BRB No. 90-1181

THOMAS C. PREVETIRE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
WEYHER/LIVSEY CONSTRUCTORS, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
WAUSAU INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter & Montagna), Norfolk, Virginia, for claimant.

Daniel R. Lahne (Knight, Dudley, Dezern & Clarke), Norfolk, Virginia, for employer/carrier.

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

STAGE, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order (89-LHC-1851) of Administrative Law Judge Michael P. Lesniak denying benefits 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Employer is in the business of constructing small power plants, and it was the general contractor on a project to build a power plant at the Norfolk Naval Shipyard from 1984-1988 as a replacement for the old oil-burning plant. The power plant is a co-generation plant,[1] producing both electricity and steam for the shipyard. The waste used as fuel for the plant is "produced" at a solid waste facility run by a state agency across the street from and outside the boundaries of the shipyard. It was intended that two-thirds of the electricity and all of the steam produced would be used by the shipyard, and that the remaining one-third of the electricity would be sold to Virginia Power. As of November 1989, however, the shipyard was using all the electricity and steam produced by the plant.

The parties stipulated, *inter alia*, that claimant sustained an injury in the course of his employment on October 16, 1986, resulting in a 22 percent permanent impairment of the left ring finger, and that claimant has received compensation under the Virginia workers' compensation statute. The parties further stipulated that at the time of injury claimant was employed as a pipefitter in the construction of the power plant on the grounds of the Norfolk Naval Shipyard. The only issues presented for the administrative law judge's resolution were whether claimant's employment satisfies the status and situs requirements of the Act. 33 U.S.C. §§902(3), 903(a) (1988). The administrative law judge concluded that the situs test was met, but that the status test was not. The administrative law judge found that claimant's job was not inherently maritime as it involved tasks identical to those performed by employer's pipefitters working on "non-maritime" power plant projects. The administrative law judge further stated that claimant's employment does not have a realistically significant relationship to traditional maritime activities involving navigation and commerce on navigable waters. Thus, the administrative law judge denied benefits under the Act.

On appeal, claimant contends that the administrative law judge erred in concluding that the status test is not met. Claimant contends that the construction of a facility for use at the shipyard is analogous to the maintenance and repair of shipyard buildings, which is covered employment, and that the administrative law judge erred in focusing on whether claimant's trade is inherently maritime as opposed to whether the structure being constructed has a maritime purpose. Employer responds, urging affirmance of the administrative law judge's denial of benefits.

Section 2(3) of the Act states:

> 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) (1988). We hold that the administrative law judge applied improper standards in determining whether claimant is engaged in maritime employment, and we reverse his finding that claimant is not covered under the Act.

[1]A co-generation plant uses more than one type of fuel. This particular plant uses refuse-derived fuel as its primary source, and oil and coal are its back-up fuels.

Initially, the administrative law judge's reliance on the "realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters" test is misplaced in light of the decision of the United States Supreme Court in *Chesapeake & Ohio Ry. Co. v. Schwalb*, U.S. , 110 S.Ct. 381, 23 BRBS 96 (CRT) (1989). In *Schwalb*, the claimant was engaged in maintenance and janitorial work, including the cleaning of conveyors used in the loading process. The court stated that the proper focus is on whether the activity is an "essential element" of loading or unloading, not whether it is a "traditional maritime activity," and that the claimant's work was essential to this process. *Id.*; *see also Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990); *Coloma v. Director, OWCP*, 897 F.2d 394, 23 BRBS 136 (CRT)(9th Cir. 1990). Similarly, in finding coverage for a shipyard maintenance worker, the United States Court of Appeals for the First Circuit stated that "[t]he maintenance of the structures housing shipyard machinery and in which shipbuilding operations are carried on is no less essential to shipbuilding than is the repair of the machinery itself." *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 342-343, 14 BRBS 52, 56 (1st Cir. 1981). *See also Price v. Norfolk & Western Ry. Co.*, 618 F.2d 1059 (4th Cir. 1980); *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 8 BRBS 241 (4th Cir. 1979), *cert. denied*, 439 U.S. 979 (1978); *Hawkins v. Reid Associates*, 26 BRBS 8 (1992). Thus, the proper inquiry in this case is whether claimant's employment is essential to the shipbuilding operation.

Moreover, whether claimant's pipefitting duties are "inherently maritime" is irrelevant if the purpose of the work being performed is related to shipbuilding. In *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982), the United States Court of Appeals for the Fifth Circuit deemed it "immaterial" that the skills used by the employee are essentially non-maritime in character if the purpose of the work is maritime. The court stated: "`non-maritime' skills applied to a maritime project *are* maritime for purposes of the `maritime employment' test of the Act."[2] *Id.*, 650 F.2d at 756, 14 BRBS at 377 (emphasis in original). The fact that the nature of claimant's duties is not altered by a maritime environment therefore does not prevent a finding of coverage under Section 2(3). *See generally White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980); *Jackson v. Atlantic Container Corp.*, 15 BRBS 473 (1989).

[2]In *Hullinghorst*, the claimant worked for a sub-contractor at a port facility as a scaffolding carpenter. He constructed scaffolding for whatever purpose the port needed but he did not participate directly in the loading, unloading, building, repair or breaking of any vessel.

Applying this law to the facts in the instant case, we hold that claimant's employment is covered under Section 2(3) of the Act. The construction of a power plant at the shipyard is essential to the shipyard's operation, for without electricity and steam no shipbuilding and repair work can be performed. *See Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991). In *Hawkins*, 26 BRBS at 8, the Board affirmed a finding of coverage for a claimant engaged in the removal of old and the installation of new underground utility lines at the same shipyard as in the instant case. As in the instant case, the claimant in *Hawkins* was not an employee of the shipyard, but was employed in construction work on a subcontract.[3] The Board stated that claimant's work was a link in the shipbuilding process, citing *Graziano*, 663 F.2d at 340, 14 BRBS at 52. Herein, claimant's construction work on a power plant also is a link in the shipbuilding and ship repair process that is just as essential as the maintenance and repair of the machinery used in the shipbuilding process. *Graziano*, 663 F.2d at 342-343, 14 BRBS at 56. It is not material to the outcome of this case that the shipbuilding and repair process would not have stopped without the construction of a new power plant. *See Price*, 618 F.2d at 1062 n.4. It is sufficient that the purpose of the new plant is maritime in nature, *i.e.*, to supply electricity and steam to the shipyard for its operations. Thus, we reverse the administrative law judge's finding that claimant's employment does not satisfy the status test of Section 2(3). Inasmuch as the parties stipulated that claimant has a 22 percent impairment of the left ring finger, we hold that claimant is entitled to benefits under Section 8(c)(10), (19) of the Act, 33 U.S.C. §908(c)(10), (19). Per the parties' stipulation, employer is entitled to a credit for payments made under the state act pursuant to Section 3(e) of the Act, 33 U.S.C. §903(e) (1988).

[3]In *Hawkins*, 26 BRBS at 8, the claimant was a heavy equipment operator on a subcontract to remove and install utility lines underground and in a nuclear submarine repair facility under construction.

Accordingly, the administrative law judge's Decision and Order denying benefits is reversed, and claimant is entitled to benefits as stated herein.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

DOLDER, Administrative Appeals Judge, dissenting:

I respectfully dissent from my colleagues' decision to reverse the administrative law judge's finding that claimant's employment did not satisfy the status test of Section 2(3) of the Act, 33 U.S.C. §902(3)(1988). I agree that the administrative law judge applied the wrong law in determining whether the status test is met. Specifically, he erred in relying on the fact that claimant's work was not "inherently maritime." *See Hullinghorst Industries Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *see generally Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78 (CRT) (1985). Furthermore, the administrative law judge did not determine if claimant's work is "essential" to the shipbuilding and repair operation carried on at the shipyard. *See generally Chesapeake & Ohio Ry. Co. v. Schwalb*, ___ U.S. ___, 110 S.Ct. 381, 23 BRBS 96 (CRT)(1989); *Hayes v. CSX Transportation, Inc.*, 985 F.2d 137 (4th Cir. 1993). Moreover, the administrative law judge did not consider whether the cases dealing with the repair of shipyard buildings are applicable to the facts of this case. *See, e.g., Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981). Given these errors and omissions on the part of the administrative law judge, I would vacate the administrative law judge's finding that claimant's employment did not satisfy the status test, and remand the case for the administrative law judge to apply the facts of this case to the appropriate law.

NANCY S. DOLDER
Administrative Appeals Judge