BRB No. 12-0410

JOHN A. KINNON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LOCKHEED MISSILES AND SPACE COMPANY	)	DATE ISSUED: 04/24/2013
	)	
	)	
and	)	
	)	
ACE AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Ralph R. Lorberbaum (Zipperer, Lorberbaum & Beauvais), Savannah, Georgia, for claimant.

Joseph B. Guilbeau (Juge, Napolitano, Guilbeau, Ruli & Frieman), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-LHC-01706) of Administrative Law Judge Kenneth A. Krantz 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 facts of this case are not in dispute. Claimant worked for employer for 20 years. At the time of his injury in October or November 2007, claimant worked as a missile mechanic senior at Kings Bay Naval Base in St. Marys, Georgia. At that time, claimant, after parking in the lot assigned by the Navy, was walking to a turnstile where he would show his badge and board a bus to take him to his work site. Prior to reaching the turnstile area, claimant twisted his ankle when he stepped on loose concrete on the sidewalk. Claimant did not think he needed medical attention, so he did not report the incident, and he continued with his work day. Claimant worked for several more weeks before he reported the incident and sought medical attention.

Claimant was diagnosed with a fractured ankle and required multiple surgeries. He suffered a staph infection and his lower leg and foot had to be amputated. Unfortunately, the infection spread, which led to kidney failure, a heart attack, and removal of part of claimant's collarbone. Claimant has not returned to any work. Claimant filed a claim for benefits under the Act, and employer controverted the claim on several grounds.

The administrative law judge found that claimant is not covered by the Act, as claimant was not a "maritime employee," 33 U.S.C. §902(3), and his injury did not occur on a covered situs, 33 U.S.C. §903(a). Decision and Order at 25, 28. Claimant appeals, and employer responds, urging affirmance.

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, including any dry dock, 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), 903(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, in order to demonstrate that coverage exists, a claimant must separately satisfy both the "situs" and the "status" requirements of the Act. *Atlantic Container Serv., Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990); *Ramos v. Container Maintenance of Florida*, 45 BRBS 61 (2011), *aff'd mem.*, 486 F. App'x 775 (11th Cir. 2012); *S.W. [Wallace] v. Atlantic Container Serv.*, 43 BRBS 118 (2009); *Stratton v. Weedon Engineering Co*, 35 BRBS 1 (2001) (*en banc*).

Section 2(3) of the Act 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). A claimant satisfies this "status" requirement if he is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). To satisfy this requirement, he need only "spend at least some of [his] time in indisputably [covered] operations." *Caputo*, 432 U.S. at 273, 6 BRBS at 165; *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981).

Claimant's duties as a missile mechanic senior are not in dispute.[1] He testified, and his supervisors confirmed, that he built, dismantled and inspected missiles and subassemblies of missiles. That is, he assembled new missiles and refurbished old ones that were to go on or that came off Trident submarines. Specifically, he inspected parts and finished pieces, tested motors and checked for hydraulic leaks, and drove a forklift and a crane in the assembly building to move and lift missile parts. His work involved only missile hardware, assembly, and inspection. Tr. at 44-54, 59, 62-63, 97, 122-125 135-136, 160, 171. Claimant agreed with the summary that his job is to "work in connection with assembling missiles from their component parts, putting them all together, inspecting them, and getting them ready for delivery to the Navy[.]" *Id*. at 86. After claimant's group completed its work on a missile, the missile was moved to another building where the assembly process continued. After that, the missile belonged to the Navy and went to the "Limited Production Area" for storage from three to 18 months prior to being loaded onto a submarine. *Id*. at 89-90, 124, 147, 153, 160. There is no allegation that claimant worked on submarines, loaded or unloaded submarines, or built or refurbished any part of the submarine itself, and the administrative law judge so found. Decision and Order at 22-23.

The administrative law judge specifically found that "the purpose of Claimant's occupation was to assemble Trident D-5 missiles from their component parts, inspect them, disassemble and repair them, and get them ready for delivery to the Navy." Decision and Order at 22. The administrative law judge also found that claimant's work on the missiles, while essential to the mission of the submarines, was not essential to the operation of the submarines. Thus, the submarines were operational and functional without claimant's work. *Id.* at 24. The administrative law judge also distinguished claimant's work from those employees who maintained: pipes that carried steam onto vessels, *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); power plants that provided power to the shipyard, *Kerby v. Southeastern Public Serv. Auth.*, 31 BRBS 6 (1997), *aff'd mem.*, 135 F.3d 770 (4th Cir.), *cert. denied*, 525 U.S. 816 (1998); or propellers that were parts of the vessels, *Davis*

[1]Claimant's command was the Strategic Weapons Facility Atlantic. The command that maintains and repairs the submarines is called the Trident Refit Facility. Tr. at 156. Submarines are not constructed at Kings Bay Naval Base. *Id*. at 157.

v. Doran Co. of California, 20 BRBS 121 (1987), *aff'd*, 865 F.2d 1257 (table), 22 BRBS 3(CRT) (4th Cir. 1989). *Id.* at 24. Specifically, however, the administrative law judge relied on the rationale of another administrative law judge in distinguishing between work essential to a submarine's operation and work that furthers the military mission of the submarine. The administrative law judge concluded that work on the missiles, which promotes a submarine's mission, is distinguishable from work on components of the submarine itself, which promotes its operation and function as a vessel. Decision and Order at 25 (citing *Stallings v. Dyncorp*, 39 BRBS 287(ALJ) (2005)).[2]

Claimant contends the distinction between "mission" and "operation" is not valid and that his work, which he argues is akin to building or repairing the "appurtenances" of a vessel, is covered. He likens his job to that of workers who repair machinery on vessels. We reject claimant's contention and affirm the administrative law judge's finding that claimant was not engaged in maritime employment.

In order for claimant's work to be covered, it must be integral to the loading, unloading, building, repair, or maintenance of the submarines. *See generally Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT). As stated above, it is undisputed that claimant did not load or unload the submarines, he did not build or repair the submarines or any part thereof,[3] and he did not repair or maintain any equipment used to load or unload the submarines.[4] He also did not perform his work on the submarines. Rather, claimant built

[2]*Stallings* was appealed to the Board, BRB No. 05-0673; however, the Board granted a motion to remand prior to any decision being issued.

[3]*Compare with Alford v. American Bridge Div.*, 642 F.2d 807, 13 BRBS 268, *modified in part on reh'g*, 655 F.2d 86, 13 BRBS 837, *modified in part*, 668 F.2d 791 (5th Cir. 1981), *cert. denied*, 455 U.S. 927 (1982) (claimants who fabricated custom-built modules to be installed on newly-built ships were covered); *Davis*, 20 BRBS 121 (claimant who fabricated ships' propellers covered); *Smart v. Newport News Shipbuilding & Dry Dock Co.*, 7 BRBS 995 (1978) (claimant who prepared a nuclear reactor which was a component part of a nuclear frigate was covered).

[4]*Compare with Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (laborers maintaining the conveyor belts by which coal was loaded from railcars to ships were covered); *Coastal Prod. Serv., Inc., v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009) (claimant who had some loading duties and maintained pipelines that loaded oil onto barges was covered).

and dismantled missiles which would eventually be loaded onto and carried by the submarines.[5]

In *Wilson v. General Engineering & Machine Works, Inc.*, 20 BRBS 173 (1988), the Board addressed a similar situation wherein the claimant, a maintenance machinist who maintained the physical plant, forklifts and cranes at a missile launching systems test facility, was injured while performing his work. One of the claimant's duties was to carry fuel via forklift to a 16-foot boat that would be used to retrieve dummy missiles from the water after testing. The Board, relying on *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985), *Ford*, 444 U.S. 69, 11 BRBS 320, and *Caputo*, 432 U.S. 249, 6 BRBS 150, affirmed the administrative law judge's finding that this work was not necessary to a loading or unloading operation, but, rather, was in support of the employer's missile testing activities, which is not traditional maritime activity. *Wilson*, 20 BRBS at 176-177. Additionally, the Board stated, as in *Herb's Welding*, there was nothing inherently maritime about the claimant's maintenance work, as that work was performed on land, and the nature of his tasks was not altered by the maritime environment or connected to the loading and unloading of ships. *Id.* at 176; *Cf. Stevens v. Metal Trades, Inc.*, 22 BRBS 319 (1989) (welder who repaired military amphibious vehicle, which was a "vessel," was engaged in maritime employment).

Similarly, claimant's work here involved building and maintaining missiles in accordance with employer's contract with the Navy. Contrary to claimant's assertion, a missile on a submarine is not akin to machinery that is an appurtenance of a vessel, such as a crane or boom used for loading and unloading, or to a propeller that is a component of a vessel. *See* n.3, *supra*. That is, the missile is not part and parcel of the submarine: it is a separate entity that is carried by the submarine, more akin to cargo. Movement of cargo by vessel does not render the manufacturing of the cargo "maritime" in nature – the car manufacturer or the widget builder is not performing maritime work merely because its products are to be transported by vessel; only the loading and unloading of that cargo is covered employment. *See Ford*, 444 U.S. 69, 11 BRBS 320; *Coleman*, 904 F.2d 611, 23 BRBS 101(CRT). Claimant's work did not involve loading or unloading vessels, and he was not engaged in the construction, demolition or repair of ships or their components. As claimant built and repaired missiles which were, many months later, to be carried by submarines for military purposes, the administrative law judge properly found that claimant did not establish the status element, as his work was not integral to maritime activity. Thus, we affirm the finding that claimant is not a covered employee as it is in

[5]Although the administrative law judge relied on a decision that is not controlling precedent because it was rendered by another administrative law judge, *Stallings*, which involved a claimant who built and repaired equipment necessary for the operation of aircraft onboard aircraft carriers, is strikingly similar to this case, and it was not unreasonable for him to find the rationale persuasive.

accordance with law.[6] 33 U.S.C. §902(3); *see Wilson*, 20 BRBS 173; *see also Balonek v. Texcom, Inc.*, 43 BRBS 153 (2009); *Dickerson v. Mississippi Phosphates Corp.*, 37 BRBS 58 (2003). The denial of benefits is affirmed.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[6]As lack of status precludes coverage under the Act, we need not address claimant's remaining contention regarding the administrative law judge's finding that the situs element was not satisfied in this case.