BRB No. 00-0248

JACQUELINE L. RUFFIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: Oct. 25, 2000
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh (Rutter, Walsh, Mills & Rutter, L.L.P.), Norfolk, Virginia, for claimant.

Christopher A. Taggi (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order (1999-LHC-0931) of Administrative Law Judge Fletcher E. Campbell, Jr., 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).

Claimant commenced working as an industrial cleaner for employer in 1983. In 1987, claimant was assigned to Building 103, which houses various types of machinery, overhead cranes, and tow motors. Claimant's employment duties consisted of industrial cleaning. Specifically, claimant was required to sweep the walkways and around the machines, pick up metal shavings and debris dropped from the machinery as well as any waste materials left

behind by the machinists, empty 55-gallon drums which were used to contain the waste products, and stock eye safety supplies. As claimant performed her employment duties within Building 103 while the machinery and overhead cranes were in operation, claimant was required to wear a hard hat and safety glasses. 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 of time from October 4, 1990, through January 10, 1999.[1] In January 1999, employer filed a Notice of Final Payment indicating that, as it was now of the opinion that claimant did not meet the "status" requirement required for coverage under the Act, it would terminate claimant's disability compensation payments. Claimant thereafter filed a claim for permanent partial disability compensation.

In his Decision and Order, the administrative law judge determined that claimant was not covered under Section 2(3) of the Act, 33 U.S.C. §902(3)(1998), because her general cleaning duties do not have a sufficiently strong nexus with loading, unloading, or shipbuilding. 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. 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.

Generally, a claimant satisfies the "status" requirement if she is an employee engaged in work which involves loading, unloading, constructing, or repairing vessels. *See* 33 U.S.C. §902(3);[2] *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 his time

[1]Claimant did not return to work for employer; rather, it is undisputed that claimant subsequently obtained other employment.

[2]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).

in indisputably longshoring operations." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 273, 6 BRBS 150, 165 (1977).

In finding that claimant was not covered by Section 2(3) of the Act, the administrative law judge found the issue of coverage controlled by the decision of the United States Court of Appeals for the Third Circuit in *Dravo Corp. v. Banks,* 567 F.2d 593, 7 BRBS 197 (3d Cir. 1977). Specifically, the administrative law judge found that as claimant in the case at bar performed job duties similar to those of the janitorial employee in *Banks*, who was found not covered by Section 2(3) of the Act, claimant is also not covered as a matter of law. The administrative law judge noted that *Banks* was cited with approval by the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction the instant case arises, in *Newport News Shipbuilding & Dry Dock Co. v. Graham*, 573 F.2d 167, 8 BRBS 241 (4th Cir.), *cert. denied*, 439 U.S. 979 (1978), and *White v. Newport News Shipbuilding & Dry Dock Co.,* 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980). Although he acknowledged that these decisions were decided before the Supreme Court's decision in *Schwalb,* the administrative law judge found that they remain valid authority as they all require a "sufficiently strong nexus with either loading/unloading or shipbuilding." Decision and Order at 5-6. Concluding that an employee engaged in general cleaning duties lacks this nexus, he denied coverage under the Act. For the reasons that follow, we remand the case to the administrative law judge for further consideration.

We first address the legal standard for coverage applied by the administrative law judge. 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).

The test for coverage set forth in *Banks* is not inconsistent with the "integral or

essential part" test of *Schwalb*. The Third Circuit held that in order for a claimant to be covered under the Act, his "job should have been a necessary 'ingredient' in the shipbuilding process . . . ." *Banks*, 567 F.2d at 595-596, 7 BRBS at 200-201.[3] Similarly, the Fourth Circuit's decision in *White*, 633 F.2d at 1074, 12 BRBS at 605-606, recognizes that the employee's work must be "integral" to the shipbuilding process in order to be covered by the Act, citing the "necessary ingredient" test of *Banks* as a phrase used to describe functions covered by the Act. *See also Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). Thus, insofar as it relies on this language, the administrative law judge's decision reflects the proper recitation of the standard for coverage under the Act.

Nonetheless, we must remand this case for further application of the facts to this law, as well as for consideration of additional case law not discussed by the administrative law judge. The claimant in *Banks* was a general laborer, essentially involved in unskilled jobs related to plant maintenance. He was injured while spreading salt on icy walkways and steps. In denying coverage in the present case, the administrative law judge relied on the following language from *Banks*:

> Banks' duties have no traditional maritime characteristics, but rather are typical of the support services performed in any production entity, maritime or not. "Plant maintenance" is required in any business . . . Clearing ice is a necessary "incident" of any operation. We suggest that in order to be covered, Banks' job should have been a necessary "ingredient" in the shipbuilding process, which it was not.

Banks, 567 F.2d at 595-596, 7 BRBS at 200-201. In *Banks*, the United States Court of Appeals for the Third Circuit, in denying coverage, analogized claimant's duties, described as "typical of support services performed in any production entity," to those of a clerical worker who was excluded from coverage in *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476,

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[3] *See also Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112(CRT) (3d Cir. 1992), wherein the Third Circuit evaluated its prior case law in light of *Schwalb* and found it consistent in requiring an integral relationship between loading, unloading or shipbuilding.

5 BRBS 393 (3d Cir. 1977), for lack of a maritime nexus. Following *Banks*, the Board adopted this "support services" rationale, and denied coverage to those engaged in support services typical of those found in any business. *See Graziano v. General Dynamics Corp.*, 13 BRBS 16 (1980) (Miller, J., dissenting), *rev'd*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981)(maintenance worker); *Neely v. Pittston Stevedoring Corp.*, 12 BRBS 859 (1980) (Miller, J., dissenting) (claims examiner not covered); *Castro v. Hugo Neu-Proler Co.*, 10 BRBS 35 (1979) (Miller, J., dissenting) (general clean-up work around shiploading conveyor and around the gantry crane not covered); *White v. Newport News Shipbuilding & Dry Dock Co.*, 9 BRBS 493 (1978)(Miller, J., dissenting), *rev'd*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980)(claimant unloaded pipe and marked it for identification).

The Board's holdings in *White* and *Graziano* were reversed by the Fourth and First Circuits, respectively. In *White*, the Fourth Circuit held that the employee's color coding of pipe for use in ship fabrication was the first step taken to physically alter the pipe for use in ship construction. The claimant's work therefore was an integral part of and directly involved in shipbuilding, and he was covered under the Act. *White*, 633 F.2d at 1074, 12 BRBS at 605-606. In *Graziano*, 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 view of the court's decisions in these cases, as well as those reversing the Board's holding that security guards are excluded from coverage on a similar rationale, *see Miller v. Central Dispatch, Inc.*, 673 F.2d 773, 14 BRBS 752 (5th Cir. 1982)*; Arbeeny v. McRoberts Protective Agency*, 642 F.2d 672, 13 BRBS 177 (2d Cir. 1981), *cert. denied*, 454 U.S. 836 (1981), the Board disavowed the support services test in *Jackson v. Atlantic Container Corp.*, 15 BRBS 473, 474 (1983). *See also Bazemore v. Hardway Constr., Inc.*, 20 BRBS 23 (1987). Thus, the administrative law judge's denial of coverage cannot be affirmed to the extent it is grounded in the language from *Banks* denying coverage on the rationale that claimant performed "support services."

In addition, the administrative law judge erred in relying on *Banks* and cases citing it for the general conclusion that "as a matter of law, one who is engaged in general cleaning duties is not covered under the Act because her duties do not have a sufficiently strong nexus with either loading/unloading or shipbuilding." Decision and Order at 6. As *Schwab* clearly demonstrates, employees who perform general cleaning duties may well be covered by the Act if those duties are integral to the overall ship construction process. Thus, claimant

correctly contends that the administrative law judge erred in focusing on the description of her duties as janitorial rather than on whether the duties themselves were integral to the shipbuilding process. In *Graziano*, 663 F.2d at 343, 14 BRBS at 56, the First Circuit held that "[t]he maintenance of 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." The court also held that, based on claimant's masonry duties alone, coverage was mandated, holding such duties to be "a necessary link in the chain of work that resulted in ships being built and repaired." *Id.* The administrative law judge did not discuss this case or consider whether claimant's duties are in any way analogous to those of claimant in *Graziano* or the employees in *Schwab* who similarly performed housekeeping and janitorial services and were held to be covered under the Act. Thus, on remand, the administrative law judge must consider whether claimant's work sweeping and disposing of debris and waste from machinery, as well as the stocking of safety supplies, all of which was ongoing while the machinery was in use, was essential to the building and repairing of ships.

In this regard, claimant argues the removal of debris and scrap metal created by the machinery used in the shipbuilding process is an integral part of and essential to the overall ship construction process since the Building 103 machine shop could not continue to efficiently, effectively, and safely construct and prefabricate components used in the construction process if the immediate area was not maintained and cleaned. In addressing claimant's contention on remand, the administrative law judge must consider coverage in the context of the holding in *Schwalb* that "the ship loading process could not continue unless the [equipment that the employee] worked on was operating properly." *Schwalb*, 493 U.S. at 48, 23 BRBS at 99 (CRT). Specifically, the Supreme Court stated that the determinative consideration is whether the ship loading/unloading process could continue without the claimant's function, and it noted that it is irrelevant whether the employee may have other duties unconnected to loading or unloading or whether his contribution to the loading process is not continuous. *Id.* The court in *Graziano* proposed a similar test, stating that "the shipbuilding process of [employer] would not have come to an immediate halt if [claimant's] duties were not successfully discharged, but the failure to perform routine maintenance would have led eventually to a stoppage or curtailment of shipbuilding and repairs." 663 F.2d at 343, 14 BRBS at 56. Thus, if, on remand, the administrative law judge finds that the tasks performed in Building 103 by claimant were integral to the ship construction process, the fact that those tasks can be described as janitorial in nature will not deprive her of coverage under the Act.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge