BRB No. 03-0341

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| JACQUELINE L. RUFFIN | ) | |
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| Claimant-Respondent | ) | |
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| v. | ) | |
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| NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY | ) | DATE ISSUED: 09/17/2003 |
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| Self-Insured Employer-Petitioner | ) | |
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| DIRECTOR, OFFICE OF WORKERS= COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Compensation Order on Second Remand of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Gary R. West (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Employer appeals the Compensation Order on Second Remand (1999-LHC-0931) of Administrative Law Judge Fletcher E. Campbell, Jr., 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).

This case is before the Board for the third time. To recapitulate, claimant worked for employer as an industrial cleaner. Claimant=s employment duties consisted of sweeping the walkways and around the machines, picking up metal shavings and debris dropped from the machinery as well as any waste materials left behind by the machinists, emptying 55-gallon drums which contained the waste products, and stocking eye safety supplies. On June 13, 1990, claimant injured her back while lifting a trash bag into a dumpster. Employer voluntarily paid claimant temporary total and permanent partial disability compensation for various periods between October 4, 1990 and January 10, 1999. In January 1999, employer filed a Notice of Final Payment on the ground that claimant did not meet the Astatus@ element for coverage under the Act. Claimant filed a claim for permanent partial disability compensation.

In his initial decision, the administrative law judge found that claimant was not covered under Section 2(3) of the Act, 33 U.S.C. ' 902(3), because her cleaning duties did not have a sufficiently strong nexus with loading, unloading, or shipbuilding. Thus, the administrative law judge denied benefits. Claimant appealed. The Board remanded the case for reconsideration consistent with the Supreme Court's decision in *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989), emphasizing that the janitorial nature of claimant=s duties cannot deprive her of coverage if her work was integral to the shipbuilding process. *Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 153 (2000).

On remand, the administrative law judge again denied coverage. The administrative law judge emphasized that claimant did not clean the machines themselves, but only removed the debris on the ground. He stated there was no evidence that any of claimant=s cleaning duties were necessary to maintain the machinery or to keep it functioning. The administrative law judge further found that claimant did not demonstrate, with specific evidence of record, that her failure to perform her duties could result in the machinery breaking down and thus in the halting of the shipbuilding process. The administrative law judge therefore again denied benefits, and claimant appealed.

The Board reversed the administrative law judge's finding that claimant did not satisfy the status element of Section 2(3). The Board held that, pursuant to *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT), and the Board's decision in *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002), the administrative law judge erred in not drawing the only rational inference permitted by the record, *i.e.*, that claimant=s failure to perform her job inevitably would impede the shipbuilding and repair process. *Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 52 (2002). The Board noted that claimant had to perform her duties on the floor of the machine shop while the machines were in operation, and that she distinguished her job duties from those of janitors who removed primarily paper trash from plastic waste baskets in offices, and

dusted and vacuumed. *Id.* at 55. Moreover, the Board held that it is not significant that the claimant's failure to perform her job would not lead to an immediate impediment to shipbuilding, as eventually the debris would accumulate to a point at which shipbuilding was impeded. *Id.*, citing *Price v. Norfolk & Western Ry. Co.*, 618 F.2d 1059 (4th Cir. 1980), and *Watkins*, 36 BRBS at 23-24. As the Board held that claimant is covered by the Act, the Board remanded the case to the administrative law judge to resolve any remaining issues.

On remand, the parties agreed that claimant is entitled to continuing permanent partial disability benefits at a compensation rate of $181.24 per week commencing January 10, 1999, and the administrative law judge entered an award to this effect. Employer appeals, contending that the Board improperly held that claimant satisfied the status element of Section 2(3). Employer contends that the Board erred in holding that claimant's duties constitute covered work as such activity is not unique to shipbuilding, and is, moreover, merely incidental to shipbuilding. Claimant responds, urging the Board to reject employer's contention and to reaffirm its decision that claimant is a covered employee.[1]

The Board=s decision on the coverage issue constitutes the law of the case, and, unless there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was erroneous, or the first decision was clearly erroneous and to let it stand would produce a manifest injustice, the Board will adhere to its decision. *See, e.g., Jones v. U.S. Steel Corp.*, 25 BRBS 355 (1992). We hold that employer has not established a basis for departure from the law of the case doctrine, as there has been no change in the factual situation and employer has failed to demonstrate any error in the Board=s decision. *See Schwalb,* 493 U.S. at 48, 23 BRBS at 99(CRT)("It makes no difference that the particular kind of repair [claimant] was doing might be

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[1]We reject claimant's contention that the Board is without jurisdiction to consider employer's appeal of the coverage issue because employer did not file a motion for reconsideration of the Board's April 2002 decision. Employer has filed a timely appeal of the administrative law judge's Compensation Order on Second Remand, and thus the Board has jurisdiction over employer's appeal. 33 U.S.C. §921(b)(3); 20 C.F.R. §802.205. Whether the Board will address, in a substantive way, the issues employer raises does not involve the Board's jurisdiction. Contrary to claimant's contention, employer was not required to seek immediate review of the Board's prior decision in the court of appeals, as the Board's decision was not a final order in that benefits had yet to be awarded. *See* 33 U.S.C. §921(c); *Cooper Stevedoring Co. v. Director, OWCP*, 826 F.2d 1011, 20 BRBS 27(CRT) (11th Cir. 1987). All intervening orders of the Board are reviewable in the court of appeals upon the issuance of final decision and order of the Board. *See, e.g., Burns v. Director, OWCP*, 41 F.3d 1555, 29 BRBS 28(CRT) (D.C. Cir. 1994).

considered traditional railroad work or might be done by railroad employees wherever railroad cars are unloaded," as this claimant=s work was essential to the loading and unloading process); *see also Price,* 618 F.2d 1059; *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002); *Watkins,* 36 BRBS 21; *Jackson v. Atlantic Container Corp.*, 15 BRBS 473 (1983). Therefore, we affirm the Board=s determination that claimant was a covered employee pursuant to Section 2(3) of the Act. *See Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff=d on recon.*, 35 BRBS 190 (2002). As employer does not raise any contentions with regard to the administrative law judge's Compensation Order on Second Remand, the award of benefits is affirmed.

Accordingly, the administrative law judge's Compensation Order on Second Remand is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge