BRB No. 00-0678

MARGARET M. SUMLER	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: March 30, 2001
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Compensation Benefits Under the Longshore and Harbor Workers' Compensation Act of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Robert J. Macbeth, Jr. (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Compensation Benefits Under the Longshore and Harbor Workers' Compensation Act (1999-LHC-2199, 2499, 2500) of Administrative Law Judge Richard K. Malamphy 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 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).

Claimant worked in employer's paint department, painting structures at employer's shipyard such as bathrooms, office buildings, and lines on the pier. She suffered work-related injuries to her back and neck on February 8, 1984, while painting bathroom partitions.

Employer voluntarily paid claimant temporary total disability compensation for this injury from March 31, 1984 through May 8, 1986, and temporary partial disability compensation thereafter until September 17, 1990. Claimant returned to light duty work for employer in the air conditioning department, where she cut and delivered filters used in buildings at employer's shipyard. On November 8, 1988, claimant sustained a hernia injury while working for employer. Employer voluntarily paid temporary total disability compensation for this injury from November 18, 1988 through November 1, 1989. After returning to her position in employer's air conditioning department, claimant suffered a third work-related injury on March 15, 1990, while pulling filter cages apart. Claimant felt pain in her neck, shoulder and arm, and has not returned to work since that date. Claimant underwent surgery on February 10, 1992, for relief of her right thoracic outlet syndrome. Employer voluntarily paid temporary total disability compensation from March 16, 1990 through June 20, 1999, when it discontinued compensation payments.

In his Decision and Order, the administrative law judge summarily determined that claimant was not covered under Section 2(3) of the Act, 33 U.S.C. §902(3)(1982), (1998), because her duties were not uniquely maritime. Consequently, the administrative law judge denied benefits without considering the remaining issues. Claimant appeals, challenging the administrative law judge's finding that she did not meet the status test. Specifically, claimant asserts that she performed maritime work in that her duties were integral to shipbuilding operations. Employer responds, urging affirmance of the administrative law judge's decision.

A claimant satisfies the "status" requirement if she 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);[1] *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). Moreover, to satisfy this requirement, a claimant need only "spend at least some of [her] time in indisputably longshoring operations." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 273, 6 BRBS 150, 165 (1977).

In finding that claimant is not covered by Section 2(3) of the Act, the administrative

[1]Section 2(3) provides that "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)(1998).

law judge, relying on *Kilburn v. Colonial Sugars*, 32 BRBS 3 (1998), found that claimant failed to establish that her work duties at employer's shipyard were "more maritime specific than that commonly conducted in the usual commercial or non-maritime industrial setting." *See* Decision and Order at 6. Thus, the administrative law judge denied coverage under the Act. For the reasons that follow, we remand the case to the administrative law judge for further consideration.

Initially, we hold that the legal standard for coverage applied by the administrative law judge was in error. In *Schwalb,* the Supreme Court upheld coverage for three employees, two of whom worked at a loading terminal performing housekeeping and janitorial services and one employee whose job was to maintain and repair loading equipment. The two employees engaged in housekeeping and janitorial services were responsible for cleaning spilled coal from loading equipment in order to prevent equipment malfunctions as well as ordinary janitorial services. Holding all three employees covered, the Court reasoned that employees "who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act." *Schwalb,* 493 U.S. at 47, 23 BRBS at 99(CRT). The Court stressed that coverage "is not limited to employees who are denominated 'longshoremen' or who physically handle the cargo," *id.*, and held that "it has been clearly decided that, aside from the specified occupations [in Section 2(3)], land-based activity . . . will be deemed maritime only if it is an integral or essential part of loading or unloading a vessel." 493 U.S. at 45, 23 BRBS at 98(CRT); *see P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 82, 11 BRBS 320, 328 (1979); *Caputo*, 432 U.S. at 272-274, 6 BRBS at 165. In addressing the janitorial work performed, the Court further stated that "equipment cleaning that is necessary to keep machines operative is a form of maintenance and is only different in degree from repair work." 493 U.S. at 48, 23 BRBS at 99 (CRT).

In *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981), *rev'g* 13 BRBS 16 (1980)(Miller, J., dissenting), the claimant was employed as a maintenance-mason, whose duties involved the repair of masonry in shipyard buildings, but also included digging ditches, breaking up cement with a jackhammer, laying cement, grouting, removing asbestos from pipes, repairing boilers and manholes, and cleaning acid tanks in places throughout the shipyard. The First Circuit reversed the Board's holding that these duties are not covered under the Act, and held that claimant's overall masonry work on shipyard facilities was sufficient to establish coverage because maintenance and repair of shipyard facilities was essential to the building and repairing of ships. The court reasoned that the claimant's work was a necessary link in the chain of work that resulted in the building and repairing of ships. *Graziano*, 663 F.2d at 343, 14 BRBS at 56.

In a recent decision involving an employee who performed janitorial duties at a shipyard, *Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 153 (2000), the Board, citing *Schwalb,* remanded the case for the administrative law judge to consider

whether the duties performed by the claimant were integral to the ship construction process, noting that the fact that those tasks can be described as janitorial in nature will not deprive the claimant of coverage. *Cf. Gonzalez v. Merchants Bldng Maintenance*, 33 BRBS 146 (1999)(decedent not covered under the Act as his janitorial duties were incidental to the shipbuilding operation and did not expose him to any of the hazards of shipbuilding that the Act is designed to cover). In the instant case, contrary to the administrative law judge's finding, the standard for coverage does not concern whether claimant's duties were more maritime specific than those conducted in non-maritime settings. *See Ruffin*, 34 BRBS at 155-156; *Jackson v. Atlantic Container Corp.*, 15 BRBS 473 (1983). Rather, pursuant to *Schwalb*, the standard is whether claimant's painting and air conditioning work at employer's shipyard facilities were integral to the ship construction process; *i.e.*, whether employer's ship construction process could continue without claimant's function. *See Schwalb*, 493 U.S. at 48, 23 BRBS at 99(CRT). In this regard, claimant's supervisor in the air conditioning department, A.R. Dyke, testified that some filters claimant either changed or cut for the purpose of proper ventilation were used in buildings where fabrication activity occurred. *See* Tr. at 38-39.

Moreover, the administrative law judge's reliance on *Kilburn* is misplaced, as the employee in that case was found to have performed only 13 hours of longshore work at a sugar refinery in the year prior to his death. The issue in *Kilburn* was whether the employee spent "some of his time" in indisputably longshoring operations. *See Caputo*, 432 U.S. at 273, 6 BRBS at 165. The Board affirmed the administrative law judge's finding that the maritime duties the employee performed were merely incidental to his non-maritime work, and thus insufficient to confer status. *Kilburn*, 32 BRBS at 5. In the instant case, all of claimant's work occurred at employer's shipyard and involved either the painting or maintenance of employer's shipyard facilities. Unlike the situation in *Kilburn*, the issue is whether claimant's work was integral to the ship construction process. On remand, the administrative law judge must consider whether claimant's painting and air conditioning work at employer's shipyard facility was essential to the building and repairing of ships.

Accordingly, the administrative law judge's Decision and Order Denying Compensation Benefits Under the Longshore and Harbor Workers' Compensation Act is vacated, and the case is remanded for further consideration consistent with this opinion.[2]

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

[2]By letter received by the Board on March 26, 2001, claimant notified the administrative law judge that she had dismissed her attorney, and she requested modification of the administrative law judge's decision. In addition to reconsidering this case pursuant to this opinion, the administrative law judge must consider claimant's motion for modification on remand.