BRB No. 00-1138

PERRY J. MOON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED: Aug. 22, 2001
TIDEWATER CONSTRUCTION COMPANY	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

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

Henry P. Bouffard (Vandeventer Black, L.L.P.), Norfolk, Virginia, for self-insured employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (1999-LHC-2077) of Administrative Law Judge Daniel A. Sarno, 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 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 in dispute. Employer was awarded a contract by the Navy on November 7, 1996, to construct a "controlled industrial facility" at the Norfolk Naval Base. In January 1997, construction began on the facility, which would be used to store spent nuclear fuel from submarines and ships. Construction was completed on October

2, 1998. ALJ Ex. 1; Tr. at 75, 81, 83. Claimant's crew was sent to work on the warehouse when the job was approximately 30 percent completed. Claimant worked as a carpenter, and he was responsible for setting the form for the concrete structure of the outside walls of the building, pouring the concrete, removing the form, re-outfitting the form and repeating the process. ALJ Ex. 1; Tr. at 10, 30, 77. On July 24, 1997, claimant's crew was pulling a form off a concrete wall which had been poured the day before. Claimant, in a scissor lift, was attempting to remove the final bolt to allow the crane to lift the form. Just after he removed the bolt, a gust of wind blew the form against the newly created wall. The form bounced back, striking the scissor lift. Another gust of wind caused the form to hit the lift a second time, sending claimant falling to the ground approximately 18 feet below. He sustained serious injuries and required numerous surgical procedures and a lengthy recuperation period.[1] ALJ Ex. 1; Tr. at 14, 16-17. Employer paid temporary total disability benefits under the Virginia workers' compensation act. ALJ Ex. 1. Claimant filed a claim for benefits under the Longshore Act.

Claimant testified he was not involved in any aspect of loading, unloading, building or maintaining ships, or repairing or maintaining equipment used in the loading process. Tr. at 30. In fact, he stated that once the carpenter trade completed its work on the warehouse, he would have been reassigned. *Id.* at 31. John Carter, claimant's supervisor on this project, testified that employer was contracted only to construct the building and when the construction was complete, the building would be turned over to the Navy; employer would have no involvement in using the building or storing materials. Tr. at 75-78.

The administrative law judge found that this case involved no factual disputes, and he found that the Norfolk Naval Base is a covered situs under 33 U.S.C. §903(a). Decision and

[1]The parties stipulated that claimant sustained a closed concussion, injuries to his shoulder, right leg, ribs, hip and sacrum, right toe, right eye, and multiple fractures of his face. ALJ Ex. 1. Claimant specified that he injured the right toe on his right foot, broke his right knee, fractured his hip in five places, broke his tailbone, broke three to five ribs on the right side and separated three others, bruised his right lung, cut his wrist, broke his right pinky finger, jammed his right shoulder, crushed the bones behind his right eye, and suffered a cut on his head. He also claims to have sustained back and neck injuries. Tr. at 17-20.

Order at 2, 4-5. Highlighting the evidence establishing that claimant handled no cargo and had no responsibilities for working with ships or loading or unloading them, he concluded that claimant does not have the requisite status for coverage under Section 2(3) of the Act, 33 U.S.C. §902(3). The administrative law judge found that although the facility on which claimant was working would have a future role in storing off-loaded materials, claimant was constructing the building and was not a part of the unloading process. The administrative law judge specifically found that the decision of the United States Court of Appeals for the Fourth Circuit in *Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT) (4th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995), controls the status issue presented in this case. Consequently, he denied benefits under the Act. Decision and Order at 6-7. Claimant appeals, arguing that *Prevetire* is distinguishable and that his duties constituted covered employment.

Claimant contends the administrative law judge erred in finding that he did not satisfy the status requirement. He argues that his duties as a carpenter were a necessary part of the construction of a warehouse which was to be used to store spent fuel from submarines and ships. He contends it is incongruous to cover those workers employed to maintain or repair such a facility but not those employed in its construction. He denies that his duties were too tangential to the unloading process and distinguishes *Prevetire* on the basis that the storage facility in the present case would be used solely by the shipyard, whereas the power plant in *Prevetire* was to supply electricity to the naval base as well as to commercial suppliers. Based on his construction of a facility destined for a maritime use, he argues that he is a "harbor worker" who is covered by Section 2(3) of the Act.[2] Employer asserts that *Prevetire* controls and that the administrative law judge correctly denied benefits under the Act.

Section 2(3) of the Act, 33 U.S.C. §902(3), states:

> 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. . . .

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

[2]Claimant additionally argues that remand is required because the administrative law judge failed to address the issue of medical benefits.

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). It is eminently clear the Act covers those workers injured while maintaining or repairing buildings and machinery essential to the shipbuilding and the loading/unloading processes, *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989); *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981); *Price v. Norfolk & Western Railway Co.*, 618 F.2d 1059 (4th Cir. 1980); *Kerby v. Southeastern Public Service Authority*, 31 BRBS 6 (1997), *aff'd mem.*, 135 F.3d 770 (4th Cir.), *cert. denied*, 119 S.Ct. 53 (1998), and 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); *Hullinghorst 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).

Claimant asserts that, as the building under construction is located at the naval base, a covered situs, and will be used to store materials off-loaded from ships, his work is covered under the line of cases holding the construction of harbor facilities is covered work, as well as under those cases holding shipyard and terminal building maintenance covered. This case, however, arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, and that court has drawn a distinction between the construction of a building located on a covered site, holding work constructing a structure which is not "inherently maritime" like a dock or pier is not covered work, and the maintenance and repair of such buildings, which may be covered employment. *Compare Price*, 618 F.2d 1059 (railroad employee who painted/maintained support tower which housed conveyor was covered) *with Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT). 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 inasmuch as his connection to maritime employment was merely that power from the plant he "helped to build would eventually be used by the shipyard," concluding that this connection "barely extended beyond 'breathing salt air.'" *Prevetire*, 27 F.3d at 990, 28 BRBS at 62(CRT). It further noted that claimant's construction duties would not have changed had the power plant been located outside the shipyard's fence. *Id.* Relying on the Supreme Court's decision in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985), the Fourth Circuit stated that Prevetire's work, like Gray's,[3] was not "an integral or essential

[3]Gray worked as welder on an offshore drilling platform, building and replacing pipelines and doing general maintenance work. He was injured while welding a gas flow line. The Supreme Court held that offshore drilling is not "inherently maritime," and Gray was not covered. *Gray*, 470 U.S. 414, 17 BRBS 78(CRT).

part of loading or unloading a vessel." *Prevetire*, 27 F.3d at 989, 28 BRBS at 62(CRT). In comparing the two cases, the court stated that Gray had an even stronger connection to maritime employment than did Prevetire, yet he did not meet the status requirement; thus, as "Congress did not intend to extend LHWCA coverage to every employee who works at a shipyard regardless of whether the work is maritime employment," the court held that Prevetire was not a covered employee. *Id.*, 27 F.3d at 989-990, 28 BRBS at 62(CRT). Whereas Prevetire did not meet the status requirement because his work constructing a power plant, which would be essential to the shipbuilding process *in the future*, was not maritime *in the present*, claimant Price, *see Price*, 618 F.2d 1059, was covered by virtue of the fact that he maintained a shipyard structure which was involved in the loading and unloading process contemporaneous with his injury. *See also Graziano*, 663 F.2d 340, 14 BRBS 52 (mason-laborer, who repaired shipyard buildings containing shipbuilding equipment, covered); *Kerby*, 31 BRBS 6 (two maintenance workers, injured while maintaining or repairing power plant, were covered employees because their duties in keeping the power plant operational were essential to the shipbuilding process).

In similar cases, claimants have been held outside the Act's coverage notwithstanding work building structures on or near water. In *Laspragata v. Warren George, Inc.*, 21 BRBS 132 (1988), the Board held that a core driller injured while building the foundation of sewage treatment plant was not covered, and, in *Silva v. Hydro-Dredge Corp.*, 23 BRBS 123 (1989), an employee hired to repair a seawall with no maritime purpose was not a covered employee. In *Alexander v. Hudson Engineering Co.*, 18 BRBS 78 (1986), the Board held that an electrician required to fabricate and outfit fixed offshore platform facilities was not a covered employee. *See also Laviolette v. Reagan Equip. Co.*, 21 BRBS 285 (1988) (employee hired to build housing superstructure used on offshore drilling rig not covered). In *McGray Constr. Co. v. Director, OWCP [Hurston]*, 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999), the United States Court of Appeals for the Ninth Circuit held that the claimant, who was engaged as a pile driver on an oil-production pier, was not a covered employee because he was injured while performing the non-maritime work for which he was hired. Thus, where the facility under construction or renovation does not have a uniquely maritime purpose, the workers engaged in its construction have not been covered.

As the administrative law judge held, *Prevetire* controls the outcome of this case. The building at issue here was under construction at the time of claimant's injury, and it was not a pier or dry dock or other "uniquely maritime" structure, but rather was a warehouse. Because it was under construction, its use as a maritime storage facility was a future, not a current, one, as was the case with the power plant which was not operational at the time of Prevetire's injury. Moreover, as employer is a contractor who was hired by the Navy to build a warehouse, claimant was on the premises for the sole purpose of constructing this warehouse. Unlike an employee hired by a shipyard to maintain and repair its facilities, *e.g.*, *Graziano*, 663 F.2d 340, 14 BRBS 52, as a construction worker claimant had only a temporary

connection to the base which would terminate when he completed his portion of the construction of the building. Upon completion of his work, he would proceed to his next construction job. In light of *Prevetire*, we hold that the administrative law judge properly applied Fourth Circuit precedent to determine that claimant does not have the requisite status to convey coverage. *Gray*, 470 U.S. 414, 17 BRBS 78(CRT); *Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT). Therefore, we affirm the administrative law judge's denial of benefits under the Act.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge