BRB No. 03-0261

RYAN SOUTHCOMBE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
A MARK, B MARK, C MARK CORPORATION	)	DATE ISSUED: Dec. 12, 2003
	)	
and	)	
	)	
TRAVELERS INSURANCE	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

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

Jonathan H. Walker (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for claimant.

Roger S. Mackey, Chantilly, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order and the Order Denying Motion for Reconsideration (2002-LHC-711) of Administrative Law Judge Daniel A. Sarno, Jr., denying benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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).

Claimant was employed by employer as an ironworker. Employer was a subcontractor hired by Ocean Marine. Ocean Marine was constructing a marina on the Elizabeth River, which would include an 80-foot high "megayacht" service facility. Employer subcontracted to supply labor and equipment necessary to install the steel, siding, roof deck and other components for the yacht service center and the yacht storage buildings. At the time of claimant's injury, he was assisting in the unloading of steel beams from a flat-bed trailer. The beams were intended for use as the frame of the yacht service facility. As claimant was guiding the forks of forklifts, a steel beam slid off the forklift, pinning claimant beneath the beam. Claimant was severely injured, sustaining a crush injury to his pelvis, a left lower extremity injury that necessitated a below-the-knee amputation, and a fracture of his lumbar spine that also required surgery. It is undisputed that claimant has been totally disabled since August 6, 2001.

Employer conceded that claimant was injured on a covered situs pursuant to Section 3(a) of the Act, 33 U.S.C. §903(a), but contested the issue of whether claimant was engaged in maritime employment pursuant to Section 2(3) of the Act, 33 U.S.C. §902(3).[1] The administrative law judge found that the status test was not met, relying on *Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT) (4th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995). The administrative law judge found that claimant was on the premises to assist in the construction of the building and that he therefore had only a temporary connection to the site. The administrative law judge found that claimant was not a harbor-worker, as he was not constructing an inherently maritime facility such as a dock or pier. The administrative law judge also stated that there was no evidence regarding the duration of claimant's job on employer's premises or whether he would have been involved in the construction of the building itself.

Claimant filed a motion for reconsideration, stating that he was unable to testify regarding his job duties because he was in the hospital. The administrative law judge stated that claimant's counsel was well aware of the hearing date months in advance, and made no effort to depose claimant or otherwise move for a continuance due to claimant's condition. The administrative law judge, therefore, found no basis to allow claimant to testify after the fact. Furthermore, the administrative law judge assumed, *arguendo*, that claimant would have been involved in the actual construction of the megayacht repair building pursuant to counsel's proffer regarding claimant's likely testimony, and found, pursuant to *Prevetire*, that this work would also be insufficient to confer coverage. Therefore, the administrative law judge denied claimant's motion for reconsideration.

[1]Employer accepted claimant's state claim for compensation, and has paid claimant's medical expenses.

Claimant appeals, and employer responds, urging affirmance of the finding that the status element is not met.

Claimant first contends that the presumption at Section 20(a) of the Act, 33 U.S.C. §920(a), should apply to presume that claimant was involved in the construction of a maritime facility. Claimant thus contends that he should be considered a harbor-worker. Claimant further avers that he should be covered on the basis that he was constructing a ship repair facility. Claimant therefore contends that *Prevetire* is distinguishable, as that case involved the construction of a power plant, which is not an inherently maritime structure.

Section 2(3) of the Act 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, ….

33 U.S.C. §902(3).[2] The Section 20(a) presumption does not apply to the legal interpretation of the coverage provisions. *See Fleischmann v. Director OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir.), *cert. denied*, 525 U.S. 981 (1998); *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 6 BRBS 229 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 4 BRBS 156 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Stockman v. John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 4 BRBS 304 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002). Claimant seeks to apply Section 20(a) to presume that the megayacht facility is a maritime facility, although he also states that this fact is not in dispute. The administrative law judge found that the facility eventually would house a maritime enterprise, Decision and Order at 7, and he assumed, *arguendo*, in his order on reconsideration that claimant would have continued to work on the construction project. Order at 2-3. The seminal issue here is whether claimant's work on this project is "maritime employment" which is a legal issue to which the Section 20(a) presumption does not attach. *Watkins*, 36 BRBS 21. Therefore, we reject claimant's first contention.

[2]The Act excludes "individuals employed by a marina" unless such individuals are engaged in the "construction, replacement, or expansion of such marina (except for routine maintenance)." 33 U.S.C. §902(3)(C). Employer does not contend this exclusion is applicable in this case. *See generally Keating v. City of Titusville*, 31 BRBS 187 (1997).

We next address claimant's contention that the administrative law judge erred in applying *Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT) to deny coverage in this case. Claimant contends that, contrary to the administrative law judge's finding, he is a "harbor-worker" because he was constructing a yacht repair facility, which he argues is "inherently maritime." With regard to the definition of "harbor-worker," the Board has defined it as one directly involved in the construction, repair, alteration or maintenance of harbor facilities, including docks, piers, wharves, and adjacent areas used in loading, unloading, repairing or building vessels. *Stewart v. Brown & Root, Inc.*, 7 BRBS 356 (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) (in affirming, Fourth Circuit did not specifically address term "harbor-worker," but noted that the Board's definition was "apt" as claimants were constructing dry docks); *see Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989). In *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 756, 14 BRBS 373, 377 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982), the Fifth Circuit stated that a claimant who erected scaffolding as part of a pier repair project performed the work of a "typical harbor-worker." More recently, the Second Circuit deferred to the Director's position that the term "harbor-worker" includes marine construction workers, so long as the project has a connection to ships. *Fleischmann*, 137 F.3d 131, 32 BRBS 28(CRT) (pile driver/laborer who worked in construction of bulkheads, piers, and docks is covered as a harbor-worker); *cf. Fusco v. Perini North River Associates*, 622 F.2d 1111, 12 BRBS 328 (2d Cir. 1980), *cert. denied*, 449 U.S. 1131 (1981) (construction of sewage treatment plant in river does not have connection to ships; therefore claimant not a harbor-worker).

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has drawn a distinction between workers engaged to repair or replace existing harbor or shipyard facilities and those engaged in the construction of new land-based facilities. 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), the Fourth Circuit held that a pipefitter employed to construct a power plant on the premises of the Norfolk Naval Shipyard was not a covered employee. The court declined to expand coverage to include this worker merely because the power plant being built would eventually provide steam and electricity to shipbuilding and ship repair operations. *Cf. Kerby v. Southeastern Public Service Authority*, 31 BRBS 6 (1997), *aff'd mem.*, 135 F.3d 770 (4th Cir.), *cert. denied*, 525 U.S. 816 (1998) (holding covered a maintenance worker under the same power plant at issue in *Prevetire*). The *Prevetire* court cited *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78(CRT) (1985), for the proposition that the Act was not intended to cover everyone who "breathes salt air," and it opined that Prevetire's case was significantly weaker than was Gray's, who was not covered despite working on a construction project on a fixed offshore oil rig. The court concluded that if Prevetire were covered, the status requirement essentially would be read out of the Act. *Prevetire*, 27 F.3d at 989-990, 28 BRBS at 62-63(CRT); *see also McGray Constr. Co. v. Director,*

OWCP [Hurston], 181 F.3d 1008, 33 BRBS 81(CRT) (9th Cir. 1999) (pile driver on an oil-production pier not a covered employee because pier has no connection to ships).

In *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994), *aff'g Simonds v. Pittman Mechanical Contractors, Inc*., 27 BRBS 120 (1993), the Fourth Circuit addressed a case in which the claimant contracted to construct pipelines for a pier project. The project involved removing the old pipelines and replacing them with new pipelines. The pipelines were used to load fuel, steam, and water onto the vessels when they were docked at the pier. The court distinguished *Prevetire* on the ground that the claimant in *Pittman* was actually involved in the installation and repair of equipment necessary for the loading process. *Id.*, 35 F.3d at 126, 28 BRBS at 94(CRT); *see Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). The fuel, steam and water were "cargo" loaded onto vessels, and the piers were not useable when the pipelines were not functioning. *Id.; see also Hawkins v. Reid Associates*, 26 BRBS 8 (1992) (claimant covered as a harbor-worker for injury occurring during installation of utility lines at submarine repair facility).

The Board followed *Prevetire* in *Moon v. Tidewater Constr. Co*., 35 BRBS 151 (2001). In *Moon*, the claimant was engaged as a carpenter on a project to build a "controlled industrial facility" at the Norfolk Naval Base; the warehouse would be used to store spent nuclear fuel from submarines and ships. Claimant was on the site only for the duration of the project. He testified that once the carpenter trade completed its work on the warehouse, he would have been reassigned to another project. Claimant's supervisor 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 or maintaining the building or in storing materials.

The Board affirmed the administrative law judge's finding, based on *Prevetire*, that claimant Moon was not a covered employee. The Board distinguished between workers engaged to construct a shipyard building and those engaged to maintain an already functioning shipyard building. *Moon*, 35 BRBS at 153-154. The latter employees are covered under the Act. *See Price v. Norfolk & Western Ry. Co.*, 618 F.2d 1059 (4th Cir. 1980); *Graziano v. General Dynamics Corp*., 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981); *Kerby*, 31 BRBS 6; *see also Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT). Claimant Moon, however, was not constructing a pier or dry dock or other "uniquely maritime"' structure, and the warehouse's use as a maritime storage facility was a future, not a current, use, as was the case with the power plant which was not operational at the time of claimant Prevetire's injury. Moreover, the employer in *Moon* was a contractor who was hired by the Navy to build a warehouse and the claimant was on the premises temporarily, for the sole purpose of constructing this warehouse. Pursuant to *Prevetire*, therefore, the Board held that claimant Moon was not a covered employee.

In this case, the administrative law judge found that claimant was on the premises solely to construct a building, and not to maintain or repair shipyard facilities. Decision and Order at 6-7. The administrative law judge found that, pursuant to *Prevetire*, a finding of coverage cannot rest on the future use of the facility. Order Denying Motion for Reconsideration at 2-3. The administrative law judge concluded that claimant's work was not integral to the loading, unloading, repair or building of vessels and that claimant therefore is not a covered employee.

We affirm the administrative law judge's finding that claimant was not engaged in maritime employment pursuant to Section 2(3) of the Act. As in *Moon*, claimant was engaged to construct a building that eventually would have a maritime purpose. This future use, however, is insufficient to confer coverage in this case. *Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT); *Moon*, 35 BRBS 151. Unlike the claimants in *Joyner*, 607 F.2d 1087, 11 BRBS 86, claimant herein was not engaged in the construction of a pier or dry dock or other "uniquely maritime" structure such that coverage could be conferred on this basis. *Moon*, 35 BRBS at 154. Moreover, claimant's relationship to this facility was merely temporary as he was on the premises solely under a subcontract to build the facility. *Id.* Assuming, *arguendo*, that claimant would have remained on the site for the duration of the construction project, the administrative law judge correctly found that this fact would not confer coverage, as there is no evidence that claimant would remain to maintain the megayacht facility upon its completion. *See Prevetire*, 27 F.3d at 989, 28 BRBS at 61(CRT); *Kerby*, 31 BRBS 6. Claimant has not identified any errors in the administrative law judge's reasoning or application of law in this case. As the administrative law judge's finding that claimant was not engaged in maritime employment is rational, supported by substantial evidence, and in accordance with law, it is affirmed. *Herb's Welding*, 470 U.S. 414, 17 BRBS 78(CRT); *Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT); *Moon*, 35 BRBS 151.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge