

BRB No. 04-0701

TIMOTHY C. LONG)
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 Claimant-Respondent)
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 v.)
)
 WASHINGTON GROUP) DATE ISSUED: May 9, 2005
 INTERNATIONAL)
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 and)
)
 ZURICH AMERICAN INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Petitioners) DECISION and ORDER

Appeal of the Decision and Order of Richard E. Huddleston,
Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, L.L.P.), Norfolk, Virginia,
for claimant.

Joseph F. Giordano and Vanessa L. Crockett (Semmes, Bowen & Semmes),
McLean, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2003-LHC-2107) of Administrative
Law Judge Richard E. Huddleston 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 disputed. Claimant worked for employer, an on-site contractor at the Giants Industries oil refinery in Yorktown, Virginia, as a carpenter from July 1997 through December 23, 2002. On October 24, 2002, claimant was building scaffolding to fix a leak that had occurred in a pipe in the coker port, situated approximately 1.25 mile from the dock. While he was building the scaffolding, the patch that had been put on the pipe the night before blew out, causing claimant to jump out of the way. In the process of escaping the blow out, claimant injured his right arm and shoulder. Following the incident, claimant returned to “light duty” work for a period but stopped as of December 23, 2002.¹ Claimant filed a claim for temporary total disability benefits from December 24, 2002, through May 11, 2003, and June 11, 2003, through October 26, 2003, and for temporary partial disability benefits from May 12 through June 10, 2003, and from October 27, 2003, to the present and continuing.²

The administrative law judge found that claimant was an “employee” covered by the Act, 33 U.S.C. §902(3). He awarded claimant the temporary total and temporary partial disability benefits claimed.³ Decision and Order at 44-45. On appeal, employer challenges only the finding that claimant meets the status element. Claimant responds, urging affirmance.

Section 2(3) of the Act 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). Generally, a claimant satisfies the “status” requirement if he is an employee engaged in work 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); *Shives v. CSX Transportation, Inc.*, 151 F.3d 164, 32 BRBS 125(CRT) (4th Cir.), *cert. denied*, 525 U.S. 1019 (1998). To satisfy this requirement, he need only “spend at least some of [his] time” in indisputably maritime operations. *Northeast Marine Terminal Co. v. Caputo*,

¹The “light duty” work consisted of sitting in the shop, occasionally sweeping, but effectively, doing nothing. Tr. at 67-68.

²Between May 12 and June 10, 2003, claimant worked as an automobile detailer, but he was laid off. On October 27, 2003, claimant obtained a job as an estimator for a contracting company. Decision and Order at 5.

³Additionally, because he determined there was insufficient evidence to resolve the issue of whether claimant is entitled to additional compensation under Section 14(e), 33 U.S.C. §914(e), the administrative law judge remanded the case to the district director for resolution of that issue. Decision and Order at 44-45.

432 U.S. 249, 273, 6 BRBS 150, 165 (1977); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). The Act covers those workers injured while maintaining or repairing buildings and machinery essential to the shipbuilding and the loading/unloading processes, *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT); *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; *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981); *Price v. Norfolk & Western Ry. Co.*, 618 F.2d 1059 (4th Cir. 1980); *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), as well as those workers injured during the construction of “inherently maritime” structures, such as piers and dry docks, *Pittman Mechanical Contractors, Inc. v. Director, OWCP [Simonds]*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Hullingshorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980); *Hawkins v. Reid Associates*, 26 BRBS 8 (1992), and breakwaters, *Olson v. Healy Tibbitts Constr. Co.*, 22 BRBS 221 (1989) (Brown, J., dissenting). The Board has defined the term “harbor worker” as including “at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships). . . .” *Stewart v. Brown & Root, Inc.*, 7 BRBS 356, 365 (1978), *aff'd sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980); *see Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989); *Crawford v. Trotti & Thompson, Inc.*, 9 BRBS 685 (1979) (Miller, J., concurring; Smith, J., dissenting), *aff'd*, 631 F.2d 1214, 12 BRBS 681 (5th Cir. 1980).

Claimant testified that as a carpenter for employer he built scaffolding and forms and he performed regular maintenance. These tasks could take place anywhere on the facility, including the dock, for any number of hours each day. Tr. at 61-62. Claimant built scaffolding for different purposes: to repair pipelines, to insulate pipelines, or, on the dock, to grease, repair, or inspect the loading arm.⁴ In addition, claimant testified that he replaced boards and hand-railings on the dock, and he also set up forms so concrete could be poured to reinforce the breakwall that protected the dock. Tr. at 63-65; *see also* Tr. at 22, 29-30.

Claimant’s immediate supervisor, Mr. Rosier, agreed that claimant’s work as a carpenter included building scaffolding, building forms in which to pour concrete,

⁴The loading arm is a device with a long hose attached to it. It swings over to the ship and connects the ship’s pipes to the refinery pipes, allowing for the unloading of crude oil or loading of the refined product. Tr. at 24.

replacing doors and windows, and doing anything carpentry-related, including making repairs to the docks by replacing boards and hand-railings. He explained that the scaffolding was erected for new construction, installing pipelines or insulation, repairing leaks, running electrical conduits, repairing or inspecting the loading arm, and that the carpenters built the scaffolding so the other crafts could do their work. Tr. at 18-21, 35, 39-41. Mr. Davis, the project manager who managed all work assigned to employer by Giants Industries, testified that the carpenter's primary job, 90 to 95 percent of the time, was to build scaffolding, and this work could occur anywhere on the facility.⁵ He stated that forms were built very infrequently. Tr. at 109-111.

The administrative law judge credited the testimony of claimant and Mr. Rosier and concluded that claimant's duties as a carpenter included: building scaffolding to allow workers in other crafts to reach different kinds of pipelines, to reach the loading arm on the pier, and to reach the storage tanks. He found that claimant also replaced boards and hand-railings on the dock, that claimant built form work for the breakwall and for oil pump platforms, and that claimant did not perform any loading, unloading or repair work himself. Decision and Order at 15. Accordingly, the administrative law judge found that claimant spent "some of his time" in maritime work because he repaired and maintained the docks, he erected scaffolding to reach the loading arm and he built forms so the breakwall could be maintained. As he determined these duties are essential to furthering the loading and unloading of ships at the refinery, he concluded that claimant satisfied the status requirement. Decision and Order at 16.

Employer contends claimant's connection to the maritime process at the refinery was too remote to confer status. It asserts that claimant's work was not indispensable to the loading and unloading process, as he did not load or unload the ships and he made no repairs to the equipment or pipelines himself. Employer describes claimant's work erecting scaffolding as "tangential" to the loading process and not deserving of maritime status. With regard to claimant's dock work, employer asserts that any connection between claimant and the docks was minimal and not "essential or integral" to maritime activity. We reject employer's arguments, and we affirm the administrative law judge's finding that claimant satisfies the status requirement.

Initially, the administrative law judge found that claimant repaired and maintained the docks. It is axiomatic that those workers involved in the construction, repair,

⁵Mr. Davis explained that the Giants' facility is an oil refinery and that employer's contract with Giants called for employer to perform any maintenance or renovations to the facility; no loading or unloading was involved in the contract and, in fact, employer's employees could not be on the dock when the ships were being loaded or unloaded. Tr. at 104-106.

alteration or maintenance of harbor facilities, including docks, are harbor workers under the Act. *Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2^d Cir. 1998), *cert. denied*, 525 U.S. 981 (1998); *Bundens v. J.E. Brenneman Co.*, 46 F.3d 292, 29 BRBS 52(CRT) (3^d Cir. 1995); *Simonds*, 35 F.3d 122, 28 BRBS 89(CRT); *Joyner*, 607 F.2d 1087, 11 BRBS 86; *Huff v. Mike Fink Restaurant, Benson's, Inc.*, 33 BRBS 179 (1999); *Ripley v. Century Concrete Services*, 23 BRBS 336 (1990); *Stewart*, 7 BRBS at 365. It is the nature the duties to which a claimant may be assigned, rather than his primary duties or the duties to which he was assigned the day of his injury, which are paramount. *Maher Terminals, Inc. v. Director, OWCP [Riggio]*, 330 F.3d 162, 37 BRBS 42(CRT) (3^d Cir.), *cert. denied*, 540 U.S. 1088 (2003), *aff'g Riggio v. Maher Terminals, Inc.*, 35 BRBS 104 (2001); *Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990); *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 12 BRBS 808 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981). The credited testimony of claimant and Mr. Rosier, which constitutes substantial evidence to support the administrative law judge's finding, establishes that dock repair was a regular part of claimant's duties.⁶ As repair of such an inherently maritime structure is covered employment, claimant satisfies the Section 2(3) status requirement.⁷ *See also Graziano*,

⁶Although there is divergent testimony regarding the percentage of time claimant's work related to the dock or the pipelines that loaded or unloaded ships, the testimony supports the administrative law judge's conclusion that claimant spent "some of his time" performing these activities.

⁷The Fourth Circuit, within whose jurisdiction this case arises, has drawn a distinction between the construction of facilities on a covered site which are not "inherently maritime" and the maintenance and repair of such existing facilities. *Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT) (4th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995). In *Prevetire*, the Fourth Circuit held that a pipefitter who was injured during the construction of a power plant on the Norfolk Naval Base was not a covered employee. It held that he was a construction worker whose work was not maritime because his work constructing a power plant, which would be essential to the shipbuilding process *in the future*, was not maritime *in the present*, whereas claimant Price, *see Price v. Norfolk & Western Ry. Co.*, 618 F.2d 1059 (4th Cir. 1980), was covered by virtue of the fact that he maintained a shipyard support tower which was used in the loading and unloading process in the time period when he was injured. *See also Southcombe v. A Mark, B Mark, C Mark Corp.*, 37 BRBS 169 (2003) (ironworker hired only to construct building to be used as yacht service center not covered); *Moon v. Tidewater Constr. Co.*, 35 BRBS 151 (2001) (contractor carpenter hired only to construct warehouse on naval base not covered); *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), (two maintenance workers, injured while maintaining or repairing power plant, were

663 F.2d 340, 14 BRBS 52 (mason-laborer who repaired shipyard buildings containing shipbuilding equipment covered); *Price*, 618 F.2d 1059 (railroad employee who painted/maintained support tower which housed conveyor for loading vessels covered).

In addition, claimant's work erecting scaffolding used by other workers to access and repair loading equipment was properly held covered by the administrative law judge. In this regard, we reject employer's attempt to analogize this case to *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985), *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 27 BRBS 103(CRT), *reh'g en banc denied*, 8 F.3d 24 (5th Cir. 1993), *cert. denied*, 511 U.S. 1086 (1994), and *Dravo Corp. v. Banks*, 567 F.2d 593, 7 BRBS 197 (3^d Cir. 1977). This case does not involve drilling activities on an offshore fixed platform, which the Supreme Court has held is not "maritime employment," *Herb's Welding*, 470 U.S. 414, 17 BRBS 78(CRT), and coverage is not based on any activities relating to the refining process, but on claimant's work facilitating loading and unloading. Moreover, work involving "support services," such as painting and general maintenance, has been held covered where it is integral to the loading or shipbuilding process. *Jackson v. Atlantic Container Corp.*, 15 BRBS 473 (1983); *see also Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002) (employee who changed air filters in buildings at shipyard is covered). Thus, to the extent employer argues that employees who maintain pipelines do not perform maritime work, and that claimant herein was not performing maritime work because his work was further removed from the actual pipeline loading/unloading process, or that claimant's duties as a carpenter should be considered mere "support services," then employer's argument must be rejected. *Id.*; *see also Simonds*, 35 F.3d 122, 28 BRBS 89(CRT).⁸ Although claimant did not actually repair the pipelines or the loading arm or pour the concrete to reinforce the breakwall to protect the dock, his work was essential to these covered activities, as the workers performing the actual repair work could not do their jobs if claimant did not construct the scaffolding or the forms. Had claimant not performed his job, the loading and unloading process would have been impeded. *See Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT); *Graziano*, 663 F.2d 340, 14 BRBS 52; *Price*, 618 F.2d 1059; *Kerby*, 31 BRBS 6. Accordingly, we reject employer's argument that claimant's work was "too tangential" to confer status. We affirm the administrative law judge finding that claimant's work

covered employees because their duties in keeping the power plant operational were essential to the shipbuilding process).

⁸In *Simonds*, the United States Court of Appeals for the Fourth Circuit held that a welder who installed and repaired pipelines that transported steam, water and fuel from the land-based storage facility to the vessels at the pier was a maritime employee because he installed and repaired equipment that was necessary for the loading process, as the pier could not be used without the pipelines.

repairing docks and performing other work integral to the loading and unloading process is covered maritime employment, as that finding is supported by substantial evidence and is in accordance with law.

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