BRB No. 04-0929

CHERYL PERU	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SHARPSHOOTER SPECTRUM VENTURE, LLC	)	DATE ISSUED: 08/22/2005
	)	
	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jennifer Gee, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan (Longshore Claimants' National Law Center), Washington, D.C., and Jay Lawrence Friedheim, Honolulu, Hawaii, for claimant.

Michael D. Formby and Michael J. Nakano (Frame, Formby & O'Kane), Honolulu, Hawaii, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (2003-LHC-2722) of Administrative Law Judge Jennifer Gee 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).

On November 17, 2002, claimant sustained a work-related injury in the course of her employment as a photographer. Employer is a photography enterprise that has a contract with the "Battleship Missouri Memorial," a non-profit, tax-exempt organization that operates the museum vessel *Missouri* in Pearl Harbor, Hawaii. EX 5; Tr. at 23. The

museum subleased to employer a part of the premises for employer's "exclusive use solely as a photography production and concession site to provide photography Services . . . to visitors of the Museum." EX 5. Employer's human resource director described the business as providing "retail souvenir photography," whereby employer's photographers solicit tourists' permission to take their photograph as they board the vessel and then try to sell them the photograph when they disembark. Tr. at 79, 82. The photographs are taken from the pier primarily, but sometimes from the bow under the cannons or in the captain's room. Tr. at 82-84. Employer has a trailer on the pier where its equipment is stored and the photographs are processed, but it has no facilities on the vessel. Tr. at 83. The photographs were sold from a booth or a stand on the pier as the tourists disembarked the vessel. Tr. at 65.

Claimant's duties with employer included greeting and photographing tourists on the pier as they boarded on the vessel. Tr. at 23-24, 85. On November 17, 2002, claimant was to take photographs in the captain's room during a special tour. While climbing a ladder, she banged her head and "crunched" her neck. Tr. at 27-28. Claimant was diagnosed with a scalp contusion and a cervical strain. Claimant returned to light-duty work on January 2, 2003, and to full-duty work on February 28, 2003. She sought benefits under the Act.

The issue presented to the administrative law judge was whether claimant was a "maritime employee" under Section 2(3) of the Act, 33 U.S.C. §902(3). The administrative law judge found that claimant was excluded under Section 2(3)(B) of the Act because she was "essentially working indirectly for a museum." She also found that employer operates as a "retail outlet" by taking photographs of tourists and selling the photographs at the end of the tour. Decision and Order at 4. Thus, the administrative law judge denied benefits.[1] Claimant appeals, and employer responds, urging affirmance.

Section 2(3)(B) of the Act excludes from coverage "individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet" provided that

[1] The administrative law judge stated that employer did not raise the issue of situs, 33 U.S.C. §903(a). On appeal, claimant assumes that, but for the exclusion at Section 2(3)(B), she would be covered under the Act pursuant to *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983), as she was injured on a vessel on actual navigable waters. If the *Missouri* is afloat, then the holding in *Perini North River Associates* would apply to provide coverage under the Act absent the applicability of any exclusions. *See McCarthy v. The Bark PEKING*, 716 F.2d 130, 15 BRBS 182(CRT) (2d Cir. 1983), *cert. denied*, 465 U.S. 1078 (1984) (employee injured on a museum vessel with permanently welded rudder was injured on navigable waters pursuant to *Perini*); *see also Lockheed Martin Corp. v. Morganti*, 412 F.3d 407 (2d Cir. 2005), *aff'g* 37 BRBS 126 (2003).

such individuals are covered by a state workers' compensation statute. 33 U.S.C. §902(3)(B). On appeal, claimant contends that the administrative law judge erred in finding she was employed by a museum, as she worked for employer, a photography concessionaire, and not the museum. Claimant also contends that employer is not a "retail outlet" because it does not comport with the plain meaning of those words. For the reasons that follow, we affirm the administrative law judge's finding that claimant is excluded from the Act's coverage as she is an employee of a "retail outlet."[2]

The exclusion at Section 2(3)(B) has been addressed in few cases. In *Green v. Vermilion Corp.*, 144 F.3d 332, 32 BRBS 180(CRT) (5th Cir. 1998), *cert. denied*, 526 U.S. 1017 (1999), the claimant was employed at a duck camp. During the three-month duck season, the claimant worked as both a cook and watchman. During the rest of the year, he was a watchman and general maintenance worker. He lived at the camp Monday through Friday, and his mode of transportation to and from the camp was by boat. He occasionally assisted in mooring and unloading supply boats that docked at the camp. Claimant was injured on the deck of a vessel while assisting in its mooring.

The claimant filed suit in district court against his employer under the Longshore Act and general maritime law. The district court granted employer's motion for summary judgment on the Longshore Act claim on the ground that the claimant was excluded under the Section 2(3)(B) "club/camp" exception, and dismissed the remainder of the claims on the ground that claimant's sole remedy was under the state workers' compensation law. The claimant appealed to the Fifth Circuit.

The Fifth Circuit stated that the claimant satisfied the situs test as he was injured on navigable waters. *See* 33 U.S.C. §903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). The court thus assumed, *arguendo*, that claimant was engaged in "maritime employment," but concluded nonetheless that he is excluded by the "club/camp" exception. The claimant first contended that he was not employed by a camp, but by a corporation involved in various business ventures, including the camp. In this way he attempted to avoid the language of Section 2(3)(B): "individuals *employed by* a club, camp. . . ." are excluded. The court stated that the word "by" does not warrant such an interpretation; rather, the key to the provision is the exclusion of those who are "exclusively [furthering] an operation which comports with the plain meaning of the terms 'camp' and 'club.'" *Green*, 144 F.3d at 335, 32 BRBS at 182(CRT). As the claimant was employed exclusively and solely to render services to promote and maintain a duck camp, the Fifth Circuit held he was excluded from coverage.

[2] As a result, we need not reach the administrative law judge's finding that claimant also is excluded under the "museum" provision.

The court further explored the legislative history of Section 2(3)(B) in considering whether the nature of the employing venture is dispositive of who is an excluded employee. *See also* discussion, *infra.* The Fifth Circuit stated, "we do not believe that in construing the 'club/camp' exception, we are limited to considering only the nature of the employer's business." *Id.* The court noted that Congress stated that businesses engaged in the types of operations enumerated in Section 2(3)(B) may have employees who should remain covered by the Act because of the nature of their work or the hazards to which they are exposed. Concluding that the claimant's work at the duck camp as a cook, watchman, and general repairman of camp buildings did not, or only minutely, involved maritime activities, the court held that the claimant was not an employee "for which LHWCA benefits were intended." *Id.*, 144 F.3d at 335, 32 BRBS at 182(CRT).

The Board addressed this issue in *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179 (1999), in which the claimant was employed as a harbor master for a company that owned, *inter alia*, several river cruising passenger vessels, barges, tugboats, water taxis, and docks. At the time of the injury, the claimant was the harbormaster for the *Mike Fink*, a 160-foot paddle-wheel, permanently-moored vessel used as a restaurant. The claimant's duties consisted of maintaining the exterior of the property owned by Mike Fink, Incorporated: the parking lot, the vessel, and the dock. Initially, the Board held that all employees of a restaurant are not excluded from coverage regardless of the duties they perform, but rather the nature of the duties to which claimant is or may be assigned remains relevant under Section 2(3)(B). *Huff*, 33 BRBS at 184, *citing Green*, 144 F.3d at 335, 32 BRBS at 182(CRT), and *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Specifically, the Board discussed the holding in *Green* and held that "the focus is properly on claimant's overall job duties and whether they further the operation of a restaurant within the plain meaning of that term, or whether they are duties that further maritime commerce and expose the claimant to maritime hazards." *Huff*, 33 BRBS at 185. The Board noted claimant's duties of repairing and enlarging the dock and the fact that he was responsible for the safety of the dock and the pleasure crafts moored there. Thus, the Board held that as claimant's duties furthered maritime commerce on the Ohio River, and were not solely and exclusively in furtherance of a restaurant within the plain meaning of that term, the claimant was not excluded from coverage under the Act. *Id*.

In *Boomtown Belle Casino v. Bazor*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003), *rev'g* 35 BRBS 121 (2001), the Board affirmed an administrative law judge's finding of coverage in the case of an employee of a casino vessel under construction. The Board rejected the contention that the employee was not covered merely because he was employed by a casino, citing *Green.* The Board also affirmed the administrative law judge's factual findings regarding the employee's duties and held that they were shipbuilding activities because the vessel was under construction.

The Fifth Circuit reversed this decision, holding that the employee was excluded as he was employed by a casino which was a "recreational operation" under Section 2(3)(B) and that the inquiry essentially ends there; the employee's actual job duties are not relevant. The court stated that the Section 2(3)(B) exclusion "turns . . . on the nature of the employing entity, and not on the nature of the duties an employee performs." *Bazor*, 313 F.3d at 303, 36 BRBS at 82(CRT). The court observed that the plain language of Section 2(3)(B) bases the exclusion on the nature of the employer, and that the legislative history suggesting coverage might be granted based on the employees' duties was codified only in Section 2(3)(C).[3] The court stated that if the employee's actual duties were investigated, those duties "exclusively furthered the operation of the casino" even if some of them exposed him to hazards associated with maritime commerce. *Id.*, 313 F.3d at 303-304, 36 BRBS at 82(CRT).

Under any of the tests applied in these cases, claimant is excluded from coverage under Section 2(3)(B). Claimant contends that this exclusion does not apply because she was not employed by a "retail outlet" within the plain meaning of that phrase. Claimant avers that the plain meaning, *i.e.*, definition, of "retail" is "the sale of goods or commodities in small quantities directly to consumers," quoting *American Heritage Dictionary of the English Language* (4th Ed. 2000). Claimant contends that "outlet" connotes a "store," and offers a museum gift shop as an example of the type of "retail outlet" intended to be excluded from coverage. Claimant contends that the photographs are not "goods" because they are produced and supplied by employer itself, so that employer is not a "retail" operation but a "service" operation. Claimant thus avers that to be a "retail outlet" the operation must sell to consumers "a variety" of "goods" produced or manufactured by some third party.

We reject this restrictive reading of the statute, as it is inconsistent with the legislative history governing the Section 2(3)(B) exclusion. The House Education and Labor Committee Report states:

> Some examples of the distinction between covered employees of such enterprises and those who would not be covered (which examples are intended to be illustrative, but are not necessarily exclusive) follow:
>
> Sales clerks, stockroom personnel and related personnel of a retail outlet built over navigable waterways or adjacent to such waterways would come within the exclusion of the definition of "employee."

[3] Section 2(3)(C) excludes from coverage "individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance)." 33 U.S.C. §902(3)(C); *see Shano v. Rene Cross Constr.*, 32 BRBS 221 (1998).

H.R. Rept. No. 98-570, *reprinted in* 1984 U.S.C.C.A.N. 2734 at 2737. In addition, the report states that the exclusions are to be narrowly construed, but that the exclusions of Section 2(3)(B) are based on the "nature of the employing enterprise" as such enterprises "are not generally viewed as maritime employers, although located on or adjacent to navigable waters." *Id.* at 2737-2738.

While claimant correctly suggests that sales clerks and stockroom personnel denote a certain type of retail outlet, the legislative history makes clear that such examples are not exclusive. There is no support for claimant's contention that a "retail outlet" must sell a "variety" of goods or that the outlet have a back room where it stocks goods that it later sells. There also is no support for the contention that the "outlet" must be a "store" in the traditional sense of having four walls and a front door.

Employer sells photographs, on the pier, that its employees have taken of tourists. We hold that the sale of photographs is a retail function and therefore is sufficient to bring employer's employees within the exclusion of Section 2(3)(B). The fact that employer's employees have duties on navigable waters is irrelevant to the applicability of the exclusion, contrary to claimant's contention. In *Perini North River Associates,* the Supreme Court held that,

> when a worker is injured on the actual navigable waters in the course of his employment on those waters, he satisfies the status requirement in § 2(3), and is covered under the LHWCA, *providing, of course, that he . . . is not excluded by any other provision of the Act.*

459 U.S. at 324, 15 BRBS at 80(CRT) (emphasis added). Moreover, claimant is excluded from the Act's coverage under either the more restrictive *Bazor* formulation of Section 2(3)(B), or the less restrictive approach taken by the *Green* court and the Board in *Huff.* Pursuant to *Bazor*, 313 F.3d at 303, 36 BRBS at 82(CRT), as employer is a "retail outlet," its employees are excluded from coverage. If one examines the nature of claimant's duties, moreover, claimant is excluded as her duties solely furthered employer's retail photography business and did not involve maritime activities. *See Green*, 144 F.3d at 335, 32 BRBS at 182(CRT); *cf. Huff*, 33 BRBS at 185 (claimant's harbormaster duties were not in furtherance of employer's restaurant business within the plain meaning of that term, but constituted traditional maritime activates).

As employer is properly characterized as a "retail outlet" in that it sells photographs to consumers, and claimant is an employee of this "retail outlet" who does not have maritime duties, we affirm the finding that claimant is excluded from the Act's coverage pursuant to Section 2(3)(B). The denial of benefits therefore is affirmed.

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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BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge