BRB No. 07-1011

B.E.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 06/20/2008
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Granting Summary Decision and Dismissing Claim of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Carolyn P. Kelly (O'Brien, Shafner, Stuart, Kelly & Morris, P.C.), Groton, Connecticut, for claimant.

Mark P. McKenney (McKenney, Quigley, Izzo & Clarkin, L.L.P.), Providence, Rhode Island, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Summary Decision and Dismissing Claim (2007-LHC-1278) of Administrative Law Judge Daniel F. Sutton 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 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). The Board held oral argument in this case on April 16, 2008, in Providence, Rhode Island.

Claimant worked as a janitor for employer. She was injured when she slipped on ice and fell at work on January 19, 2005. According to the affidavit of her supervisor, claimant's work involved cleaning offices and bathrooms, including mopping,

vacuuming, dusting, and emptying wastebaskets. Motion for Summary Decision (M/SD) at exh. 1. Claimant stated that she does not work on ships and most of her work is performed in "restricted area" or "confidential area" offices. Her duties also include cleaning the cafeteria and bathrooms located in Building 197, which is used by employees who work on submarines, re-stocking bathrooms and, on Saturdays, cleaning bathrooms in the Seawolf production area. M/SD attachment to exh. 1; Cl. Resp. to M/SD. Employer paid claimant medical benefits as well as temporary total disability benefits under the Act from January 20 to February 1, 2005. Cl. Resp. to M/SD at exh. 2; Cl. Pre-Hearing Statement. Claimant filed a claim under the Act seeking additional temporary total and permanent total disability benefits.

In its motion for summary decision, employer argued that claimant is not a maritime worker covered by the Act, and it requested dismissal of the claim. In response, claimant contended her janitorial duties are essential to the shipbuilding process, and she argued that employer is equitably estopped from asserting lack of coverage as a defense because employer paid her benefits under the Act.[1] The administrative law judge found that claimant did not satisfy the criteria for applying equitable estoppel and rejected her argument. With regard to coverage, the administrative law judge determined that, even in a light most favorable to claimant, she has not shown that her duties are essential to the shipbuilding process. He rejected her assertions that *Gonzalez v. Merchants Bldg. Maint.*, 33 BRBS 146 (1999), is inconsistent with *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002), and that the OSHA shipbuilding regulation which requires, among other things, "adequate washing facilities," 29 C.F.R. §1915.97(b), proves that her work is essential to the shipbuilding process. Accordingly, the administrative law judge found that the undisputed facts establish a lack of any material issue of fact warranting a hearing. The administrative law judge found that claimant is not a covered employee and that employer is entitled to summary decision as a matter of law. The administrative law judge dismissed claimant's claim. Decision and Order at 4-10. Claimant appeals the decision, and employer responds, urging affirmance.

Claimant argues that the administrative law judge erred in finding there were no genuine issues of material fact with regard to two issues: 1) whether employer should be equitably estopped from asserting a lack-of-coverage defense, and 2) whether claimant

[1]Following the January 2005 injury, employer filed an LS-1 form authorizing medical treatment and an LS-208 form terminating temporary total disability benefits paid pursuant to the Act. Cl. Resp. to M/SD at exh. 1-2. Additionally, claimant stated that she was injured in 1996 and 1998, and employer paid benefits under the Longshore Act for those injuries.

meets the Section 2(3), 33 U.S.C. §902(3), status requirement. Thus, claimant asserts that the administrative law judge erred in granting employer's motion for summary decision.

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to summary decision as a matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Buck v. General Dynamics Corp.*, 37 BRBS 53 (2003); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); 29 C.F.R. §§18.40(c), 18.41(a). Not only must there be no genuine issue as to evidentiary facts, but there must be no controversy regarding inferences to be drawn from those facts. *Donahue v. Windsor Locks Board of Fire Commissioners*, 834 F.2d 54 (2d Cir. 1987); *Buck*, 37 BRBS 53; *Hall*, 24 BRBS 1; 29 C.F.R. §§18.40(d), 18.41(a). The party opposing a motion for summary judgment, in this instance, claimant, must "set forth specific facts showing that there is a genuine issue of fact for the hearing" in order to defeat the motion. *Buck*, 37 BRBS 53; 29 C.F.R. §18.40(c). The party opposing the motion must establish the existence of an issue of fact which is both "material" and "genuine;" material in the sense of affecting the outcome of the litigation, and genuine in the sense of there being sufficient evidence to support the alleged factual dispute. *O'Hara*, 294 F.3d at 61; *see also First Nat'l Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 290 (1968). If a rational trier-of-fact might resolve the issue in favor of the non-moving party, summary decision must be denied. *First Nat'l Bank of Arizona*, 391 U.S. at 289. Summary decision is also proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In this case, the administrative law judge found that, even assuming claimant satisfied some of the elements for applying the doctrine of equitable estoppel by relying on employer's payments under the Act for past injuries and its short period of payment of temporary total disability benefits under the Act for this injury, one element necessary for invocation of the doctrine is notably absent. Specifically, the administrative law judge found that claimant did not demonstrate that she relied *to her detriment* on employer's conduct. Rather, he found that claimant filed a claim for this injury under the state workers' compensation law thereby protecting her state rights, and she did not show that she was precluded from pursuing that claim. Decision and Order at 4. As he concluded that claimant has not acted to her detriment because she has not been deprived of the ability to pursue a claim for her injury under state law, the administrative law judge found

that equitable estoppel is not applicable, and he permitted employer to raise lack of status as a defense against the claim under the Act.

Equitable estoppel is a doctrine in equity which prevents one party from taking a position inconsistent with a position it took in an earlier action such that the other party would be at a disadvantage. *Rambo v. Director, OWCP*, 81 F.3d 840, 30 BRBS 27(CRT) (9th Cir. 1996), *rev'd on other grounds*, 521 U.S. 121 (1997); *Betty B Coal Co. v. Director, OWCP*, 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999); *Ingalls Shipbuilding, Inc. v. Director, OWCP [Benn]*, 976 F.2d 934, 26 BRBS 107(CRT) (5th Cir. 1992). It typically holds a party to a representation made, or a position assumed, because another party has in good faith relied upon that representation or position. *Porter v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 113, 119 (2002). Reasonable reliance to the party's detriment is essential for application of this doctrine. *Kosakow v. New Rochelle Radiology Assocs.*, 274 F.3d 706 (2d Cir. 2001).

The United States Court of Appeals for the Second Circuit, in whose jurisdiction this case arises, stated that "a party may be estopped from pursuing a claim or defense where: 1) the party to be estopped makes a misrepresentation of fact to the other party with reason to believe that the other party will rely upon it; 2) and the other party reasonably relies upon it; 3) to her detriment." *Kosakow*, 274 F.3d at 725; *see also Rambo*, 81 F.3d at 843, 30 BRBS at 29(CRT); *Porter*, 36 BRBS at 119. Claimant argued before the administrative law judge that she satisfied the criteria for equitable estoppel because: 1) employer knew her duties; 2) employer paid her benefits under the Act and followed the procedures of the Act; 3) claimant did not know that when cleaning onboard ships was removed from her duties, her status changed; and 4) other than to file an initial claim, she did not proceed or protect her rights under the state act. Cl. Resp. to M/SD.

We affirm the administrative law judge's determination that claimant did not establish that the doctrine of equitable estoppel applies to prohibit employer from asserting lack of coverage as a defense in this case. Contrary to claimant's assertion, she bears the burden of producing evidence probative of her claim of detrimental reliance. *Porter*, 36 BRBS 113. The administrative law judge rationally found that claimant did not demonstrate, in response to employer's motion for summary decision, that she had relied on employer's actions to her detriment. The administrative law judge found that claimant did not establish that she detrimentally relied on employer's payments under the Act because claimant, nevertheless, filed an initial claim for this injury under the state law. Claimant did not submit any evidence that she would be precluded from pursuing the state claim in the event she is not entitled to benefits under the Act. In the absence of any detrimental reliance, there can be no application of the doctrine of equitable estoppel. *Betty B Coal Co.*, 194 F.3d at 504, 22 BLR at 2-24; *Rambo*, 81 F.3d at 843, 30 BRBS at 29(CRT); *Porter*, 36 BRBS at 119-120. Where the party asserting equitable estoppel has not set forth facts to show all the necessary elements, there is no genuine issue of material

fact regarding whether equitable estoppel should apply, and, indeed, equitable estoppel cannot apply as a matter of law. *Id.* Thus, the administrative law judge properly permitted employer to assert its lack-of-coverage defense in this case.

Claimant next contends the administrative law judge erred in granting summary decision on the issue of whether she is a covered employee. Claimant argues that the administrative law judge erred in relying on *Gonzalez*, 33 BRBS 146, instead of on *Watkins*, 36 BRBS 21, and other more recent cases. She asserts she is covered because she is a non-excluded worker who is exposed to maritime hazards, and her duties keep the shipyard in compliance with OSHA housekeeping regulations. Contrary to claimant's assertions, the administrative law judge properly found that there is no dispute as to the facts regarding her duties as a janitor: she cleans offices, the cafeteria, and bathrooms. Rather, the issue before the administrative law judge was whether employer was entitled to summary decision as a matter of law.

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). Generally, a claimant satisfies the "status" requirement if she is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See* 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). To satisfy this requirement, she need only "spend at least some of [her] time in indisputably longshoring operations." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 273, 6 BRBS 150, 165 (1977); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). Although an employee is covered if some portion of her activities constitutes covered employment, those activities must be more than episodic, momentary or incidental to maritime work. *Boudloche*, 632 F.2d at 1346, 12 BRBS at 732; *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990).

In *Schwalb*, the Supreme Court upheld coverage for three employees, two of whom worked at a loading terminal performing housekeeping and janitorial services and one who maintained and repaired loading equipment. The two employees engaged in housekeeping and janitorial services were responsible for ordinary janitorial services as well as cleaning spilled coal from loading equipment in order to prevent equipment malfunctions. Holding all three employees covered, the Court reasoned 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." *Id.*, 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); *Caputo*, 432 U.S. at 272-274, 6 BRBS at 165. In addressing the janitorial work performed, the Court further stated that "equipment 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).

In three cases involving maintenance employees at a shipyard, the Board considered whether, consistent with the Supreme Court's holding in *Schwalb*, the employees' functions were essential to the employer's shipbuilding process. In *Watkins*, 36 BRBS 21, the Board held that the claimant, who spent four hours every day emptying 55-gallon drums filled with shipbuilding debris next to the ships, was covered under the Act pursuant to *Schwalb*. Although the record in *Watkins* contained no direct evidence that the claimant's failure to perform her job would be an impediment to the employer's shipbuilding operations, the Board held that the administrative law judge erred in failing to draw the only rational inference based on the evidence presented, which is that the claimant's failure to remove the debris eventually would lead to such a build-up of trash that work on the ships could not continue. *Watkins*, 36 BRBS at 23-24. The Board held that the claimant's work emptying trash barrels from the ships' sides met the status test, as it was integral to the employer's shipbuilding and repair operations. *Id.*

In *Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 52 (2002), the Board applied the *Watkins* rationale and held that the claimant was covered under Section 2(3). Specifically, the Board held that the claimant's duties, which included the removal of metal shavings, discarded metal and other debris from around the machinery while the machines were in operation, was integral to the employer's shipbuilding and repair process. The Board reasoned that, consistent with *Schwalb* and *Watkins*, the impediment to shipbuilding need not be immediate, and the evidence in *Ruffin* established that eventually the shipbuilding process would be impeded by the accumulation of detritus around the machines.[2] *Ruffin*, 36 BRBS at 55; *see also Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981) (shipyard maintenance worker who repaired buildings and performed other work throughout the yard held covered);[3] *Price v.*

[2]The Board emphasized that although the record did not establish the rate at which the debris accumulated, it would defy logic and *Schwalb* to require the claimant to demonstrate how quickly the debris accumulates and the potential effects of the failure to perform her job. *Ruffin*, 36 BRBS at 55.

[3]The court's reasoning in *Graziano* was similar to *Schwalb* in holding that building maintenance was essential because the failure to perform it would eventually lead to a stoppage or curtailment of shipbuilding and repairs.

Norfolk & Western Ry. Co., 618 F.2d 1059 (4th Cir. 1980) (railroad employee injured while painting a structure used in loading vessels held covered).

In *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002), the Board affirmed the administrative law judge's determination that the claimant, who worked in the air conditioning department and was required to replace air conditioning filters in the buildings of the shipyard, was a covered employee. The Board discussed *Schwalb*, *Ruffin*, and *Watkins* and concluded that the evidence supported the administrative law judge's finding that changing air filters in buildings where ships were being constructed, for ventilation purposes and for proper maintenance of the air conditioning unit, was integral to the shipbuilding process. *Sumler*, 36 BRBS at 100-102.

The Board, however, also has affirmed an administrative law judge's determination that a janitor who performed essentially the same duties as claimant here was not a covered employee. In *Gonzalez*, 33 BRBS at 148, the employee was assigned to clean and restock bathrooms and portable toilets at a shipyard. His territory covered bathrooms in stationary buildings, portable buildings and on ships. Although he worked aboard ships, the administrative law judge found that his connection to maritime activity was insufficient to fulfill the status requirement and that these strictly janitorial duties were not connected to building, repairing, loading or unloading ships and, thus, fell short of being integral to that process. *Gonzalez*, 33 BRBS at 147-148. On appeal, the Board rejected assertions that the employee's duties should be analogized to those of the claimants in *Holcomb v. Robert W. Kirk & Associates, Inc.*, 655 F.2d 589, 13 BRBS 839(CRT) (5th Cir. 1981), *cert. denied*, 459 U.S. 1170 (1983) (watchman held covered), and *Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991) (firewatch/safety man held covered). Rather, the Board held that the janitorial duties are more akin to those of a cook, *Coloma v. Director, OWCP*, 897 F.2d 394, 23 BRBS 136(CRT) (9th Cir.), *cert. denied*, 498 U.S. 818 (1990), or a courtesy van driver, *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112(CRT) (3d Cir. 1992), who were held not to be covered employees as their duties were not essential to the loading, unloading, building or repairing of ships. *Gonzalez*, 33 BRBS at 148. As to the facts of the case itself, the Board noted that the employee's maintenance duties did not involve any shipbuilding equipment, and thus the administrative law judge reasonably concluded that his duties were merely incidental to the shipbuilding operation. *Id.*

In this case, the administrative law judge found that the facts are undisputed, and he concluded that claimant's duties cleaning the offices, cafeteria, and bathrooms are not essential to the shipbuilding process. As these duties are similar to those of claimant in *Gonzalez*, the administrative law judge did not err in relying on it. Although claimant cleans facilities used by production workers, the evidence establishes that she does not clean or maintain any shipbuilding equipment or the production areas around the equipment. The administrative law judge therefore properly found that, unlike the

claimants in *Schwalb, Sumler, Ruffin,* and *Watkins*, claimant's job was not such that her failure to perform it would disrupt the shipbuilding process.[4] The undisputed evidence leads to but one legal conclusion -- claimant's job is not integral to employer's shipbuilding operation. *See Rock*, 953 F.2d 56, 25 BRBS 112(CRT); *Coloma*, 897 F.2d 394, 23 BRBS 136(CRT). As "Congress did not seek to cover all those who breathe salt air[,]"*Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423, 17 BRBS 78, 82(CRT) (1985), employees who are on a shipyard site but do not perform duties essential to the shipbuilding process are not covered. As the facts establish that claimant was such an employee, we affirm the administrative law judge's determination that there is no genuine issue of material fact regarding claimant's lack of status under Section 2(3) and that employer is entitled to summary decision on this issue as a matter of law. As coverage under Section 2(3) is a necessary element of a claim, the administrative law judge properly dismissed claimant's claim under the Act.

Accordingly, the administrative law judge's Decision and Order Granting Summary Decision and Dismissing Claim is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

[4]Similarly, contrary to claimant's assertions at oral argument, *Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 126 S.Ct. 2319 (2006), is distinguishable. The claimant therein was an engineer who spent 30 percent of his time on navigable waters testing sonar equipment. He drowned during the course of his employment.