BRB No. 04-0732

MICHAEL S. TAYLOR	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: 06/16/2005
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna Klein Camden L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason, Mason, Walker & Hedrick, P.C.), Newport News, Virginia, for self-insured employer.

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

SMITH, Administrative Appeals Judge:

Claimant appeals the Decision and Order (2003-LHC-00292) of Administrative Law Judge Richard K. Malamphy 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).

Claimant was hired as a welder at employer's shipyard. The majority of the work at the shipyard is performed pursuant to contracts with the United States Navy. These contracts require that the workers be certified in their respective fields. Therefore, employer runs a training and certification school for all employees. Claimant was

assigned to the training program because he had no formal training as a welder.[1] He was in this phase of the program when he injured his back. Claimant was working in a booth in the welding school on June 14, 2002, when he became dehydrated and passed out. He alleges that he hurt his back in the fall. He sought treatment with Dr. Skidmore, a neurological surgeon, who recommended that claimant undergo surgery to stabilize his lower back. Cl. Ex. 2 at 11. Claimant has not returned to work since the accident.

In his decision, the administrative law judge found that the parties agree the injury took place on a covered situs. *See* 33 U.S.C. §903(a). However, the administrative law judge found that claimant was not a covered employee under Section 2(3) of the Act, 33 U.S.C. §902(3), and thus denied benefits.

On appeal, claimant contends that the administrative law judge erred in finding that he was not a covered employee, as participation in the welding school was an integral and essential part of employer's shipbuilding process. Employer responds, urging affirmance of the administrative law judge's decision as claimant had not yet begun work as a welder and thus is not covered under the Act.

Section 2(3) of the Act states 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). In *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989), the Supreme Court 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 [or building or repairing] a vessel." 493 U.S. at 45, 23 BRBS at 98(CRT).

In the instant case, the administrative law judge found:

> It is apparent that if the claimant had successfully completed another eight to ten weeks of welding school he could have gone into the production of ships as a "certified" welder. However, during his short period of employment he was never actively involved in building, repairing, or breaking a ship, or engaged in loading or unloading ships.

[1] New hires who are experienced welders must undergo the same certification process as employees who have no experience as welders. In addition, some current employees undergo training to achieve certification in different types of welding or for more advanced levels of work.

Decision and Order at 4. Thus, the administrative law judge concluded that claimant was not a covered employee under the Act.

Employer's representative, Gary Roy, testified that he is responsible for overseeing the welding school at the shipyard. He stated that a "new hire" is brought to the training department after his initial orientation. In addition, he stated that the course generally takes 10 to 12 weeks to complete and that around the fifth or sixth week, the trainees begin the certification training. The course is completed when the trainee is certified in three different areas of welding (stick welding, semiautomatic MIG and flux core welding). Tr. at 13. He noted that 30 percent of the trainees do not pass the course and thus do not become welders at the shipyard. *Id.* at 15. They may be terminated because of poor attendance, lack of skills and abilities, or any number of other reasons. *Id*. At the time of his injury, claimant had been attending the training program for approximately one and a half weeks and had not begun the certification process. *Id.* at 17.

On the facts of this case, we affirm the administrative law judge's finding that claimant's duties as a welder trainee are not covered under the Act as they were not essential or integral to shipbuilding. *Schwalb,* 493 U.S. at 45, 23 BRBS at 98(CRT). The projects worked on by the trainees do not leave the welding school and are not used in the construction or repair of ships. Tr. at 19. The fact that employer's workers ultimately must be certified to work in the shipyard is insufficient to establish that claimant's initial training was integral to the shipbuilding process. Rather, as a trainee, claimant was in a probationary period, during which he performed no actual welding or other work on vessels. As he could be terminated from this training program for a variety of reasons, there was no guarantee that he would ever have been engaged in actual shipbuilding or repair. Since actually performing welding work on a ship is wholly dependent upon successful completion of the training and the certification schools, claimant had not satisfied the prerequisites for employment as a welder and merely had the potential to perform such work in the future. Thus, while our dissenting colleague is correct that the test under Section 2(3) is occupational, *see Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977), in this case, claimant was not yet a welder or shipbuilder and thus does not meet an occupational test. We therefore hold that as a trainee, who has never worked as a welder, claimant was not engaged in work integral to shipbuilding or ship repair. As a result, we affirm the administrative law judge's finding that claimant's duties as a welder trainee were not covered by the Act.[2] *See generally*

[2] The Board has previously addressed the coverage of trainees in employer's welding program, with a majority holding the claimant covered. *Hemminger v. Newport News Shipbuilding & Dry Dock Co.,* 13 BRBS 1099 (1981) (Miller, J., concurring)(Smith, CJ., dissenting). In the more than 20 years since this decision was issued, a number of appellate decisions have made clear that not every employee on a

Buck v. General Dynamics Corp./Electric Boat Div., 37 BRBS 53 (2003)(due to lack of persuasive evidence that claimants' failure to perform their jobs would impede the shipbuilding process, the Board affirmed the finding that the work was not integral to shipbuilding); *Gonzalez v. Merchants Building Maintenance*, 33 BRBS 146 (1999); *cf. Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002)(Board reversed the finding that claimant was not a covered employee as her failure to perform her job as a janitor would eventually impede the shipbuilding process); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002)(same). *See also Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112(CRT) (3d Cir. 1992); *Coloma v. Director, OWCP*, 897 F.2d 394, 23 BRBS 136(CRT) (9th Cir.), *cert. denied*, 498 U.S. 818 (1990).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

I concur:

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REGINA C. McGRANERY
Administrative Appeals Judge

HALL, Administrative Appeals Judge, dissenting:

I respectfully dissent from the majority's determination to affirm the administrative law judge's finding that claimant is not a covered employee under the Act. As the majority notes, the Board previously considered a case in which the claimant was hired as a "tack welder trainee" for employer. *Hemminger v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 1099 (1981) (Miller, J., concurring) (Smith, CJ., dissenting). In *Hemminger*, the majority stated that claimant's occupation should be the focus of the

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covered situs like a shipyard is covered, *see Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57(CRT) (4th Cir. 1994), *cert. denied*, 514 U.S. 1063 (1995); *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112(CRT) (3d Cir. 1992), and that work must have an actual impact upon longshoring or shipbuilding in order to be "essential" or "integral" to such maritime work. *See Schwalb*, 493 U.S. at 45, 23 BRBS at 98(CRT); *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002). Based on this intervening case law, we conclude that *Hemminger* is not persuasive authority.

status inquiry, including the period of training for that occupation. Indeed, the Supreme Court has stated that the status inquiry is an "occupational test." *See P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979). In this case, claimant was hired by the shipyard as a welding trainee, which is a paid entry level position for a shipyard welder, a covered occupation under the Act. As the Board recognized in *Hemminger*, a claimant need not be directly involved in a production activity at the time of his injury, as the "moment of injury" test has been rejected in favor of an occupational focus. 13 BRBS at 1101, citing *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). As training is a necessity in order for employers to acquire a capable and productive work force, the Board properly concluded that claimant was a covered employee as her training was in furtherance of the employer's shipyard business. *See Hemminger*, 13 BRBS at 1104; *see also Sharp v. Pacific Gas & Electric Co.*, 2 BRBS 381 (1975)(Board summarily affirmed administrative law judge's finding that a trainee scuba diver was engaged in maritime employment).

Neither the administrative law judge nor the parties cited *Hemminger* or addressed the points stated in that opinion, and I see no basis in the cases decided in the intervening years to depart from its holding. As Judge Kalaris stated in *Hemminger*, training is a recognized fact of any employment, as employees entering new employment all receive training to some degree whether in a new skill, for advancement in already acquired skills, or in the particular employer's work procedures, operations and safety practices. As such, a training period must be considered to be simply an aspect of an occupation, and where that occupation is covered under the Act, the training period is also covered.

Moreover, such training is an "integral" or "essential" aspect of shipbuilding. Employer is required to hire certified welders, and it therefore follows that a training program which produces such welders is necessary to their operations. The lack of trained and certified employees would eventually lead to a disruption of employer's shipbuilding and repair operation. *See Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 47, 23 BRBS 96, 99(CRT); *Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002). As the Supreme Court held in *Schwalb*, work which would eventually impede the loading or shipbuilding process if not performed is covered. Accordingly, as a lack of certified welders would clearly impede the work of the shipyard, I believe claimant is covered under the Act under the test stated by the Supreme Court in *Schwalb*.

Employers in general do not hire or pay non-essential workers. Thus, claimant, who was hired by employer as part of its shipyard operations, performed an essential function as he trained as a welder. As such he is an employee who is integral to the shipbuilding process. *Ingalls Shipbuilding Corp., Div. of Litton Systems, Inc. v. Morgan*, 551 F.2d 61, 5 BRBS 754 (5th Cir. 1977), *cert. denied*, 434 U.S. 966 (1977). Therefore, I

would reverse the administrative law judge's finding that claimant is not a covered employee and remand the case for consideration on the merits.

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BETTY JEAN HALL
Administrative Appeals Judge