BRB No. 12-0035

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| LEE A. SMITH, JR. | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| LABOR FINDERS | ) | DATE ISSUED: 09/11/2012 |
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| and | ) | |
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| ACE AMERICAN INSURANCE COMPANY | ) | |
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| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeal of the Decision and Order Granting Employer/Carrier's Motion for Summary Decision Dismissing Claimant's Claim for Lack of Jurisdiction and Cancelling Hearing of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Kristopher W. Carter (Denham Law Firm, PLLC), Ocean Springs, Mississippi, for claimant.

Mark L. Clark and Jonathan A. Tweedy (Brown Sims, P.C.), Houston, Texas, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Granting Employer/Carrier's Motion for Summary Decision Dismissing Claimant's Claim for Lack of Jurisdiction and Cancelling Hearing (2011-LHC-1146) of Administrative Law Judge C. Richard Avery 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 was hired as a temporary laborer, a "beach-walker," to assist in the cleanup of Horn Island, Mississippi.[1] Claimant began working for employer on October 1, 2010, following the oil spill resulting from the Deepwater Horizon explosion. His job was to collect oil residue, oil balls, and other contaminants and pollutants in bags or buckets for removal and disposal.[2] During the course of the work day, claimant and the other workers would gather their supplies (lunch, water, Gatorade, ice, etc.) and their tools ("HazMat" clothes, scoop, shovel, etc.) and load them on the transport vessel that would take them to the island.[3] The boat ride to and from the mainland took about 30-45 minutes, "maybe longer." EX A at 19-22.

Upon arriving at Horn Island, claimant and his co-workers would unload their gear, set up a tent where the ice and drinks would be available for their breaks, and put on HazMat protection. Afterwards, the workers would get into trailers pulled by a "Gator" to be taken to the part of the island they would clean that day. *Id.* at 23-25, 31. Once at the cleanup site, they each received a five-gallon bucket. Claimant and his co-workers would line up shoulder-to-shoulder and walk the beach. They used scoops and shovels to pick up the oil from land or from where they could reach into the water without actually going into the water, and put it in their buckets. Because the oil waste was heavy, buckets at one-third full were to be brought to the designated drop spot. Claimant stated that another crew dumped the buckets into bags or other containers and loaded them onto ships for disposal (the "debris vessels"). *Id.* at 27-29, 31. He also stated that, at the end of the day, he and other beach-walkers would load their trash onto the transport vessel, and he alleges that, a few times, he carried some bags of oil debris onto the debris vessel.

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[1]Horn Island is a narrow, long, barrier island off the coast of Mississippi in the Gulf of Mexico. It is a wilderness protected by the National Park Service, undeveloped, except for a ranger station. *See* EX C. In his deposition, claimant estimated the island to be 20 miles long, and he stated it could take 20 to 30 minutes to travel to a clean-up site. EX A at 23.

[2]BP contracted with Clean Harbors for the cleanup project. Clean Harbors contracted with Hazmat Services, Inc. (HSI), which, in turn, contracted with employer for workers such as claimant. EX A at 44-45.

[3]Either the transport vessel, or a smaller boat onto which the crew transferred, would dock alongside a barge at the island's shore. EX A at 22-23.

The workers would then board the transport vessel to return to the mainland. *Id.* at 31-33, 53.

At the end of the day on October 11, 2010, while claimant was returning to the transport boat, the trailer in which he was riding crashed into another trailer. Claimant fell forward out of his seat, injuring his back and shoulders. He filed a claim under the Act for his injuries. Employer filed a motion for summary decision, arguing that claimant satisfied neither the status nor situs requirement of the Act. 33 U.S.C. §§902(3), 903(a).

The administrative law judge granted employer's motion for summary decision. He found that Horn Island is protected by the National Park Service and is used only for recreational purposes, as there is no loading, unloading, building, repairing, or dismantling of vessels. The administrative law judge rejected claimant's analogy to the beach in *Nelson v. American Dredging Co.*, 143 F.3d 780, 32 BRBS 115(CRT) (3d Cir. 1998), noting that this case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, not the Third Circuit. The administrative law judge determined that the situs requirement was not met. 33 U.S.C. §903(a). The administrative law judge also determined that claimant's work was not maritime in nature, as he was hired to collect oil on the beaches of the island in a cleanup project. He found the collected oil was put in buckets for later placement onto a vessel for disposal, and claimant did not routinely participate in loading those buckets onto the vessel. The administrative law judge compared this case to *Hough v. Vimas Painting Co., Inc.*, 45 BRBS 9 (2011), wherein the Board held that the claimant's removal of debris from a bridge was not covered employment, even though the debris was vacuumed onto a barge, because the purpose of the claimant's work was to clean a bridge. The administrative law judge relied on *Hough* to find that claimant did not satisfy the status requirement. 33 U.S.C. §902(3). Consequently, the administrative law judge granted employer's motion for summary decision and dismissed claimant's claim, having found there was no genuine issue of material fact and that claimant did not satisfy either the status or situs requirement. Claimant appeals the administrative law judge's decision. Employer responds, urging affirmance.

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 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). 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). Here, the administrative law judge found that there are no genuine issues of material fact and that claimant did not establish the essential status and situs elements of his claim; therefore, he granted employer's motion for summary decision.

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, or that it occurred on a landward area covered by Section 3(a), and that his work is maritime in nature pursuant to Section 2(3) and is not specifically excluded by any provision in the Act. 33 U.S.C. §§902(3), 3(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Thus, if the injury did not occur on navigable waters, in order to demonstrate that coverage exists, a claimant must separately satisfy both the "situs" and the "status" requirements of the Act. *Id.*; *see also Coastal Prod. Serv., Inc., v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009). In this case, it is undisputed that claimant's injury occurred on land; therefore, as he was not injured on navigable waters, he must satisfy both the status and situs requirements in order to be covered by the Act.

Section 2(3) of the Act specifically provides:

> 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) (emphasis added). Congress did not define "maritime employment" but the Supreme Court has held that the Act "cover[s] all those on the situs involved in the essential or integral elements of the loading or unloading process." *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46, 23 BRBS 96, 98(CRT) (1989); *see also Stowers v. Consolidated Rail Corp.*, 985 F.2d 292, 26 BRBS 155(CRT) (6th Cir.), *cert. denied*, 510 U.S. 813 (1993). To satisfy this requirement, a claimant need only "spend at least some of [his] time in indisputably [covered] 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). That is, a claimant satisfies the "status" requirement if he 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, 23 BRBS 96(CRT).

We reject claimant's contentions that his beach-cleaning job satisfies the status requirement.

Removing Oil from the Beaches and Water

Claimant first observes that his job required that he line up with his co-workers to collect oil from the beaches and the water. He used a shovel and a scoop to collect oil into buckets. Although he was not permitted to enter the water for safety reasons, he was to pick up oil at the waterline. EX A at 27-29. Claimant argues that this is analogous to the factual situation in *Schwalb*, and that his work, therefore, is covered. We disagree.

In *Schwalb*, one of the regular duties of the claimants was to remove coal which had fallen onto rollers and below the conveyor belts, so as to prevent clogs. The conveyor system was integral to the loading of coal onto ships as well as railcars; therefore, the Supreme Court held that the claimants' maintenance of the conveyor system was integral to the loading of vessels, and their work was covered by the Act. *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT). Contrary to claimant's contention, the administrative law judge properly found that his case is more like the situation in *Hough*. In *Hough*, the claimant was hired to clean a bridge prior to its being repainted. He used a vacuum to clean the bridge and the vacuum deposited the debris onto a barge for collection and storage until the bridge cleanup project was complete. Relying on *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 27 BRBS 103(CRT), *reh'g en banc denied*, 8 F.3d 24 (5th Cir. 1993), *cert. denied*, 511 U.S. 1086 (1994), the Board held that the storage of collected debris did not "enable" the barge to "engage in maritime commerce" and neither the debris nor the claimant's role in vacuuming the debris was integral to any maritime purpose. *Hough*, 45 BRBS at 15; *see also B.E. [Ellis] v. Electric Boat Corp.*, 42 BRBS 35 (2008) (janitor who cleaned offices at a shipyard not covered).

Claimant was hired to clean up the Horn Island beaches from the effects of an oil spill. The oil he picked up was eventually loaded onto a vessel for disposal. However, as in *Hough*, claimant's work duties were not in furtherance of "maritime commerce" because claimant's purposes in cleaning up the island were to protect the wildlife preserve and to enable re-opening of the island for recreational purposes. Unlike the facts in *Schwalb*, claimant's duties in removing oil from the beaches or the water's edge were not essential to any loading or unloading process or to maritime commerce.[4]

[4]Claimant argues that if he did not perform his job there would have been nothing to load onto the vessel, making his job essential to the loading process. He also argues that because companies made millions of dollars from the cleanup and disposal of the oil debris, he was putting the oil debris into "maritime commerce." We reject this argument, as extension of this analogy would grant coverage to any workers whose products

*Hough*, 45 BRBS at 15; *see generally Fusco v. Perini North River Associates*, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980) (nature of work not related to navigation or maritime commerce); *Terlemezian v. J.H. Reid General Contracting*, 37 BRBS 112 (2003) (work to improve roadways in port not maritime).

Loading/Unloading Tools & Supplies

Claimant next asserts that loading and unloading tools and supplies from the crew boat are covered activities. We disagree. In *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985), the Supreme Court addressed whether a welder who built and replaced pipelines on an offshore fixed platform was involved in maritime employment. One of his duties was to load and unload his tools and supplies from a boat. The Court acknowledged that "maritime employment" is not limited to the enumerated occupations but stated that the term cannot be read to eliminate the requirement that there be a connection with the loading or construction of ships. *Herb's Welding*, 470 U.S. at 423-424, 17 BRBS at 82-83(CRT). Thus, the Court held that the claimant was not covered because, despite having to unload his tools from a boat, his job as a welder on a fixed oil platform included no tasks that were "inherently maritime." *Id.*, 470 U.S. at 425, 17 BRBS at 83(CRT).

In a similar factual situation, the Fifth Circuit cited *Herb's Welding* in denying coverage in *Munguia*, 999 F.2d 808, 27 BRBS 103(CRT). In *Munguia*, the court concluded that a claimant's duties loading and unloading supplies and tools from a small crew boat and repairing this boat were merely incidental to his job on fixed oil platforms. Specifically, the Fifth Circuit reasoned that this "loading" and "unloading" alone did not warrant a conclusion that the employee was engaged in "maritime employment" as the work on fixed platforms is not maritime in nature. The *Munguia* court relied on the rationale espoused in *Fontenot v. AWI, Inc.*, 923 F.2d 1127, 24 BRBS 81(CRT) (5th Cir. 1991), to find there is a limit to conferring coverage by "loading:"[5]

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ultimately are loaded onto vessels for shipment. *See generally Garmon v. Aluminum Co. of America - Mobile Works*, 28 BRBS 46 (1994), *aff'd on recon.*, 29 BRBS 15 (1995) (separation between manufacturing process and loading process). As the Supreme Court stated in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985), the Act does not cover "all those who breathe salt air."

[5]The discussion in *Fontenot* concerned the status of an oilfield worker who worked on platforms as well as vessels. The court concluded that the claimant's exclusive remedy was against his employer under the Act because his injury occurred on a vessel on navigable waters.

