BRB No. 98-1633

AMPARO GONZALEZ (Widow of ANTONIO REYES) Claimant-Petitioner v. MERCHANTS BUILDING MAINTENANCE and CNA INSURANCE COMPANIES Employer/Carrier-Respondents	)	DATE ISSUED: 9/21/99 DECISION and ORDER

Appeal of the Decision and Order Granting Motion for Summary Decision of Henry B. Lasky, Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter, San Diego, California, for claimant.

William N. Brooks, II (Law Offices of James P. Aleccia), Long Beach, California, for employer/carrier.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, the alleged surviving spouse of Antonio Reyes, appeals the Decision and Order Granting Motion for Summary Decision (98-LHC-0814) of Administrative Law Judge Henry B. Lasky 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).

While employed as a janitor, Antonio Reyes (decedent) sustained an injury to his right

elbow while cleaning a restroom located in the National Steel & Shipbuilding Company (NASSCO) building on June 25, 1996. Mr. Reyes's job duties involved the cleaning and restocking of restrooms and portable toilets throughout the NASSCO shipyard, including performing these services in bathroom facilities located aboard ships approximately two to three times a day. Following a period of unsuccessful conservative treatment, it was determined that surgery would be necessary to correct the damaged tendon in Mr. Reyes's right elbow. Although the surgery was authorized, Mr. Reyes died on December 28, 1996,[1] before it could be scheduled. Claimant thereafter filed a claim for widow's benefits under the Act, alleging that Mr. Reyes's death was attributable to the industrial injury that he suffered while working for employer.[2]

In his decision, the administrative law judge determined that Mr. Reyes was not covered under Section 2(3) of the Act, 33 U.S.C. §902(3), as he was not engaged in loading, unloading, repairing, or building a vessel, and thus, his *de minimis* connection to maritime activity is insufficient to fulfill the status requirement of the Act. Consequently, the administrative law judge granted employer's motion for summary decision and thereby dismissed the case.

On appeal, claimant contests the dismissal of her claim. Employer responds, urging affirmance.

Claimant argues that contrary to the administrative law judge's determination, the status test is met, since Mr. Reyes's regular duties aboard ships facilitated the work of those actually building the ships, and thus, served as an integral part of the shipbuilding process under the Act. Claimant specifically avers that Mr. Reyes's janitorial work aboard ships is no more remote from actual shipbuilding activities than that of a night watchman, which both the Board, in *Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991), and the United States Court of Appeals for the Fifth Circuit in *Holcomb v. Robert W. Kirk & Assoc., Inc.*, 655 F.2d 589, 13 BRBS 839 (5th Cir. 1981), held is covered employment under the Act. Lastly, claimant argues that her claim falls within the jurisdiction and coverage of the Act since at

[1]The immediate cause of Mr. Reyes's death is listed as cardiopulmonary failure with spontaneous nontraumatic intracerebral and subcranial hemorrhage.

[2]Mr. Reyes previously filed a claim seeking disability benefits on August 5, 1996.

least some of decedent's work was performed aboard ships and he was injured on a covered situs.

In order for a claim to be covered under the Act, a claimant must establish that his injury occurred upon a site covered by Section 3(a) and that he was a maritime employee under Section 2(3) and not subject to any specific statutory exclusions. 33 U.S.C. §§902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983); *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996). Therefore, in order to demonstrate that he is covered by the Act, a claimant must satisfy both the "situs" and the "status" requirements.[3] *Id.*

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....

[3]As the administrative law judge noted, there is no dispute that decedent, in the instant case, established the requisite "situs" test under Section 3(a) of the Act, 33 U.S.C. §903(a). This finding however does not, as claimant suggests, relieve her from satisfying the "status" requirement as decedent was not injured on navigable waters. Thus, claimant's contention that decedent's work is maritime in nature because he performed that work at a covered situs is without merit. *See generally Herb's Welding Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78 (CRT) (1985).

33 U.S.C. §902(3)(1998). The United States Supreme Court held that the maritime employment requirement as applied to land-based workers whose jobs are not enumerated in Section 2(3) is an occupational test focusing on loading and unloading. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989). Thus, individuals who sustain injuries while repairing and maintaining equipment essential to the loading and unloading processes are covered under the Act as the process would not continue without the functions of these workers.[4] *Id.* Applying the test enunciated in *Schwalb,* the United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, held that a claimant was not engaged in "maritime employment" under the Act, since his duties as a messman and cook were not integral or essential to the loading and unloading process. *Coloma v. Director, OWCP*, 897 F.2d 394, 23 BRBS 136 (CRT)(9th Cir. 1990), *aff'g Coloma v. Chevron Shipping Co.*, 21 BRBS 200 and 21 BRBS 318 (1988), *cert. denied*, 498 U.S. 818 (1991); *see also Alcala v. Director, OWCP*, 141 F.3d 942, 32 BRBS 81 (CRT)(9th Cir. 1998); *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 67, 25 BRBS 112, 121 (CRT)(3rd Cir. 1992). The Ninth Circuit reasoned that, contrary to the fact pattern in *Schwalb*, there was no dependence between claimant's duties as a messman and cook and the loading and unloading processes, as evidenced by the fact that the employer's longshoring operation continued even after the closing of the restaurant in which claimant worked. *Coloma*, 897 F.2d at 394, 23 BRBS at 136 (CRT). Similarly, the United States Court of Appeals for the Third Circuit deems 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). 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.

Contrary to claimant's contentions, the instant case is distinguishable from the decisions in *Spears* and *Holcomb*, inasmuch as the duties of the claimants in those cases were much more closely associated with and integral to the shipbuilding process. In *Holcomb*, the Fifth Circuit held that a watchman of a vessel docked in navigable waters at a ship repair

[4]In *Schwalb*, the Supreme Court specifically held that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act, as their work is an integral part of and essential to those overall processes. The Court reasoned that "someone who repairs or maintains a piece of loading equipment is just as vital to and an integral part of the loading process as the operator of the equipment," since "[w]hen machinery breaks down or becomes clogged or fouled because of lack of cleaning, the loading process stops until the difficulty is cured." *Schwalb*, 493 U.S. at 42, 23 BRBS at 99 (CRT). Thus, even employees performing "janitorial" services may be covered under the Act where, for instance, their functions include the cleaning of spilled coal from loading equipment. *Id.*

yard for the purposes of being readied for sea, who is injured aboard ship while in the performance of his duties, is within the scope of the term "maritime employment." Specifically, the Fifth Circuit held that the claimant's work was certainly an "integral part" of and "directly involved in an ongoing ship repair operation." *Holcomb*, 655 F.2d at 594, 13 BRBS at 842.

In *Spear*, 25 BRBS at 132, the Board affirmed the administrative law judge's finding that claimant is covered under Section 2(3), and thus, not excluded by Section 2(3)(A),[5] since he did not work exclusively as a security guard, as he performed fire and safety duties, and as he regularly spent several hours a night on duty on submarines. These duties were held to be integral to the shipbuilding process under the precedent of *Holcomb*. The Board explicitly held that if claimant spends some of his time in an indisputably covered activity, he is not engaged in exclusively security guard work, as it was not the intent of Congress to deprive traditional maritime employees who are exposed to hazards associated with shipbuilding of coverage by virtue of the 1984 amendments. *See also Dobey v. Johnson Controls*, 33 BRBS 63 (1999).

In contrast to those cases, the administrative law judge rationally found that the decedent's work in the instant case falls short of being integral to loading, unloading, building or repairing ships. The administrative law judge determined that decedent's duties were strictly janitorial, and he was in no way performing any tasks connected with the building, repairing, loading or unloading of ships. Decedent's maintenance duties did not involve any equipment used in the shipbuilding process. The administrative law judge therefore concluded that decedent's duties were merely incidental to the shipbuilding operation and did not expose him to any of the hazards of shipbuilding that the Act was designed to cover.

Inasmuch as the facts of the instant case are analogous to those presented in *Coloma* and *Rock*, *i.e.*, decedent's duties are not essential to the overall loading, unloading, building or repairing of vessels, and the administrative law judge's findings of fact are rational and supported by substantial evidence, and as they comport with applicable law, his dismissal of claimant's claim is affirmed. *Coloma*, 897 F.2d at 394 23 BRBS at 136 (CRT); *Rock*, 953 F.2d at 67, 25 BRBS at 121 (CRT).

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

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[5]Section 2(3)(A), added by the 1984 Amendments, explicitly excludes from the term "employee," those "individuals employed exclusively to perform office clerical, secretarial, security, or data processing work." 33 U.S.C. §902(3)(A).

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge