CHARLES BUCK	)	BRB No. 02-0534
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
GENERAL DYNAMICS CORPORATION/	)	DATE ISSUED: APR 24, 2003
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
	)	
JAMES RONDEAU	)	BRB No. 02-0535
	)	
Claimant-Petitioner	)	
	)	
5.	)	
	)	
GENERAL DYNAMICS CORPORATION/	)	
ELECTRIC BOAT CORPORATION	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeals of the Decisions and Orders Denying Claims of Daniel F. Sutton and David W. Di Nardi, Administrative Law Judges, United States Department of Labor.

Stephen C. Embry and Melissa M. Olson (Embry & Neusner), Groton, Connecticut, for claimants.

Edward W. Murphy (Morrison, Mahoney & Miller, LLP), Boston, Massachusetts, for self-insured employer.

Before: McGRANERY, HALL and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant Buck appeals the Decision and Order Denying Claim (2002-LHC-00047, 00523) of Administrative Law Judge Daniel F. Sutton and Claimant Rondeau appeals the Decision and Order Denying Claim (2002-LHC-00673) of Administrative Law Judge David W. Di Nardi rendered on claims filed pursuant to the Longshore and Harbor Workers= Compensation Act, 33 U.S.C. '901 *et seq.* (the Act). We must affirm the administrative law judges= findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. '921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). These cases were consolidated for oral argument before the Board, which was held on February 25, 2003, in Boston, Massachusetts. The cases are now consolidated for decision. 20 C.F.R. '802.104(a).

Claimants Buck and Rondeau worked for National Employers Company, which was employer=s claims adjuster for its workers= compensation claims. In 2000, employer set up its own workers= compensation unit and claimants were hired as adjusters. Thereafter, both claimants alleged they sustained injuries while in employer=s employ. Claimant Buck filed two claims, the first alleging that his diabetes was aggravated by the stress of his employment. He also alleged that he sustained neck, shoulder, hand, and arm injuries due to repetitive trauma. Claimant Rondeau alleged that he sustained a back injury in the course of his employment.

Employer filed motions for summary decision on the grounds that claimants met neither the status test of Section 2(3), 33 U.S.C. '902(3), nor the situs test of Section 3(a), 33 U.S.C. '903(a). Employer contended that claimants= work was not integral to the construction, repair, loading, or unloading of vessels, and that claimants= alleged injuries did not occur on a covered situs. In support of its motions, employer submitted portions of claimants= depositions, as well as affidavits of the director of employer=s workers= compensation department. Claimants opposed employer=s motions, to which employer filed reply briefs.

Judge Sutton granted employer=s motion for summary decision in *Buck*. He found that claimant=s work was not integral to the shipbuilding and repair process, pursuant to *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). He stated he could not infer from the facts that Claimant Buck=s failure to perform his job duties would impede the shipbuilding and repair process, as in *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002) (Board held, pursuant to *Schwalb,* that the only permissible inference on facts presented is that the claimant=s failure to perform her cleaning duties would eventually impede the shipbuilding process). In *Rondeau*, Judge Di Nardi reached the same conclusion and granted employer=s motion for summary decision. Neither administrative law judge addressed the situs issue.

On appeal, claimants contend the administrative law judges erred in granting employer=s motions for summary decision, as there are genuine issues of material fact at issue that require the holding of an evidentiary hearing. Claimants further contend that their work was integral to the shipbuilding and repair process, citing *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001), *aff=g* 34 BRBS 112 (2000), and *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d 1085, 21 BRBS 18(CRT) (11th Cir. 1988), *rev=g* 20 BRBS 104 (1987) (Brown, J., dissenting). Claimants also contend they were injured on a covered situs. Employer responds that the grants of summary decision were appropriate, as claimants did not adequately raise before the administrative law judges any contested factual issues, but argued only application of case law to the facts presented. Employer further avers that the administrative law judges= findings that claimants= work was not integral to the shipbuilding and repair process should be affirmed.

Under the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (OALJ Rules),[1] any party may move, with or without supporting affidavits, for summary decision at least twenty days before the hearing. 29 C.F.R. '18.40(a). Any party opposing the motion may serve opposing affidavits or countermove for a summary decision. *Id.* When a motion for summary decision is supported by affidavits, Aa party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.@ 29 C.F.R. '18.40(c). If the pleadings, affidavits, material obtained through discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact, the administrative law judge may enter summary decision for either party. 29 C.F.R. ''18.40(d), 18.41(a).

Section 18.40 of the OALJ Rules is analogous to Rule 56 of the Federal Rules of Civil Procedure. The purpose of the summary judgment procedure under FRCP 56 is to promptly dispose of actions in which there is no genuine issue as to any material fact. *Donahue v. Windsor Locks Board of Fire Commissioners*, 834 F.2d 54

[1]The OALJ Rules apply to this issue, as they are not inconsistent with a rule of special application as provided by statute or regulation. 29 C.F.R. '18.1; *see Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

(2d Cir. 1987). Not only must there be no genuine issue as to the evidentiary facts, but there must also be no controversy regarding inferences to be drawn from them. *Id*. In determining if summary judgment is appropriate, the court must look at the record in the light most favorable to the party opposing the motion, and must draw all inferences in favor of the party opposing the motion. *O=Hara v. Weeks Marine*, 294 F.3d 55, 61 (2d Cir. 2002). To defeat a motion for summary judgment, the party opposing the motion must establish the existence of an issue of fact which is both material and genuine, material in the sense of affecting the outcome of the litigation, and genuine in the sense of there being sufficient evidence to support the alleged factual dispute. *Id.*

We reject claimants= contention that the administrative law judges erred in granting employer=s motions for summary decision. Contrary to claimants= contention, they did not raise before the administrative law judges the existence of Amaterial and genuine@ issues of fact pertaining to the status issue such that the administrative law judges were required to hold evidentiary hearings. In response to employer=s motion in *Buck* on the status issue, claimant responded merely that he disputed Athe assertions made in paragraphs 5, 7, 9 and 11 of employer=s motion.@ Claimant Buck=s Objection to Motion for Summary Decision at 1. In *Rondeau*, claimant responded to employer=s motion by stating only, AIn support of its motion, the employer states that there is no genuine issue of material fact. The claimant disputes this allegation.@ Claimant Rondeau=s Objection to Motion for Summary Decision at 2. These responses are insufficient to raise the existence of a material and genuine issue of fact, as the administrative law judges correctly observed.[2] *See Buck* Decision and Order at 3; *Rondeau* Decision and Order at 2. Pursuant to 29 C.F.R. '18.40(c), the party opposing a motion for summary decision which is supported by affidavits, as here, cannot defeat the motion merely by denying the assertions in the motion. Claimants, however, did just that, and thus we hold that the administrative law judges did not err in not holding evidentiary hearings in these cases. *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1

[2]2The administrative law judges stated that claimants raised issues of fact with regard to the situs issue. *Buck* Decision and Order at 5; *Rondeau* Decision and Order at 7. Contrary to claimants= contention at oral argument, this did not prevent the administrative law judges from granting employer=s motion for summary decision on the status issue.

(1990). That claimants raised legal issues in their objections to employer=s motions is not sufficient to establish the existence of material issues of fact.

Turning to claimants= contentions that employer was not entitled to summary decision as a matter of law, claimants argue that the administrative law judges erred in concluding that their work was not integral to the shipbuilding and repair process. Section 2(3) of the Act states:

> The term Aemployee@ 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).[3] In *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989), the Supreme Court stressed that coverage Ais not limited to employees who are denominated >longshoremen= or who physically handle the cargo,@ 493 U.S. at 47, 23 BRBS at 99(CRT), and the Court held that Ait 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 [or building or repairing] a vessel.@ 493 U.S. at 45, 23 BRBS at 98(CRT). The relevant facts concerning claimants= job duties, as alleged by employer and accepted by the administrative law judges are: (1) the only relationship between claimants= duties and the shipbuilding process was to administer workers= compensation claims for all Electric Boat employees; and (2) the responsibilities of a workers= compensation adjuster at Electric Boat include adjusting workers= compensation claims, using a new computer system, setting up payment schedules, organizing files, and reporting to supervisors. Further, the motions for summary decision averred that Claimant Buck did not enter the shipyard to fulfill his job duties, and that Claimant Rondeau entered the shipyard four times to interview supervisors in connection with weekly safety meetings with department and

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[3]3One of the facts alleged in employer=s motions for summary decision was that claimants were employed exclusively in an office, and employer thus averred that claimants are excluded from coverage pursuant to Section 2(3)(A), 33 U.S.C. '902(3)(A), which excludes Aindividuals employed exclusively to perform office clerical, secretarial, security, or data processing work.@ In response to claimants= appeals and at oral argument, employer stated that the administrative law judges found claimants excluded from coverage under Section 2(3)(A). Contrary to employer=s suggestion, the administrative law judges did not address this exclusion, and thus we need not address this issue in this decision.

yard supervisors and superintendents. Claimants contend that their responsibilities resulted in injured employees= being returned to the work force as soon as possible, and thus that their work was integral to the shipbuilding process.

There are several decisions of circuit courts of appeals that are relevant to the cases before us. In *Sanders v. Alabama Dry Dock & Shipbuilding Co.*, 841 F.2d 1085, 21 BRBS 18(CRT) (11th Cir. 1988), *rev=g* 20 BRBS 104 (1987) (Brown, J., dissenting), the United States Court of Appeals for the Eleventh Circuit addressed the Board=s holding that a Alabor relations assistant@ was not covered under Section 2(3). Among the claimant=s job duties were to advise foremen of contractual provisions, and to investigate, mediate and process grievances of union personnel. These duties required the claimant to be Aout and about@ in the shipyard. In its decision, which was decided before *Schwalb*, the Eleventh Circuit looked to whether the claimant=s Ajob skills directly related to furthering the shipyard concerns of a covered employer@ or had Aa realistically significant relationship to traditional maritime activity involving navigation and commerce on navigable waters.@ *Sanders*, 841 F.2d at 1088, 21 BRBS at 21(CRT). In applying this test, the court rejected the contention that the claimant=s job was typical of support services generally, and therefore was not Auniquely maritime.@ The court concluded that the claimant was a covered employee, relying on the administrative law judge=s findings that the labor relations department kept the shipyard running without interruption by labor disputes or worker misconduct. *Id.* The court therefore reversed the Board=s holding that the status element was not met.[4] *See also Mackay v. Bay City Marine, Inc.*, 23 BRBS 332 (1990) (general manager of shipyard is a covered employee).

More recently, in *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001), *aff=g* 34 BRBS 112 (2000), the Board and the United States Court of Appeals for the Second Circuit addressed the coverage issue for a union shop steward. In *Marinelli*, the administrative law judge found that the claimant facilitated the day-to-day loading and unloading process by removing interpersonal obstacles that might obstruct such operations. The administrative law

[4]4Subsequently, the Eleventh Circuit observed that the Asignificant relationship@ test for coverage used in *Sanders* was rejected by the Supreme Court in *Schwalb*. *Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 618 n.5, 23 BRBS 101, 107 n.5 (CRT) (11th Cir. 1990).

judge found that the claimant Asided@ with employer at times, and not only with the employees, and also directed employees to return to work when stoppages were threatened. The administrative law judge found that, pursuant to *Schwalb*, claimant=s job was integral to employer=s stevedoring business, and thus that he was a covered employee.

On appeal, the Board affirmed. The Board discussed the similarities between the case and *Sanders*, and noted that although the legal test used by the court in *Sanders* was problematic in light of *Schwalb, Sanders* supported the administrative law judge=s finding of coverage pursuant to the *Schwalb* standard which the administrative law judge had properly applied. *Marinelli*, 34 BRBS at 116. On appeal to the Second Circuit, the court declined to address *Sanders*, *see* 248 F.3d at 60 n.5, 35 BRBS at 45 n.5(CRT), but affirmed the administrative law judge=s finding of coverage as supported by substantial evidence. The court=s analysis consisted of rejecting the explicit contentions raised by the employer. First, the employer contended that claimant was not covered because non-union shops perform better than union shops. The court held that the inquiry was whether claimant was integral to this employer=s business of loading and unloading, and not whether his duties were essential to stevedoring operations in general. Second, the employer contended that ships were loaded and unloaded even when claimant was not present. This contention was easily rejected pursuant to *Schwalb*, as the Supreme Court stated therein that, A>It is irrelevant that an employee=s contribution to the loading process is not continuous or that repair or maintenance is not always needed.=@ *Marinelli*, 248 F.3d at 59, 35 BRBS at 44(CRT), quoting *Schwalb,* 493 U.S. at 48, 23 BRBS at 99(CRT). Third, the employer argued that the claimant=s job was the same as that of a Ashop steward in Kansas at a tire plant.@ *Marinelli*, 248 F.3d at 59, 35 BRBS at 44-45(CRT). The Second Circuit responded that the *Schwalb* court also stated that A >[i]t makes no difference that the particular kind of repair work . . . might be done by railroad employees wherever railroad cars are unloaded=@ as the work of the employees in question were integral to the ship unloading process. *Marinelli,* 248 F.3d at 60*,* 35 BRBS at 45(CRT), quoting *Schwalb,* 493 U.S. at 48, 23 BRBS at 99(CRT).[5] Thus, the Second Circuit, in

[5]5The administrative law judges in the cases before the Board properly recognized the inapplicability of the Asupport services@ doctrine, which had held that those employees whose work was typical of that in any industry were not covered under the Act. This rationale was rejected by many circuit courts of appeals prior to *Schwalb*, *see, e.g., Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981); *Arbeeny v. McRoberts Protective Agency*, 642 F.2d 672, 13 BRBS 177 (2d Cir. 1981), *cert. denied*, 454 U.S. 836 (1981); *White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980), and was

Marinelli, rejected the challenge to the finding of coverage and affirmed the administrative law judge=s finding that the claimant was a covered employee.

Two other circuit court opinions are also instructive on the scope of the Supreme Court=s holding in *Schwalb*. In *Coloma v. Chevron Shipping Co.*, 21 BRBS 200 (1988), *aff=d sub nom. Coloma v. Director, OWCP*, 897 F.2d 394, 23 BRBS 136(CRT) (9th Cir. 1990), *cert. denied*, 498 U.S. 818 (1990), the Board affirmed the administrative law judge=s finding that a messman/cook at the Richmond Longwharf was not covered under Section 2(3) as his duties were not inherently maritime and did not involve the loading and unloading process or the repairing or building of vessels. The Board relied on the Supreme Court=s decision in *Herb=s Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985),[6] for its holding, as *Schwalb* had not yet been decided. On appeal to the United States Court of Appeals for the Ninth Circuit, the court affirmed, holding that both *Herb=s*

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abandoned by the Board in *Jackson v. Atlantic Container Corp*., 15 BRBS 473 (1983). Thus, the administrative law judges properly rejected employer=s contention that the claimants herein were not covered because many large businesses have their own workers= compensation departments. *See Buck* Decision and Order at 5; *Rondeau* Decision and Order at 7.

[6]In *Herb=s Welding*, the Supreme Court stated that the phrase Amaritime employment@ cannot be read so as Ato eliminate any requirement of connection with the loading or construction of ships,@ as it Ais an occupational test focusing on loading and unloading. . . .@ 470 U.S. at 423-424, 17 BRBS at 82(CRT), citing *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979).

Welding and *Schwalb* require that the employee=s activities have an essential nexus with loading and unloading that was absent in the case before it. The absence of this nexus was demonstrated by the fact that when the ASeagull Inn@ closed, the longshoring activities at the port continued uninterrupted. Similarly, in *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112(CRT) (3d Cir. 1992), *rev=g* 21 BRBS 187 (1988), the United States Court of Appeals for the Third Circuit held that a courtesy van driver was not covered under Section 2(3). Applying *Schwalb, Herb=s Welding* and *Coloma*, the court stated, ARock=s occupation is similar in function and in importance to Coloma=s. Both workers performed helpful services for visitors on their employer=s property, but neither was indispensable to the loading process itself.@ *Rock*, 953 F.2d at 67, 25 BRBS at 121(CRT).[7] The claimant=s job had no link with the loading process. If the shipyard had discontinued the claimant=s job, the court observed that the loading process would be completely unaffected.

We affirm the administrative law judges= findings that claimants are not covered by the Act. The administrative law judges rationally found that claimants= jobs were not integral to shipbuilding, in the sense that their failure to perform their jobs would impede the shipbuilding process. Claimants= attempt to establish that they interacted with employees and supervisors to the extent the claimants did in *Sanders* and *Marinelli* is not borne out by the portion of their depositions attached to employer=s motions for summary decision. Claimant Buck testified only that he Ahelped people get back to work,@ and thus aided the shipbuilding process in this manner. Buck Dep. at 96-97. Claimant Rondeau tried to connect his work to the shipbuilding process with testimony that he often spoke with injured employees, supervisors and attorneys in his office and on the telephone. Rondeau Dep. at 40-41. Based on this evidence, the administrative law judges rationally concluded that they could not infer that claimants= failure to perform their jobs would eventually lead to work stoppages or otherwise interrupt the shipbuilding and repair activities at employer=s shipyard. *Cf. Watkins*, 36 BRBS 21; *see also Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2001); *Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 52 (2001) (claimants= failure to perform their janitorial duties would eventually impede the shipbuilding process, pursuant to *Schwalb*). As the Board stated in *Neely v. Pittson Stevedoring Corp.*, 12 BRBS 859 (1980) (Miller, J., dissenting on other grounds):

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[7]The court noted that the Board=s decision was issued before *Schwalb* was issued, and that the Board had relied on the Eleventh Circuit=s decision in *Sanders.* *See* n. 4, *supra.*

> Claimant=s work as a claims examiner did not assist, even indirectly, in the movement of cargo. As the administrative law judge noted, elimination of claimant=s job would have no effect on cargo movement. His duties are distinguishable from those of employees who have been held covered as longshoremen because their duties are an integral part or necessary ingredient of longshoring operations, even though they never actually load or unload cargo. *See Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977); *Cabezas v. Oceanic Container Service, Inc.*, 11 BRBS 279, BRB Nos. 78-592 *et al.* (1979) (container and chassis repair mechanics covered.).

Neely, 12 BRBS at 861.[8] Rather, like the claimants in *Coloma* and *Rock*, the shipbuilding process would continue unimpeded if claimants did not perform their jobs. *Id.* Thus, as the administrative law judges= conclusions that claimants= work was not integral to the shipbuilding process as required by *Schwalb* are rational, supported by substantial evidence, and in accordance with law, we affirm the findings that claimants did not satisfy the status test of Section 2(3) of the Act.[9]

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[8]We note that two other bases in the *Neely* decision for finding a lack of status have been overturned. The Board held that coverage was not conferred by the fact that claimant sustained his injury on actual navigable waters. This holding was overturned by *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). In addition, the Board relied on the Asupport services@ rationale.@ *See* n. 5, *supra.* Nonetheless, because the Board also relied on a rationale similar to that espoused in *Schwalb*, the case remains valid precedent.

[9]Both claimants are pursuing claims under the Connecticut workers= compensation scheme. Given our holding herein, we need not address claimants= contentions regarding the situs issue.

Accordingly, the administrative law judges= Decisions and Orders Denying Claims are affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge