BRB No. 01-0628

JACQUELINE L. RUFFIN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: April 29, 2002
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand 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.

Peter B. Silvain, Jr. (Eugene Scalia, Solicitor of Labor; John F. Depenbrock, Jr., Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (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).

This case is before the Board for the second time. *See Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 34 BRBS 153 (2000). Claimant worked for employer as an industrial cleaner. 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 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. As claimant performed her duties while the machinery and overhead cranes were in operation, she 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 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 "status" element for coverage under the Act. Claimant filed a claim for permanent partial disability compensation.

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.

In denying benefits, the administrative law judge relied on 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). On appeal, the Board held that the test for coverage set forth in *Banks,* that the employee's work must be a "necessary ingredient" of the shipbuilding process, is not inconsistent with the "integral or essential part" test later enunciated by the Supreme Court in *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989). *Ruffin*, 34 BRBS at 155. The Board held, however, that the administrative law judge erred in relying on other statements in *Banks* that are no longer valid precedent. Specifically, the rationale that coverage does not extend to those performing work "typical of support services performed in any production entity," has been discredited. *Ruffin*, 34 BRBS at 155, citing *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981) (masonry work on shipyard facilities sufficient to establish coverage because maintenance and repair of shipyard facilities is essential to the building and repairing of ships), and *White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980) (employee's color coding of pipe for use in ship fabrication is integral to shipbuilding, as it is

the first step taken to physically alter the pipe for use in ship construction); *see also Miller v. Central Dispatch, Inc.*, 673 F.2d 773, 14 BRBS 752 (5th Cir. 1982) (security guard covered); *Arbeeny v. McRoberts Protective Agency*, 642 F.2d 672, 13 BRBS 177 (2d Cir. 1981), *cert. denied*, 454 U.S. 836 (1981) (same); *Jackson v. Atlantic Container Corp.*, 15 BRBS 473, 474 (1983) (Board disavows "support services" rationale). The Board thus remanded the case for reconsideration of the coverage issue consistent with *Schwalb* and *Graziano,* emphasizing that the janitorial nature of the claimant's duties cannot deprive her of coverage if her work was integral to the shipbuilding process. *Ruffin*, 34 BRBS at 155-156.

On remand, the administrative law judge again denied coverage. He first found that claimant did not maintain actual equipment or structures used in shipbuilding, as in *Graziano,* 663 F.2d 340, 14 BRBS 52*, 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 *Price v. Norfolk & Western Ry. Co.*, 618 F.2d 1059 (4th Cir. 1980). The administrative law judge also emphasized that claimant did not clean the machines themselves, but only removed the debris on the ground. He stated there is no evidence that any of claimant's cleaning duties were necessary to maintain the machines or to keep them 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. Decision and Order on Remand at 5. The administrative law judge further discussed this point regarding the evidence in two footnotes:

> Indeed, one could argue that an unlimited accumulation of trash without any removal will eventually bring most businesses to a halt. Hence, a per se rule that all cleaning people at the shipyard are covered is theoretically possible. However, the Court in *Schwalb* did not adopt such a rule but focused on facts indicating the specific manner in which failure to perform the claimant's duties would bring operations to a halt . . . Thus, the only way to determine coverage of people who perform janitorial services is to require claimants to make a somewhat detailed record as to how their function is essential.

Decision on Remand at 5 n.3. The administrative law judge then stated:

> I envision a satisfactory record in the instant case to include testimony of Claimant or a co-worker as to the nature and function of the shop that she cleaned, the amount of trash that accumulated regularly, and the impact on the shop's function from a failure to clean it up or remove it. Although claimant testified that she worked in the machine shop that made parts for ships (Tr. 19) and that the trash contained paper and

> metal shavings (Tr. 24-26), neither she nor foreman George Booker testified as to the amount of trash that accumulated or the impact of a failure to remove it (Tr. 19-42, 44-51).

Id. at n 5. Therefore, the administrative law judge found that claimant's job is not covered under the *Schwalb* holding.

On appeal, claimant contends her job was integral to the shipbuilding and repair process, and that she is covered under Section 2(3) of the Act pursuant to the Supreme Court's holding in *Schwalb.*[1] The Director, Office of Workers' Compensation Programs (the Director), responds that the Section 20(a) presumption applies to the issue of coverage, and that the administrative law judge erred in not applying the presumption. The Director further maintains that claimant's work is covered under the Act even without the benefit of the Section 20(a) presumption. Employer has not responded to this appeal.

The Board recently decided a case with similar facts. In *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, BRBS , BRB No. 01-0538 (March 5, 2002), the Board held that the claimant, who spent four hours every day emptying, from ships' sides, 55-gallon drums filled with the debris of shipbuilding (strips of iron and welding rods as well as trash) was covered under the Act pursuant to *Schwalb*. Although there was no direct evidence that claimant's failure to perform her job would be an impediment to shipbuilding, the Board held that the administrative law judge erred in failing to draw the only rational inference based on the evidence presented, which is that claimant's failure to remove the debris eventually would lead to such a build-up of trash that work on the ships could not continue. *Watkins*, slip op. at 5-6. Accordingly, the Board held claimant was covered under *Schwalb.*

We reverse the administrative law judge's finding that claimant herein was not a covered employee. Initially, we observe that there is no dispute about the facts concerning claimant's job duties in this case. Thus, for the reasons stated in *Watkins*, slip op. at 4, we need not address the scope of the Section 20(a) presumption in this coverage case. We agree,

[1]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).

however, with claimant and the Director that the administrative law judge erred in concluding that the evidence is insufficient to establish that claimant's work was integral to the shipbuilding and repair process. As in *Watkins*, the administrative law judge erred in not drawing the rational inference that claimant's failure to perform her job inevitably would impede the shipbuilding and repair process, despite his recognition that such an inference was possible based on this record. *See* Decision and Order on Remand at 5, n.3, 5. The conclusion that claimant's ongoing clean-up efforts were integral to the shipbuilding and repair process is compelled by the facts in this case and the court's decision in *Schwalb.*

In *Schwalb,* the United States 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 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). 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 the present case, claimant was required to sweep around the machines in the machine shop, pick up metal shavings and debris dropped from the machinery as well as any waste materials left by the machinists, empty 55-gallon drums which contained the waste products, and stock eye safety supplies like eye wash and wipes for goggles. Tr. at 24-25. Claimant also testified that discarded pieces of metal would end up on the floor, and she would have to sweep these up. Significantly, claimant performed her job while the machines were in operation. Tr. at 31-32. Moreover, claimant distinguished her job as an industrial cleaner from that of the "janitors" who cleaned the offices on the second floor of her building and the restrooms. For example, claimant had to wear a hard hat and safety goggles to perform her job and she removed industrial waste whereas office janitors removed primarily paper trash from plastic waste baskets, and dusted and vacuumed. Tr. at 22.

The conclusion mandated by this uncontradicted evidence is that claimant's work was integral to the shipbuilding and repair process. Claimant removed metal shavings and discarded metal and other debris from around the machinery *while the machines were in*

operation. As claimant and the Director contend, if the removal of the debris was not integral to the shipbuilding and repair operation, claimant could have performed her job after hours, when there was less risk of injury from the machinery. Moreover, given the facts of this case, it defies logic and, more importantly, the Supreme Court's decision in *Schwalb*, to require the claimant to demonstrate specifically how quickly the debris accumulates and the effects of claimant's failure to perform her job. In *Schwalb*, the Supreme Court stated that " 'It is irrelevant that an employee's contribution to the loading process is not continuous or that repair or maintenance is not always needed.' " *Watkins*, slip op. at 6, *quoting Schwalb*, 493 U.S. at 47, 23 BRBS at 99(CRT). Consistent with this holding, the Board concluded in *Watkins* "that the trash's impediment to shipbuilding may not be immediate does not compel the conclusion that claimant's work removing shipbuilding debris is not integral to the shipbuilding process." *Watkins*, slip op. at 6. Indeed, this concept is embodied in a case cited by the administrative law judge which pre-dates *Schwalb*. In *Price*, 618 F.2d 1059, the United States Court of Appeals for the Fourth Circuit held covered an employee who was painting a grain elevator used in loading and unloading ships. The court stated, "Although the loading and unloading process would not stop immediately if the support towers were not painted, the failure to paint would eventually lead to severe rusting that would halt the entire process." 618 F.2d at 1062 n. 4. Similarly, in the instant case, although the record does not establish the rate at which the machinery debris accumulated, eventually the shipbuilding process would be impeded by the accumulation of detritus around the machines. Based on the evidence of record, we hold, therefore, that claimant's work constitutes maritime employment as it was integral to the shipbuilding and repair process. *Schwalb*, 493 U.S. at 48, 23 BRBS at 99(CRT); *Watkins*, slip op. at 5-6. The administrative law judge's finding to the contrary is reversed.[2]

[2]Thus, we need not address the Director's alternative contention that the case should be remanded to the administrative law judge for consideration of whether claimant was subject to reassignment on vessels or at drydocks.

Accordingly, the administrative law judge's finding that claimant did not satisfy the status test of Section 2(3) is reversed. The case is remanded to the administrative law judge for resolution of any remaining issues.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge