BRB No. 04-0740

FRANCES BOYD (Widow of WILBUR BOYD) Claimant-Petitioner v. HODGES & BRYANT Employer-Respondent and NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY Self-Insured Employer-Respondent	)	DATE ISSUED: 06/16/2005 DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Appeals Judge, United States Department of Labor.

Jennifer West Vincent (Patten, Wornom, Hatten & Diamonstein, L.C.), Newport News, Virginia, for claimant.

Lawrence P. Postol (Seyfarth Shaw LLP), Washington, D.C., for Newport News Shipbuilding and Dry Dock Company.

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

PER CURIAM:

Claimant appeals the Decision and Order (2001-LHC-2780) 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 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).

Decedent died on February 3, 1999, from squamous cell lung cancer. The death certificate states that chronic obstructive pulmonary disease and asbestosis were other significant factors contributing to the death. CX 9. Prior to his death, decedent filed a claim for disability benefits under the Act, as he was diagnosed with asbestosis in August 1998, CX 2, and a pathologist opined that asbestosis contributed to decedent's lung cancer, CX 4. Decedent's wife (claimant) filed a claim for death benefits shortly after her husband's death. CX 12.

Decedent worked for Hodges & Bryant (H&B), a plumbing, heating, and air conditioning concern, from 1960 to 1997. CX 5. He alleged that he was exposed to asbestos while on an H&B job at Newport News Shipbuilding (NNS) in the late 1960s.[1] CX 6. Decedent gave a notarized statement on October 26, 1998. He averred that he was exposed to asbestos at NNS while installing steel pipe in Ship Shed #4. He stated that the building was undergoing renovation and that his employment there lasted four months. *Id.*

NNS was joined to the case as a potentially liable general contractor under Section 4(a) of the Act, 33 U.S.C. §904(a). H&B alleged that it did not have longshore coverage on its workers' compensation insurance policy; its carrier, Travelers, refused to enter the case. NNS defended the claim on the ground that claimant failed to establish that decedent was exposed to asbestos at NNS, that decedent's employment at NNS met neither the status nor the situs test for coverage under the Act, and that H&B was an independent contractor and not an uninsured subcontractor of NNS.

The administrative law judge found that claimant did not establish that decedent was exposed to asbestos and therefore did not establish her *prima facie* case. The administrative law judge also found that decedent was not a covered employee under Section 2(3) of the Act, 33 U.S.C. §902(3).[2] The administrative law judge lastly found that H&B did not have longshore coverage, but that NNS is not liable under Section 4(a), because H&B was not a "subcontractor." The administrative law judge therefore denied benefits.

[1] This is the only allegation of asbestos exposure at a potentially covered site.

[2] The administrative law judge stated that therefore he need not address the Act's situs requirement. 33 U.S.C. §903(a).

On appeal, claimant contends that the administrative law judge misapplied Section 23(a) of the Act on the issue of decedent's asbestos exposure and therefore erred in finding claimant did not establish a *prima facie* case. 33 U.S.C. §§920(a), 923. Claimant also contends that the status element is met because decedent was renovating an existing building that was used before and after the renovation for building ship components. Finally, claimant contends that the administrative law judge erred in finding that H&B was not an uninsured subcontractor of NNS. NNS responds, urging affirmance of the administrative law judge's decision in all respects.[3]

We first address the issue of whether the administrative law judge properly found that H&B was not an uninsured subcontractor of NNS, as this issue is dispositive of NNS's liability under the Act. The administrative law judge found that H&B did not have longshore insurance, and no party contests this finding on appeal. Thus, the administrative law judge addressed whether H&B was a "subcontractor" of NNS such that NNS is liable for compensation as the general contractor. The administrative law judge found that NNS was not a general contractor that subcontracted to H&B a portion of a contractual obligation, nor did it contract to H&B a portion of its regular business. In regard to the latter, the administrative law judge found that NNS was in the shipbuilding and repair business, and not in the building renovation business. Therefore, the administrative law judge concluded that NNS is not secondarily liable for any injury decedent may have sustained at its facility.

Section 4(a) of the Act states:

> Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. ***In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of compensation.*** A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

33 U.S.C. §904(a) (emphasis added). The United States Court of Appeals for the District of Columbia Circuit has stated that:

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[3] NNS has filed as supplemental authority the recent decision of the United States Court of Appeals for the Fifth Circuit in *Tarver v. Bo-Mac Contractors, Inc.*, 384 F.3d 180, 38 BRBS 71(CRT) (5th Cir. 2004), *aff'g* 37 BRBS 120 (2003), *cert. denied*, 125 S.Ct. 1696 (2005). We accept this pleading, but, as *Tarver* is a situs case, it has little bearing on the issues before the Board.

> A general employer will be held secondarily liable for workmen's compensation when the injured employee was engaged in work either that is a subcontracted fraction of a larger project or that is normally conducted by the general employer's own employees rather than by independent contractors.

Director, OWCP v. National Van Lines, Inc., 613 F.2d 972, 986, 11 BRBS 298, 316 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980); *see also Thompson v. United States*, 670 F.Supp. 5 (D.D.C. 1985). The United States Court of Appeals for the Fifth Circuit has also discussed liability under this section:

> [S]ection 904(a) premises liability on a finding that the principal is subject to some contractual obligation, which it, in turn, passed in whole or in part to the subcontractor. *** The LHWCA distinguishes between employers who are owners and those who are general contractors working under contractual obligations to others.

Sketoe v. Exxon Co., USA, 188 F.3d 596, 598-599, 33 BRBS 151, 152-154(CRT) (5th Cir. 1999), *cert. denied*, 529 U.S. 1057 (2000). The relevant facts of *National Van Lines* are easily summarized. National Van Lines contracted with various shippers to carry cargo interstate; it then delegated a portion of its contracts to Eureka. The D.C. Circuit held that Eureka employees performed work that would normally be performed by National Van Lines's own employees, and therefore National Van Lines was liable for workers' compensation benefits due to Eureka's failure to carry insurance. *National Van Lines*, 613 F.2d at 987, 11 BRBS at 317. The court rejected National Van Lines's assertion that it was an "owner." The court stated that, "[t]he 'owner' cases are exemplified by the situation in which a property owner contracts with a contractor for services to the property." *Id.* at n. 58.

In *Dailey v. Edwin H. Troth*, 20 BRBS 75 (1986), Starlit Partnership, which purchased, renovated, and resold property for investment purchases, contracted with EHT to perform carpentry work on homes. Claimant Dailey worked for EHT, which did not have insurance. The Board held that Starlit could not be held liable under Section 4(a) because Starlit was not contractually obligated to perform the duties claimant was doing at the time of his injury. *Id.* at 77. Moreover, as Starlit's partners were engaged in investment activity and therefore did not retain any regular workers, the duties performed by claimant were not of the type normally performed by the general employer's own employees. *Id* .at 77-78. Thus, the Board held that neither of the *National Van Lines* tests for general contractor liability was satisfied, that Starlit could not be held liable for benefits, and that EHT is solely liable for the benefits awarded.

Similarly, in *Roach v. M/V Aqua Grace*, 857 F.2d 1575 (11th Cir. 1988), the United States Court of Appeals for the Eleventh Circuit addressed a case in which a diver died in the course of his employment. He was employed by Sea Scrub, which was hired to clean the hull of a vessel. His survivors sued, *inter alia*, the vessel's owner under Section 5(a) of the Act, 33 U.S.C. §905(a), as Sea Scrub did not have longshore insurance.[4] The Eleventh Circuit applied Florida law to define the term "contractor,"[5] and held that the owner of the vessel was under no contractual obligation to repair its vessel. Rather, the vessel owner acted only as any responsible owner would to preserve his property. *Id.* at 1581.

We hold that the administrative law judge properly found that NNS was the owner of Ship Shed #4 and was not under a contractual obligation to renovate the building. There is no evidence of record of a contract requiring NNS to renovate Ship Shed #4, part of which NNS then contracted to H&B. Thus, this is not a "two-contract" situation, as that presented in *National Van Lines. National Van Lines*, 613 F.2d at 987, 11 BRBS at 317. Moreover, the administrative law judge rationally found that there is no evidence that NNS is in the business of renovating buildings or that NNS's own employees usually perform this type of work. Rather, the administrative law judge rationally found that, as in *Dailey*, NNS is the owner of the building who contracted out a job to an independent contractor. *See also Roach*, 857 F.2d 1575. As the administrative law judge's finding that H&B was not a "subcontractor" of NNS is rational, supported by substantial evidence, and in accordance of law, we affirm the administrative law judge's finding that

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[4] Section 5(a) provides that the exclusivity of the Longshore Act is abrogated when the employer did not have insurance coverage, and no other employer can be held liable. In relevant part, Section 5(a) states:

> if an employer fails to secure payment of compensation as required by this chapter, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the chapter, or to maintain an action at law or in admiralty for damages on account of such injury or death. . . . For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

33 U.S.C. §905(a).

[5] Under Florida law, a general contractor is one who has a contractual obligation, a portion of which he sublets to another. *Roach*, 857 F.2d at 1580. This is the same test as that described in *National Van Lines* and *Sketoe.*

NNS cannot be held liable for any benefits due claimant due to H&B's failure to secure longshore coverage.

Because H&B is potentially liable for benefits, *see B.S. Costello, Inc. v. Meagher*, 867 F.2d 722, 22 BRBS 24(CRT) (1st Cir. 1989), we next address claimant's challenge to the administrative law judge's finding that decedent was not engaged in maritime employment at the NNS facility. Section 2(3) of the Act provides:

> 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). The administrative law judge applied the holdings 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) and *Moon v. Tidewater Constr. Co.*, 35 BRBS 151 (2001), to find that decedent's work on Ship Shed #4 was not integral to the shipbuilding process, as it was not in use for any shipbuilding or repair purposes while decedent worked there. On appeal, claimant contends that these cases are inapposite as decedent was renovating an existing shipyard building used to make ship components.

In *Prevetire*, the United States Court of Appeals for the Fourth Circuit,[6] held that a pipefitter who was injured during the construction of a power plant on the Norfolk Naval Base was not a covered employee. The court 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), quoting *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423, 17 BRBS 78, 82(CRT) (1985). The court further noted that claimant's construction duties would not have changed had the power plant been located outside the shipyard's fence. *Id.* Further relying on the Supreme Court's decision in *Herb's Welding*, 470 U.S. 414, 17 BRBS 78(CRT), the Fourth Circuit stated that Prevetire's work was not "an integral or essential part of loading or unloading a vessel." *Prevetire*, 27 F.3d at 989, 28 BRBS at 62(CRT). 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).

[6] This case arises within the jurisdiction of the Fourth Circuit.

The Board followed *Prevetire* in *Moon,* 35 BRBS 151, and *Southcombe v. A Mark, B Mark, C Mark,* 37 BRBS 169 (2003). 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). 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.

Similarly, in *Southcombe,* the claimant was an employee of a subcontractor hired to build a "mega-yacht" facility at a marina under construction on the Elizabeth River. The administrative law judge found that the claimant was not constructing an inherently maritime structure and was on the premises only temporarily. The Board held that claimant was not a "harbor worker," and that, pursuant to *Prevetire*, the future maritime use of the facility was not enough to confer coverage on the claimant whose employment likely would have been only for the duration of the building phase. *Southcombe,* 37 BRBS 169.

In contrast, it is well established that those employees who maintain existing shipyard buildings are covered under the Act. In *Price,* 618 F.2d 1059, the claimant was injured while painting a support tower of a grain elevator used as part of a conveyor system to load and unload grain vessels. The court held that the claimant was a covered employee. "The maintenance and repair of longshoring machinery and equipment is essential to the movement of maritime cargo and, thus, such an employee's duties are included in the broad concept of maritime employment." *Price,* 618 F.2d at 1061. In *Graziano,* 663 F.2d 340, 14 BRBS 52, the First Circuit followed *Price,* and held covered an employee primarily involved in repair of masonry in shipyard buildings, but whose

work in all areas of the shipyard also included digging ditches, breaking up concrete with a jackhammer, laying cement, grouting, removing asbestos from pipes, repairing boilers and manholes, and cleaning acid tanks. The court held that the maintenance of shipyard buildings and equipment is covered employment. *See also Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989); *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 two employees whose work entailed the *maintenance* of the power plant at issue in *Prevetire* were engaged in maritime employment).

We affirm the administrative law judge's finding that decedent was not engaged in maritime employment at Ship Shed #4. The shed was an existing shipyard building that had been used for building ship components. EX 6 at 23. Contrary to claimant's contention, however, we do not view the fact that decedent's work was not a new construction project as dispositive of the coverage issue. Given the nature of the project on which decedent worked, the administrative law judge rationally applied the holding in *Prevetire* to conclude that decedent's work was not "maritime" in nature. At the time of decedent's employment, Ship Shed #4 had been gutted, was undergoing a total renovation, and was not in use for shipbuilding. CX 7 at 9. Decedent's work involved plumbing, heating and air conditioning, which is not inherently maritime employment. *See Prevetire*, 27 F.3d at 989-990, 28 BRBS at 62(CRT). On these facts, the holdings in *Price* and *Graziano* are distinguishable, as it cannot be said that decedent's failure to perform his job would eventually impede the shipbuilding process. *See Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT). Moreover, like the claimants in *Prevetire*, *Moon* and *Southcombe*, the decedent was on the premises only temporarily and it is clear that not everyone at a shipyard is intended to be covered under the Act. *See generally Herb's Welding*, 470 U.S. 414, 17 BRBS 78(CRT). Therefore, as the administrative law judge's finding that decedent was not engaged in maritime employment accords with law and is supported by substantial evidence, we affirm the denial of benefits.[7]

[7] Therefore, we need not address claimant's contentions of error with regard to the administrative law judge's finding that she did not establish a *prima facie* case.

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

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge