U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 17-0540

SAMUEL BAKER Claimant-Petitioner v. BAE SYSTEMS NORFOLK SHIP REPAIR, INCORPORATED and SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED c/o ABERCROMBIE, SIMMONS AND GILLETTE Employer/Carrier-Respondents	)	DATE ISSUED: July 31, 2018 DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Matthew H. Kraft (Matthew H. Kraft, P.L.C.), Virginia Beach, Virginia, for claimant.

R. John Barrett and Megan B. Caramore (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

Before: BOGGS, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2016-LHC-00776) of Administrative Law Judge Alan L. Bergstrom 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 rational, supported by substantial evidence, and 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 worked in various capacities at the Norfolk shipyard facility, now owned by employer,[1] from 1961 until his voluntary retirement on April 6, 2015. Claimant worked full-time as a rigger from 1962 until 1970, when he transitioned to personnel and then to security positions.[2] Claimant had hearing tests in the 1970s and 1980s, but stated he was not informed of any noise-induced hearing loss until his exit audiogram on April 6, 2015, revealed a measurable hearing loss.[3] Additional audiograms conducted on April 30, 2015, and July 20, 2016, also revealed measurable losses. Dr. Powell, a certified otolaryngologist, submitted a report corresponding with the July 20, 2016 audiogram, in which he opined that claimant has a noise-induced hearing loss which requires hearing aids and annual hearing evaluations. CX 11. Claimant filed a claim for compensation, alleging his hearing loss is due to injurious noise exposure during the course of his work at the Norfolk facility, including his work as employer's security manager between 2005 and 2015.[4] Employer controverted the claim arguing, in part, that claimant was excluded from coverage pursuant to Section 2(3)(A) of the Act, 33 U.S.C. §902(3)(A).

The administrative law judge found claimant did not establish that his job duties after July 14, 1987, subjected him to the traditional hazards of maritime work on navigable

---

[1]Employer is the successor company of the waterfront companies that employed claimant from 1961 to 2005.

[2]Beginning in 1970, claimant's career at the facility consisted of the following positions: personnel trainee from 1970 to 1973; assistant personnel manager from 1973 to 1985; a captain of the security guards from 1985 to 1987; chief of security guards from 1987 to 1995; security manager and assistant human resources manager from 1995 to 2000; and security manager and facilities security officer from 2000 until his retirement in 2015. HT at 11-12; EX 2.

[3]The prior hearing tests "did not produce evidence of a hearing loss under the AMA 'Guidelines to the Evaluation of Permanent Impairment' through July 14, 1987." Decision and Order at 8. The first report of a hearing test after July 14, 1987, is the April 6, 2015 exit audiogram.

[4]At the hearing, claimant contended he has at least a 5.635 percent hearing loss in his left ear. Employer contended claimant has only a 5.6 percent left ear hearing loss. Decision and Order at 3.

waters, or to "indisputably maritime operations." He also found that claimant's work was not integral to shipbuilding and repair. The administrative law judge thus determined claimant is excluded from the Act's coverage under Section 2(3)(A), because his job primarily involved office, security and administrative work. Accordingly, claimant's claim for benefits was denied.

On appeal, claimant challenges the administrative law judge's finding that he was not engaged in covered maritime work with employer. Employer responds, urging affirmance.

Claimant contends the administrative law judge's conclusion that he is excluded from coverage under Section 2(3)(A) of the Act is contrary to law because he did not perform his work exclusively in an office or in the administrative areas of the shipyard. Claimant also contends the administrative law judge erred in finding that his work was not integral to shipbuilding and repair.

In order for a claim to be covered under the Act, a claimant must establish that his injury occurred on a site covered by Section 3(a), that he was a maritime employee pursuant to Section 2(3), and that he is not subject to any specific statutory exclusions.[5] 33 U.S.C. §§902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). Generally, a claimant satisfies the "status" requirement if at least some of his work is integral to the loading, unloading, constructing, or repairing of vessels. *See* 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Employees whose work is not integral to these maritime purposes are not covered by the Act. *See, e.g., Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112(CRT) (3d Cir. 1992) (courtesy van driver not covered); *Coloma v. Director, OWCP*, 897 F.2d 394, 23 BRBS 136(CRT) (9th Cir.), *cert. denied*, 498 U.S. 818 (1990) (cook at pier mess hall not covered); *Gelinas v. Electric Boat Corp.*, 44 BRBS 85 (2010) (occupational health nurse failed to establish work was integral to shipbuilding); *B.E.* [*Ellis*] *v. Electric Boat Corp.*, 42 BRBS 35 2008) (bathroom/cafeteria janitor not covered). A claimant also is not covered under the Act if a statutory exclusion applies. *See Daul v. Petroleum Communications, Inc.*, 32 BRBS 47 (1998), *aff'd*, 196 F.3d 611, 33 BRBS 193(CRT) (5th Cir. 1999); *Keating v. City of Titusville*, 31 BRBS 187 (1997); 20 C.F.R. §701.301(a)(12).

With regard to the exclusion relevant to this case, Section 2(3)(A) provides:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring

[5]In this case, the situs provision of Section 3(a), 33 U.S.C. §903(a), is not at issue.

operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include—

> (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work [provided such persons are covered by State workers' compensation laws].

33 U.S.C. §902(3)(A). The term "exclusively" modifies all four classifications of work in this exclusion. *Dobey v. Johnson Controls,* 33 BRBS 63, 65 n.7 (1999). Moreover, the term "office" also modifies those classifications of work. *Morganti v. Lockheed Martin Corp*., 37 BRBS 126 (2003), *aff'd*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006); *K.L.* [*Labit*] *v. Blue Marine Security, LLC*, 43 BRBS 45 (2009); *Boone v. Newport News Shipbuilding & Dry Dock Co.,* 37 BRBS 1 (2003); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.,* 39 BRBS 49 (2005); *Stalinski v. Electric Boat Corp.,* 38 BRBS 85 (2005).

The Board has discussed the status of security personnel in a number of decisions. In *Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991), the claimant patrolled the shipyard for intruders or saboteurs, ensured that other employees observed the safety rules, and prohibited unauthorized personnel from entering the reactor chambers on the submarines. The claimant also worked in the dry or wet dock areas on an as-needed or overtime basis and served as a relief watchman onboard submarines. In affirming the administrative law judge's finding of coverage, the Board held that because the claimant was not confined to an office, patrolled the areas where the nuclear submarines were located, and was required to spend several hours a night on board the submarines as a relief night watchman, the claimant was not engaged "exclusively" in the type of excluded security work contemplated by Section 2(3)(A), as his work was integral to the shipbuilding or ship repair process. *Spear*, 25 BRBS at 135, 136.

In *Dobey*, 33 BRBS 63, the claimant worked primarily on land as a traffic officer throughout the joint Air Force/Naval facility at Cape Canaveral, Florida.[6] In addition to his regular duties, the claimant would occasionally perform marine patrol duty which required his use of a patrol boat to: verify the security of the Trident Basin and the Navy docks by keeping unauthorized vessels away; escort submarines into and out of the port; and rescue any sailors who fell off the submarines. The Board reversed the administrative law judge's finding that the claimant was excluded as a security guard under Section

[6]The claimant had much the same duties as those of a police officer: he controlled the flow of traffic, controlled the speed of traffic via radar, investigated traffic accidents, and made out reports. The claimant's land-based duties also included patrolling certain zones and assuring the security of buildings. *Dobey*, 33 BRBS at 64.

2(3)(A) of the Act,[7] because although the claimant was primarily a traffic officer, he also served as an alternate marine patrol officer who had a reasonable expectation of being called upon to perform duties in a boat on navigable waters.[8] *Id.* at 66. In reaching this conclusion, the Board specifically held that the security guard exclusion does not apply to an employee who is subjected to traditional maritime hazards, even if, broadly speaking, the claimant is engaged in "security work." *Id.* at 68.

In *Labit*, 43 BRBS 45, the administrative law judge found that although the claimant was a security guard at the time of his injury, he was not excluded from the Act's coverage pursuant to Section 2(3)(A) because his work was performed aboard a vessel and he was subject to the hazards of the sea.[9] The Board held that the claimant was not the type of security officer intended to be excluded pursuant to Section 2(3)(A), because he was exposed to traditional maritime hazards on board vessels on navigable waters. It therefore affirmed the administrative law judge's finding that claimant was entitled to the Act's coverage pursuant to *Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT).[10] *Labit*, 43 BRBS at 48. In reaching this conclusion, the Board stated that the claimant's duties did not confine him, physically and by function, to an office or other administrative area on land but instead involved duties performed on vessels on navigable waters. *Id.*

---

[7]The administrative law judge found that the claimant's regular employment was land-based security, that his "occasional forays onto the water" for marine patrol were not expected regular parts of his duties, and thus that his work was exclusively "security" and as such excluded from coverage pursuant to Section 2(3)(A) of the Act. *Dobey*, 33 BRBS at 64.

[8]The Board stated that while the claimant infrequently performed such duties, they nonetheless were a regular part of his overall job responsibilities. *Dobey*, 33 BRBS at 66 (citing *Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir. 1999) (*en banc*); *Thornton v. Brown & Root, Inc.*, 23 BRBS 75 (1989); and *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997)).

[9]The claimant's employer provided security guards, at the request of a vessel or its shipping agent, pursuant to regulations issued by the Department of Homeland Security, who must be aboard ships at all times during their anchorage in order to ensure compliance with requirements of the Customs Service, the Immigration and Naturalization Service, and the Coast Guard. *Labit*, 43 BRBS at 45.

[10]In *Perini*, the Court held that when a worker is injured on actual navigable waters in the course of his employment on those waters, he is a maritime employee under Section 2(3). *Perini North River Associates*, 459 U.S. at 323-324, 15 BRBS at 80-81(CRT).

The purpose of the Section 2(3)(A) exclusion is set out in the legislative history to the 1984 Amendments. The intent was to exclude employees "who themselves are confined, physically and by function, to the administrative areas of the employer's operations." 130 Cong. Rec. H9731 (Sept. 18, 1984); *see also* H. Conf. Rep. No. 98-1027, *reprinted in* 1984 U.S.C.C.A.N. 2734, 2772 ("this exemption reflects that these individuals are land-based workers . . . and their duties are performed in an office"). The Board has recognized that this legislative history makes clear that Congress intended to narrowly exclude those security guards who are exclusively office-based and who thus are not exposed to the dangers of work on navigable waters. *Dobey*, 33 BRBS at 67-68 (citing H.R. Rep. No. 98-570, reprinted in 1984 U.S.C.C.A.N. 2734, 2736-7); *see also* 130 Cong. Rec. H9731 (Sept. 18, 1984).

The record establishes that claimant's duties required that he board ships to oversee security functions vital to employer's ship repair business. Claimant testified that certain vessels required, as a condition to employer's performing the contracted repair work, the posting of guards for which claimant held responsibility. EX 2 at 16, 20-21; HT at 23-25. Claimant testified the majority of his work day was spent moving about the shipyard. This uncontradicted testimony establishes that claimant's security work duties were not exclusively limited to his office. EX 2 at 16, 20-21; HT at 23-25. While, as the administrative law judge found, claimant's Regular Duty Job Analysis "describes primarily office security and administrative work," Decision and Order at 12, that document describes work that required claimant to "occasionally board ships."[11] Claimant's

[11]The Regular Duty Job Analysis lists ten specific "job duties" Job Title Manager of Security/Assistant Manager of Human Resources:

1. Responsible for subcontracting the security force throughout the yard and monitors their performance to maintain NORSHIPCO's contract.

2. Responsible for overseeing and safeguarding classified material as well as authorizing access to shipyard.

3. May follow regulations as approved by Sun ship concerning access to naval vessels.

4. Prepares and sends out access approval letters.

5. Assist Manager of Human Resources in directing the activity of personnel.

6. Acts as a representative of NORSHIPCO during the grievance process.

testimony confirms that from 1985 onward he was required to regularly board ships as part of his job duties. HT at 24-25. Claimant was, in these instances, performing work aboard vessels in navigable waters and thus, like the claimants in *Spears*, *Dobey* and *Labit*, was exposed to traditional maritime hazards. In this regard, and in his other duties which brought him to the machine shops and the dry dock at employer's facility, claimant's job involved work beyond the exclusively office-based security guard work that Congress intended to narrowly exclude through its enactment of Section 2(3)(A). *Dobey*, 33 BRBS at 68; *see also* H.R. Rep. No. 98-570, reprinted in 1984 U.S.C.C.A.N. 2734, 2736-7; 130 Cong. Rec. H9731 (Sept. 18, 1984). We therefore reverse the administrative law judge's finding that claimant is excluded from the Act's coverage under Section 2(3)(A).

Nevertheless, an employee who is not specifically excluded by Section 2(3)(A), must still establish that he is engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT). 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; *see also Schwalb*, 493 U.S. at 47, 23 BRBS at 99(CRT) ("it is irrelevant that an employee's contribution to the loading process is not continuous").

In *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001), *aff'g* 34 BRBS 112 (2000), the Board and the United States Court of Appeals for the Second Circuit addressed the coverage of a union shop steward. The administrative law judge found that the claimant facilitated the day-to-day loading and unloading process by removing interpersonal obstacles that might obstruct such operations. The administrative law judge found that, pursuant to *Schwalb*, claimant's job was integral to employer's stevedoring business, and thus that he was a covered employee.

---

7. Interprets labor agreements regarding employees [*sic*] concerns over rates of pay, vacation time and benefits, etc.

8. Acts as a representative of NORSHIPCO in unemployment hearings.

9. May assist in interviewing new employees as needed.

10. May occasionally board ships to investigate larceny, accident, injuries, etc., as well as to accompany shipyard visitors.

EX 1.1. Immediately below these "job duties" are typewritten notations of "Shipboard Work" and "Overtime," as well as a chart outlining the typical daily physical activities required of claimant's work. *Id.* Claimant testified that he held the position of Security Manager and Assistant Human Resources Manager from 1995-2000.

On appeal, the Board stated that the administrative law judge properly applied *Schwalb*, and affirmed his conclusion that the claimant's duties as a shop steward were integral to the loading and unloading process because it was supported by substantial evidence. *Marinelli*, 34 BRBS at 116. The Second Circuit likewise affirmed the administrative law judge's finding of coverage, rejecting the employer's arguments that the claimant's work did not meet the *Schwalb* "integral or essential test." *Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT). The court held that the inquiry was whether the claimant was integral to this employer's business of loading and unloading, and not whether his duties were essential to stevedoring operations in general. The court also rejected the employer's reliance on the fact that its ships were loaded and unloaded even when the claimant was not present, holding that pursuant to *Schwalb* it is irrelevant that the claimant's contribution to the loading process was not always needed. Finally, the court rejected the employer's argument that the claimant's job as shop steward was not particular to the stevedoring industry, stating that it makes no difference that the kind of work performed by the claimant might have been performed by a shop steward in another industry. *Marinelli*, 248 F.3d at 59-60, 35 BRBS at 44-45(CRT); *see also Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d 1085, 21 BRBS 18(CRT) (11th Cir. 1988) (The court, in a pre-*Schwalb* case, held that the claimant's responsibilities as a Labor Relations Assistant satisfy the status test since those responsibilities were significantly related to and directly furthered employer's ongoing shipbuilding and ship repair operations. In reaching this determination, the court stated the Act applies to any person "engaged in maritime employment" and does not distinguish between management and non-management personnel.).

The Board, in *Buck v. General Dynamics Corp./Electric Boat Div.*, 37 BRBS 53 (2003), distinguished *Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT), and *Sanders*, 841 F.2d 1085, 21 BRBS 18(CRT), in affirming the administrative law judge's findings that the claimants' work as workers' compensation claims examiners was not integral to shipbuilding. The Board stated that there was a lack of persuasive evidence that the claimants' failure to perform their jobs would impede the shipbuilding process, because although their work was helpful, it was not indispensable to that process. *See also Gonzalez v. Merchants Building Maint.*, 33 BRBS 146 (1999) (claimants, employed as janitors, were not covered employees pursuant to Section 2(3) since their duties were not integral to their respective employer's shipbuilding operations); *Kinnon v. Lockheed Missiles & Space Co*., 47 BRBS 13 (2013) (claimant's work as a missile mechanic not integral to employer's business of constructing submarines); *Gelinas*, 44 BRBS 85 (claimant's work as a nurse not integral as no evidence showing that her failure to perform her duties as a nurse would disrupt employer's shipbuilding operations); *cf. Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002); *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002); *Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 52 (2001) (claimants were covered employees because their failure to perform their janitorial duties would eventually impede the shipbuilding process, pursuant to *Schwalb*); *Mackay v. Bay City Marine, Inc.*, 23 BRBS 332 (1990) (general manager of shipyard whose

job duties included the procurement of licenses, the hiring of personnel, contract bidding and reviewing of work onboard vessels, is a covered employee).

The administrative law judge found that claimant's work onboard ships and his duties as security manager and facility security officer were not integral to employer's ship repair business. This finding is not rational or supported by substantial evidence. Claimant's undisputed testimony establishes that he was responsible for "maintain[ing] physical security of personnel and the ships." HT at 23-25.[12] Prior to 1998, he circulated among three facilities, which took him onboard ships and into the shop areas, to oversee the guards he supervised and to investigate accidents. *Id.* at 23-24; EX 2, Dep. at 15. Claimant stated that his work involved the posting of patrols onboard vessels, either as a specific requirement attached to the vessel or in response to general complaints of theft or vandalism. EX 2, Dep. at 16. In those instances, claimant "would put key stations up to make sure" the guards were doing their rounds and "make sure [the guards] were actually manning their posts and doing their jobs." *Id.* Claimant added that "[i]f there's a break-in on the ship, if there's an incident, a confrontation, fight, whatever, I go and inspect it." HT at 16.

The only finding that can be made from this evidence is that claimant's work was integral to employer's ship repair process. *Watkins*, 36 BRBS at 23-24; *see Sumler*, 36 BRBS 97; *Ruffin*, 36 BRBS 52; *Mackay*, 23 BRBS 332. Claimant's failure to perform his job duties inevitably would have affected employer's ability to undertake ship repair. *Schwalb*, 493 U.S. at 47-48, 23 BRBS at 99(CRT); *Watkins*, 36 BRBS at 23-24. That claimant's job may not be "inherently maritime" is not material, as it was integral to this employer's ship repair business. *Marinelli*, 248 F.3d at 59-60, 35 BRBS at 44-45(CRT). We thus reverse the administrative law judge's finding that claimant did not establish that his work duties were integral to employer's ship repair process.[13] Consequently, the administrative law judge's conclusion that claimant is not covered under

[12]We need not specifically address claimant's work from 2005 to 2015, during which time the security guards were provided under a third-party contract, as claimant's work from the time of his 1987 audiogram through 2005 was integral to employer's ship repair work. Claimant's testimony establishes that he engaged in direct supervision of the security guards prior to 2005. HT at 23-25; EX 2, Dep. at 8-13, 16, 21.

[13]The facts of this case are distinguishable from those in *Gelinas v. Electric Boat Corp.*, 47 BRBS 17 (2013), a case partly relied upon by the administrative law judge to find claimant excluded from coverage under the Act. First, unlike in *Gelinas*, claimant in this case actually performed duties onboard vessels on navigable waters. Second, as noted above, claimant's supervision of the security elements of employer's facility was a necessary component of employer's shipbuilding work.

the Act is reversed. We therefore vacate the denial of claimant's claim for hearing loss benefits and remand the case for consideration of any remaining issues.

Accordingly, the administrative law judge's finding that claimant is not covered under the Act by operation of Section 2(3)(A) and because his work was not integral to employer's ship repair business is reversed. The administrative law judge's denial of claimant's hearing loss claim is vacated, and the case is remanded for consideration of the remaining issues.

SO ORDERED.

_____
JUDITH S. BOGGS
Administrative Appeals Judge

_____
GREG J. BUZZARD
Administrative Appeals Judge

_____
JONATHAN ROLFE
Administrative Appeals Judge