> the unloading and loading, and construction activities that the [Supreme] Court recognizes as the focus of the maritime employment test . . . can be unconnected with maritime commerce. . . . For example, an employee might unload one train, and load another; or an employee might engage in construction activities, but build an airplane instead of a ship. Nothing intrinsic in any of these activities established their maritime nature; *rather it is that they are undertaken with respect to a ship or vessel. When the tasks are undertaken to enable a ship to engage in maritime commerce, then the activities become 'maritime employment.'*

*Munguia*, 999 F.2d at 813, 27 BRBS at 107(CRT) (quoting *Fontenot*, 923 F.2d at 1131, 24 BRBS at 85(CRT)) (emphasis added); *see also Laviolette v. Reagan Equipment Co.*, 21 BRBS 285 (1988) (offloading a superstructure was incidental to the claimant's construction of an offshore oil rig superstructure, which is not maritime work).

In this case, claimant loaded and unloaded his tools and supplies which included his lunch and drinks, a tent for shade, his HazMat gear, and his scoop and shovels – all with the purpose of enabling him to pick up oil detritus from the beaches. As these items are not items that enable a vessel to engage in maritime commerce, their loading or unloading does not confer coverage. *Herb's Welding*, 470 U.S. at 423-424, 17 BRBS at 82-83(CRT); *Munguia*, 999 F.2d at 813, 27 BRBS at 107(CRT); *Fontenot*, 923 F.2d 1127, 24 BRBS 81(CRT).

Loading Buckets or Bags of Waste

Claimant alleges that occasionally he would load buckets or bags of oil waste onto trailers or backhoes to be transported to the dock for loading onto the debris vessel, or that, at then end of the day, he would load remaining bags of oil debris directly onto the debris vessel. EX A at 26-27, 32-33, 53-54. The administrative law judge found that claimant was hired to collect deposits of oil from land and "did not routinely participate in the loading/unloading of the collected oil onto vessels. . . ." Order at 2. This finding is supported by substantial evidence. The owner of HSI stated in his affidavit that HSI was not contracted to load, unload, or dispose of any collected oil to or from vessels, that claimant was hired as part of the beach-walker program, and that claimant was not assigned to load or unload any goods, cargo or waste containers to or from any vessel. EX B. Claimant's supervisor at the Horn Island project stated that claimant's only job was to "swift (sic) thru the sand to remove the oil . . . and to put [it] to the side," where others would combine the buckets, put them on the Gators, and empty them. EX D. As loading collected oil onto the debris vessel was not part of claimant's regularly-assigned duties, and it was not a duty he could even be assigned pursuant to the cleaning contract, the administrative law judge rationally found that the status element is not satisfied on

this basis. *Kilburn v. Colonial Sugars*, 32 BRBS 3 (1998); *Laviolette*, 21 BRBS 285; *compare with Hudson*, 555 F.3d 426, 42 BRBS 68(CRT) (the claimant spent 9.7 percent of his time in the regular duty of maintaining the pipelines for loading oil onto the barges).

Driving the "Gator"

Claimant lastly contends he satisfied the status requirement because he occasionally drove the "Gator" which pulled the trailers used for transporting workers and supplies around the island. In his deposition, claimant stated this had occurred a few times, yet, apparently contradicting his own assertion, he later stated that another contractor was hired to drive the Gators. EX A at 23, 35-36, 40. In any event, this work is not covered employment. In *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112(CRT) (3d Cir. 1992), the court held that a courtesy van driver, who shuttled workers to points within the employer's loading facility, was helpful, but not indispensable, to the loading process and, therefore, was not covered. *Rock*, 953 F.2d at 66-67, 25 BRBS at 120-122(CRT). Thus, to the extent claimant shuttled other beach-walkers around the island, this activity does not satisfy the status requirement. *Id.*

As claimant was not engaged in maritime employment, he has not satisfied the status requirement. 33 U.S.C. §902(3); *Hough*, 45 BRBS 9; *Terlemezian*, 37 BRBS 112. Consequently, he has not established an essential element of his claim, and the administrative law judge properly granted employer's motion for summary decision.[6] *Celotex Corp.*, 477 U.S. at 322; *Ellis*, 42 BRBS 35; *Buck*, 37 BRBS 53.

[6]As claimant has not satisfied the status requirement, we need not address his contentions regarding the situs requirement.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge