

BRB No. 02-0780

KELLY L. LEGGETT	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	DATE ISSUED: 07/24/2003
AND DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employee-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh, (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Christopher R. Hedrick (Mason, Mason, Walker & Hedrick), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2001-LHC-1895) of Administrative Law Judge Daniel A. Sarno, Jr., 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).

Claimant began working for employer in 1982 and has continuously worked as a janitor in the Janitor=s Department. Tr. at 11. Her responsibilities include cleaning and restocking bathrooms in buildings and portables. She alleges she injured her back in December 2000 when she was mopping a bathroom floor in the Boiler Shop. Employer argued that claimant is not a covered employee and that the injury did not occur. The administrative law judge found that claimant is not a maritime employee pursuant to Section

2(3) of the Act, 33 U.S.C. ' 902(3), and denied benefits on that ground. He did not reach the issue of whether an injury occurred. Decision and Order at 3-4. Claimant appeals the decision, and employer responds, urging affirmance.

Claimant argues that the administrative law judge failed to review claimant=s exact job duties to determine if they were integral to the shipbuilding process and failed to properly apply the analysis in *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). Specifically, she contends the administrative law judge erred in relying on the Board=s decision in *Gonzalez v. Merchants Building Maintenance*, 33 BRBS 146 (1999). Claimant also argues that the administrative law judge failed to apply *Schwalb* to determine if her infrequent pick up of shop trash constitutes maritime work. We reject claimant=s contentions, and we affirm the administrative law judge=s decision.

Section 2(3) of the Act 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 Astatus@ 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); *Schwalb*, 493 U.S. 40, 46, 23 BRBS 96(CRT); *Shives v. CSX Transportation, Inc.*, 151 F.3d 164, 32 BRBS 125(CRT) (4th Cir.), cert. denied, 525 U.S. 1019 (1998). To satisfy this requirement, she need only Aspend 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. See *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 by cleaning spilled coal from loading equipment in order to prevent equipment malfunctions, and one who maintained and repaired loading equipment. The Court reasoned that employees Awho 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); 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 stated that Aequipment 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); see also *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002) (air conditioning filter replacement person covered); *Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 52 (2002) (indoor cleaner covered); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002) (outdoor cleaner covered).

In *Gonzalez*, 33 BRBS 146, the Board affirmed the administrative law judge's determination that a janitor was not a covered employee. The decedent, a janitor, was assigned to clean and restock bathrooms and portable toilets in shipyard 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 the claimant's assertions that the decedent'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 covered), and *Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991) (firewatch/safety man covered). Rather, the Board held that the decedent's janitorial duties were 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) (3^d Cir. 1992), whose work was not essential to the overall loading, unloading, building or repairing of ships. *Gonzalez*, 33 BRBS at 148.

In the case currently before the Board, the administrative law judge found that claimant's job is to clean and restock bathrooms in stationary and portable buildings in the shipyard. Decision and Order at 3-4. Although he acknowledged that construction of ships occurred in these buildings and that claimant had to traverse the construction area, wearing safety gear, in order to get to the bathrooms to perform her job, he found that her duties are not integral to the shipbuilding or repair process. *Id.* at 4. Additionally, he rejected claimant's argument that her infrequent removal of trash from the shop area was sufficient to confer status because it was not part of her assigned duties and it occurred rarely, perhaps only once per year. *Id.*

The instant case is distinguishable from *Schwalb*, *Sumler*, *Ruffin* and *Watkins*. In the latter cases, the employees' cleaning duties directly affected either the shipbuilding process or shipbuilding machinery. While the employees' failure to perform their jobs may not have immediately resulted in the inability to build or repair ships, such a result was an eventuality. For example, in *Watkins*, the claimant spent four hours every day next to the ships, emptying 55-gallon drums filled with shipbuilding debris. The Board held that this work was covered under the Act pursuant to *Schwalb* as claimant's failure to remove the debris eventually would lead to a build-up of trash which would impede work on the ships. *Watkins*, 36 BRBS at 23-24; *see also Sumler*, 36 BRBS at 100-102; *Ruffin*, 36 BRBS at 55.

To the contrary, in the instant case, claimant's job did not affect either the shipbuilding machinery or the shipbuilding process. Claimant was assigned to clean and restock the bathrooms and portable toilets. Though claimant's job was performed in facilities where shipbuilding occurred, the administrative law judge found that the job itself had no nexus to shipbuilding or repair work. Decision and Order at 4. Accordingly, claimant's job is indistinguishable from the decedent's job in *Gonzalez*, and the

administrative law judge rationally relied on that case.¹ Additionally, the fact that claimant had to walk through shipbuilding areas to get to the bathrooms to perform her job does not establish that the administrative law judge erred in assessing whether claimant=s job subjected her to the hazards of shipbuilding. Traversing an area of shipbuilding does not make claimant=s job of cleaning bathrooms covered maritime employment. Thus, we affirm the administrative law judge=s determination that claimant=s janitorial job is not covered by Section 2(3) of the Act. *Gonzalez*, 33 BRBS at 147-148.

We also reject claimant=s argument that her infrequent removal of trash from the shops confers status. Claimant testified that she rarely removed shop trash, estimating it occurred only once per year when the cleaners who were assigned the task failed to empty the trashcans quickly enough. Tr. at 42. Claimant also admitted this was not one of her normal job responsibilities. Tr. at 43. The administrative law judge credited this aspect of claimant=s testimony. Decision and Order at 4. Further, claimant=s supervisor, Mrs. Robinson, testified that claimant was only to remove trash from the bathrooms and was not to take trash out of the shops, as that was the responsibility of the cleaners. Tr. at 55. We need not decide whether the removal of trash from the shops is a covered task integral to the shipbuilding and/or repair process, as it was not within claimant=s job description and was not one of her assigned duties. *Compare with Dobey v. Johnson Controls*, 33 BRBS 63 (1999) (reassignment to marine patrol was necessary part of the claimant=s regular job duties). Nevertheless, it was rational for the administrative law judge to find that claimant=s voluntary removal of trash from the shop, approximately one

¹We reject claimant=s assertions that failure to perform her job would violate safety and/or health rules and eventually lead to a shipyard shutdown. Such an eventuality is too tenuous to persuade us that claimant=s job should fall within the Section 2(3) definition of Maritime employee.@

time per year, does not confer coverage.² We, therefore, affirm the administrative law judge's determination that claimant does not meet the status requirement of the Act and is not a covered employee. *Gonzalez*, 33 BRBS at 148.

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

²Claimant's brief discusses being reassigned to perform the task of removing trash from the shop, so as to analogize the case to *Riggio v. Maher Terminals, Inc.*, 35 BRBS 104 (2001), *aff'd sub nom. Maher Terminals, Inc. v. Director, OWCP*, 330 F.3d 162 (3^d Cir. 2003), and *McGoey v. Chiquita Brands Int'l*, 30 BRBS 237 (1997). Contrary to this argument, the evidence establishes that claimant was not subject to reassignment as a cleaner or as any other type of maritime worker. Further, claimant's voluntary pick up of shop trash on rare occasions does not constitute Reassignment.