BRB No. 12-0136

WESLEY STORK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLARK SEAFOOD, INCORPORATED	)	DATE ISSUED: 03/13/2013
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
NORTHROP GRUMMAN SHIPBUILDING	)	
	)	
and	)	
	)	
AMERICAN MUTUAL c/o MS INSURANCE GUARANTY ASSOCIATION	)	
	)	DECISION and ORDER
Employer/Carrier-Respondents	)	on MOTION for RECONSIDERATION

Appeal of the Decision and Order Denying Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Robert E. O'Dell, Vancleave, Mississippi, for claimant.

Vincent J. Castigliola, Jr. (Bryan, Nelson, Schroeder, Castigliola & Banahan, P.L.L.C.), Pascagoula, Mississippi, for Clark Seafood, Incorporated.

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

PER CURIAM:

Claimant has filed a timely motion for reconsideration of the Board's decision in *Stork v. Clark Seafood, Inc.*, 46 BRBS 45 (2012). 33 U.S.C. §921(b)(5); 20 C.F.R. §802.407. Clark Seafood (employer) responds, urging the Board to deny the motion and to affirm its decision. For the reasons that follow, we deny claimant's motion for reconsideration and affirm the Board's decision.

To reiterate, claimant filed a claim against employer, a commercial processor of fish, alleging he sustained a work-related hearing loss when he last worked as an ice plant operator. The administrative law judge found that: employer is an aquaculture operation; claimant is an aquaculture worker specifically excluded by the Act; and claimant did not perform maritime work. Decision and Order at 6-7; *see* 33 U.S.C. §902(3)(E). The Board affirmed the administrative law judge's finding that employer is an aquaculture operation and, after explaining that the exclusion from the Act's coverage of aquaculture workers rests on the nature of the employer's operation, and not the nature of a claimant's duties, affirmed the finding that claimant is excluded from the Act's coverage.

Claimant moves for reconsideration, contending that the Board erred in considering only the nature of employer's business in ascertaining whether the aquaculture exclusion applies. He asserts that because the Act does not specifically state that the exclusion applies to someone "employed by" an aquaculture operation, the Board erred in relying on the definition in the regulation, 20 C.F.R. §701.301(a)(12)(iii)(E), averring that it is merely an agency interpretative rule which lacks the force of law. Claimant contends that the legislative history supports his assertion that the "aquaculture worker" exclusion should be interpreted similar to the exclusion at Section 2(3)(A), 33 U.S.C. §902(3)(A), which considers the nature of the worker's duties. We reject claimant's argument that the legislative history supports his position, as well as his assertion that we should disregard the regulation.

Section 2(3)(E) of the Act states, without further explanation, that "aquaculture workers" are excluded from coverage provided they are covered by a state workers' compensation law. The regulation which implements Section 2(3)(E) defines "aquaculture workers" as:

> those employed by commercial enterprises involved in the controlled cultivation and harvest of aquatic plants and animals, including the cleaning, processing or canning of fish and fish products, the cultivation and harvesting of shellfish, and the controlled growing and harvesting of other aquatic species[.]

20 C.F.R. §701.301(a)(12)(iii)(E). In other words, employees of commercial enterprises involved in "aquaculture operations" are excluded. Claimant argues that this definition is merely an interpretive rule which does not have the force of law and is inconsistent with the statute because the statute does not provide that an aquaculture worker's status is based on the nature of his employer's operations. Thus, he suggests the Board ignore the regulation in light of the legislative history discussing other exclusions to coverage under Section 2(3).

We reject claimant's contention that the regulation at issue is "merely interpretive" and lacks the "force and effect of law." Section 39(a) of the Act, 33 U.S.C. §939(a), authorizes the Secretary of Labor to promulgate regulations to administer the Act.[1] As claimant states, an "interpretive rule" sets forth an administrative officer's understanding of a statute or regulation. *See Brown Express, Inc. v. U.S.,* 607 F.2d 695 (5th Cir. 1979); 2 Am. Jur. 2d Administrative Law §§146-147. Such a "rule" is exempt from the procedures mandated by the Administrative Procedure Act (APA) at 5 U.S.C. §553. However, "'regulations,' 'substantive rules' or 'legislative rules' are those which create law, usually implementary to an existing law." *Gibson Wine Co. v. Snyder*, 194 F.2d 329, 331 (D.C. Cir. 1952); *see New York State Elec. & Gas Corp. v. Saranac Power Partners, L.P.*, 267 F.3d 128 (2d Cir. 2001); *Davidson v. Glickman*, 169 F.3d 996 (5th Cir. 1999). A substantive rule is subject to the notice and comment procedures set forth in the APA at 5 U.S.C. §553. *Id.*; 2 Am. Jur. 2d Administrative Law §145. Such regulations implement the statutory scheme and have the full force and effect of law. *American Mining Congress v. Mine Safety & Health Admin.,* 995 F.2d 1106 (D.C. Cir. 2005).

Congress passed substantive amendments to the Longshore Act in 1984, including exclusions from coverage of certain categories of employees. In promulgating the regulations at 20 C.F.R. Parts 701-702 to implement the amendments, the Department of Labor published Interim Final Rules and requested written comments thereon. 50 Fed. Reg. 384-407 (Jan. 3, 1985). One year later, having received written comments, the Department published the Final Rules implementing the 1984 Amendments to the Act. 51 Fed. Reg. 4270-4286 (Feb. 3, 1986). These regulations were subject to the notice and

[1]Section 39(a) states:

> Except as otherwise specifically provided, the Secretary shall administer the provisions of this chapter, and for such purpose the Secretary is authorized (1) to make such rules and regulations . . . as may be necessary in the administration of this chapter.

comment provisions of the APA. 5 U.S.C. §§552-553. There were no comments to the specific regulation defining aquaculture workers, and the regulation was promulgated as proposed. 20 C.F.R. §701.301(a)(12)(iii)(E); 51 Fed. Reg. at 4282. Thus, as this regulation implemented Section 2(3)(E) of the Act, affected the rights and duties of the parties in cases under the Longshore Act, and was subject to the APA's notice and comment procedures, the regulation at issue herein is "substantive," and not "merely interpretive," and it has the force of law.[2] *See Davidson*, 169 F.3d 996.

An agency's regulatory interpretation of a statute is given considerable deference and will be sustained if its interpretation of the statute is "permissible." *McPherson v. National Steel & Shipbuilding Co.*, 26 BRBS 71 (1992), *aff'g on recon. en banc* 24 BRBS 224 (1991); *see also Honaker v. Mar Com, Inc.*, 44 BRBS 5 (2010). That is, regulations must be sustained unless they are unreasonable and plainly inconsistent with the statute. *See Delaware River Stevedores v. DiFidelto*, 440 F.3d 615, 40 BRBS 5(CRT) (3d Cir. 2006). We disagree with claimant's assertion that Section 701.301(a)(12)(iii)(E) is inconsistent with the Act merely because the statute does not explicitly state that an aquaculture worker's status is dependent upon the nature of his employer's business. Rather, in light of the exclusions at 33 U.S.C. §902(3)(B), (C), (D),[3] which determine a

[2]In the summary of the Final Rules, the Department noted that, in addition to the changes to the Interim Final Rules, which were made as suggested by the comments, the Final Rules also included a procedural update which reflected an organizational change in the Office of Workers' Compensation Programs. As the organizational change was made to improve the administration of the Longshore Act, and as all parties affected by the change were informed of the changes, the Department specifically stated that "the changes made by this rule are not substantive but relate solely to an agency organization" and "under 5 U.S.C. §553, notice and comment on the rule are unnecessary. . . ." 51 Fed. Reg. at 4270. This organizational rule was clearly distinguished from the substantive changes made to the regulations as a result of the 1984 Amendments to the Longshore Act.

[3]Section 2(3)(B), (C), (D) (emphasis added), states that the following are excluded from coverage:

> (B) individuals *employed by* a club, camp, recreational operation, restaurant, museum, or retail outlet;
>
> (C) individuals *employed by* a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

claimant's coverage based on the nature of his employer's business, Section 701.301(a)(12)(iii)(E) is a permissible and reasonable interpretation of the statute at Section 2(3)(E).

Moreover, claimant has not established that the Secretary's definition of "aquaculture workers" in the regulation is overly expansive or does not comport with the Act itself. To the contrary, the legislative history discussed by the Board in its initial decision in this case supports the conclusion that the regulatory definition is reasonable. *Stork*, 46 BRBS at 46 n.3. The Department explained in the Interim Final Rules that:

> The term "aquaculture" is defined by the regulations as a commercial enterprise involved in the controlled cultivation and harvest of aquatic plants and animals, consistent with the definition in the Senate Report; the Manager's Report emphasized that *the term also included the cleaning, processing or canning of fish* (H. Rept. 98-1027, *Supra*) *and that language has been used in the regulations.*

50 Fed. Reg. at 385 (emphasis added). Indeed, the Senate Report explained that "the cleaning, processing or canning of fish and fish products" has never been included in the definition of "maritime employment." S. Rep. No. 98-81, 98th Cong., 1st Sess. at 29; H. Conf. Rep. No. 98-1027, reprinted in 1984 U.S.C.C.A.N. 2734, 2773. Accordingly, as Section 701.301(a)(12)(iii)(E) is a permissible, consistent, interpretation of the statute, we reject claimant's assertion that we should disregard the regulatory definition of an aquaculture worker. *Honaker*, 44 BRBS 5; *McPherson*, 26 BRBS 71.

As noted, this case arises within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, and that court has held that, where an exclusion from coverage is dependent upon the nature of the employer's business, the claimant's work duties need not be considered in ascertaining whether the exclusion applies. *Boomtown Belle Casino v. Bazor*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003) (Section 2(3)(B));[4] *Daul v. Petroleum Communications, Inc.*, 196 F.3d 611, 33 BRBS 193(CRT) (5th Cir. 1999) (Section 2(3)(D)); *Green v. Vermilion Corp.*,

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> (D) individuals who (i) are *employed by* suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter.

[4]The court specifically rejected the claimant's reliance on Board decisions which addressed the claimants' duties in cases arising under Section 2(3)(B), (C). *Bazor*, 313 F.3d at 303, 36 BRBS at 82(CRT); *Stork*, 46 BRBS at 47-48.

144 F.3d 332, 32 BRBS 180(CRT) (5th Cir. 1998), *cert. denied*, 526 U.S. 1017 (1999) (Section 2(3)(B)); *see also Keating v. City of Titusville*, 31 BRBS 187 (1997) (Section 2(3)(C)).[5] In asserting that the coverage analysis should consider a claimant's duties, as in a case governed by Section 2(3)(A), claimant ignores Fifth Circuit law. *Id.*; *see Stork*, 46 BRBS 47-48.[6] As Section 701.301(a)(12)(iii)(E) defines an aquaculture worker in terms of his employment with an aquaculture operation, Fifth Circuit law requires that coverage be ascertained without addressing claimant's work duties. Therefore, as claimant was injured during the course of his employment with an aquaculture operation, he is excluded from the Act's coverage. Claimant's motion for reconsideration is denied.

Accordingly, claimant's motion for reconsideration is denied. 20 C.F.R. §802.409. The Board's decision, affirming the administrative law judge's denial of benefits, is affirmed.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

[5]As claimant asserts, the decisions in *Alcala v. Director, OWCP*, 141 F.3d 942, 32 BRBS 82(CRT) (9th Cir. 1998), and *Ljubic v. United Food Processors*, 30 BRBS 143 (1996), addressed the nature of the claimants' work activities despite their employment by aquaculture operations. These cases arose within the jurisdiction of the United States Court of Appeals for the Ninth Circuit and were decided before the Fifth Circuit's decisions in *Bazor*, *Daul* and *Green*. As this case arises within the jurisdiction of the Fifth Circuit, we are bound by Fifth Circuit law.

[6]The Board noted that the Fifth Circuit, in *Bazor*, 313 F.3d at 302, 36 BRBS at 82(CRT), acknowledged the legislative history which states there may be employees of the excluded enterprises who remain covered by the Act, regardless of the nature of their employer. Specifically, workers who are maritime construction workers or vendors who perform work normally performed by the employer's regular employees are not excluded, and these exceptions are stated in the statute. *See* 33 U.S.C. §902(3)(C), (D). No such exception is given for aquaculture workers.