trash after the shipbuilders finished work, and cleaned up oil spills on roads, docks and piers, among her other duties. Claimant asserts that the "logical fact" is that the failure to perform these duties would lead to the back-up of debris, which would ultimately interfere with shipbuilding. While this inference would certainly follow in some cases, in this case, the record is simply too undeveloped for us to hold that the inference that if claimant did not pick up debris, it would cumulate to enormous proportions is the only one which could be drawn. Claimant here did not testify as to whether her work was performed on an ongoing basis while ships were under construction or provide any other details which would lead inexorably to the conclusion that ship construction would have been impeded had she not performed her cleaning duties. *See* Tr. at 13-32. On these facts, we cannot say that the administrative law judge erred.

(1999). The facts presented here permit more than one reasonable inference to be drawn, and the administrative law judge did not err in declining to construe the evidence to reach the conclusion urged by claimant.

On remand, the administrative law judge fully considered claimant's coverage, finding she did not maintain equipment or structures that were essential to employer's work, nor did she work with materials used in the building of ships. Most significantly, the administrative law judge found that the record did not establish that claimant's failure to perform her general cleaning duties would impede or bring to a halt employer's operations. He thus concluded that the record does not support a finding that claimant's duties were essential to the loading or unloading of ships in that a failure by claimant to perform her assigned duties would impede employer's operations. On the specific facts presented here, we affirm the administrative law judge's conclusions. The determination that claimant is not covered by the Act is thus affirmed.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge