BRB No. 08-0789

K.L.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLUE MARINE SECURITY, LLC	)	DATE ISSUED: 04/16/2009
	)	
and	)	
	)	
LOUISIANA WORKERS' COMPENSATION CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order of Patrick M. Rosenow, Administrative Law Judge, United States Department of Labor.

Louis B. Koerner, Jr. (Koerner Law Firm), New Orleans, Louisiana, for claimant.

David K. Johnson (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2007-LHC-2186) of Administrative Law Judge Patrick M. Rosenow 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 working as a guard aboard a ship when he was exposed to a substance which caused him to have a seizure and lose consciousness. Employer provides security guards, at the request of a vessel or its shipping agent, to foreign vessels entering the Mississippi River. Guards are required on certain vessels pursuant to regulations issued by the Department of Homeland Security. Such guards must be aboard ships at all times during their anchorage in order to ensure compliance with requirements of the Customs Service, the Immigration and Naturalization Service, and the Coast Guard. Following his injury, claimant's attempts to return to work were unsuccessful and he sought benefits under the Act.

The parties agreed to try separately the issue of coverage and, as the pertinent facts were not in dispute, filed motions for summary decision. The administrative law judge found that, although claimant was a security guard at the time of the injury, he is not excluded from coverage under the Act pursuant to Section 2(3)(A), 33 U.S.C. §902(3)(A), because his work was not performed in an office but aboard a vessel on navigable waters.

On appeal, employer contends that as claimant was employed as a security guard, he is specifically excluded from the Act's coverage pursuant to Section 2(3)(A).[1] Moreover, employer contends that claimant's duties were delegated to him by the United States Coast Guard, and thus that he acted as a government employee, who is barred from obtaining compensation under the Act pursuant to Section 3(b), 33 U.S.C. §903(b). Claimant responds, urging affirmance of the administrative law judge's Decision and Order.

We first address employer's contention that claimant's entitlement to the Act's coverage is barred pursuant to Section 3(b), 33 U.S.C. §903(b). Employer raised this issue before the administrative law judge in its June 26, 2008, Supplemental Memorandum in Support of Motion for Summary Decision, but the administrative law judge did not address it in his Decision and Order. Section 3(b) states that,

> no compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof, or of any State or foreign government, or any subdivision thereof.

[1] We note that employer's appeal is of an interlocutory order, as the administrative law judge neither awarded nor denied benefits. *See Arjona v. Interport Maintenance*, 24 BRBS 222 (1991); *Caldwell v. Universal Maritime Service Corp*., 22 BRBS 398 (1989). Generally, piecemeal litigation is to be avoided, but in this instance we will entertain the appeal at this time. *Jackson v. Straus Systems, Inc*., 21 BRBS 266 (1988).

33 U.S.C. §903(b). We reject employer's contention as it offered no factual or legal support for its contention that claimant is an employee of the United States or any agency thereof merely because he is employed by a company to enforce federal regulations.[2]

Employer also contends that claimant is excluded from the Act's coverage pursuant to Section 2(3)(A). In order for a claim to be covered under the Act, a claimant must establish that his injury occurred upon a site covered by Section 3(a), that he was a maritime employee pursuant to Section 2(3), and is not subject to any specific statutory exclusions. 33 U.S.C. §§902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983); *Munguia v. Chevron U.S.A., Inc.*, 999 F.2d 808, 27 BRBS 103(CRT), *reh'g en banc denied*, 8 F.3d 24 (5th Cir. 1993), *cert. denied*, 511 U.S. 1086 (1994). An injury on actual navigable waters provides coverage if the claimant is an "employee of a statutory 'employer' and is not excluded by any other provisions of the Act." *Perini North River Associates*, 459 U.S. at 323-324, 15 BRBS at 80-81(CRT); *see also Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217(CRT) (5th Cir.1999) (*en banc*) (injury on navigable waters provides coverage under the Act unless the employee was transiently or fortuitously on navigable waters). Although claimant's injury occurred on navigable waters, he is not covered under the Act if a statutory exclusion applies. *See Dobey v. Johnson Controls*, 33 BRBS 63 (1999); *Daul v. Petroleum Communications, Inc.*, 32 BRBS 47 (1998), *aff'd*, 196 F.3d 611, 33 BRBS 193(CRT) (5th Cir. 1999); *Keating v. City of Titusville*, 31 BRBS 187 (1997); 20 C.F.R. §701.301(a)(12)(iii)(A).[3]

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[2] There is no evidence that employer had a direct contract with an agency of the United States Government. On the date of injury, employer was retained by Kinder Morgan Bulk Terminals to provide security guards on board a Turkish vessel.

[3] 20 C.F.R. §701.301(a)(12)(iii)(A) states that the term "employee" does not include

> the following individuals (*whether or not the injury occurs over the navigable waters of the United States*) where it is first determined that they are covered by a state workers' compensation act:
>
> Individuals employed exclusively to perform office clerical, secretarial, security, or data processing work (but not longshore cargo checkers and cargo clerks);

(emphasis added).

Section 2(3)(A) 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, but such term does not include—
>
> (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work [provided such persons are covered by State workers' compensation laws].

33 U.S.C. §902(3)(A). The term "exclusively" modifies all four classifications of work listed in this exclusion. *Dobey*, 33 BRBS at 65 n.7. In addition, the Board has stated, with regard to clerical and data processing work, that the term "office" also modifies those classifications of work.[4] *Morganti v. Lockheed Martin Corp.*, 37 BRBS 126 (2003), *aff'd*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006); *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003); *see also Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005); *Stalinski v. Electric Boat Corp.*, 38 BRBS 85 (2005). For the reasons expressed below, we hold that claimant is not excluded from the Act's coverage because he was not exclusively performing "office" security work.

The Board has twice addressed the security guard exclusion. In *Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991), the claimant worked as a guard and watchman. Claimant was required to patrol the shipyard for intruders or saboteurs who might damage employer's property. Claimant assured that other employees observed the safety rules and that unauthorized personnel did not enter the reactor chambers on the submarines. In addition to patrolling the shipyard, claimant also worked in the dry dock or wet dock areas on an as-needed basis or on overtime during the weekend. In addition, claimant served as a relief watchman on board submarines. The claimant was injured while climbing a tower in the yard during an ice storm. *Id.* at 134-135.

[4] In *Dobey*, 33 BRBS at 65 n.7, the claimant argued that "office" modified each category of work. *See* discussion, *infra*. Similarly, in *Spear v. General Dynamics Corp.*, 25 BRBS 132, 136 n.2 (1991), the Board declined to address the Director's contention that the claimant did not work "exclusively" as an "office" security guard, as the case was decided on other grounds.

The administrative law judge in *Spear* found that the claimant did not work "exclusively" as a security guard because part of his work was integral to the shipbuilding process in that claimant performed fire prevention and safety duties in addition to patrolling. The administrative law judge also found that claimant served as a night watchman aboard submarines, which is "indisputably" covered activity. The Board affirmed the finding that claimant was not excluded from the Act's coverage because he did not work "exclusively" as a security guard. The Board stated that the claimant's job title is not determinative of his coverage and that the administrative law judge rationally found that claimant's duties related to fire prevention and safety and as a night watchman were an integral part of the shipbuilding process and therefore covered under the Act. In this regard, the Board cited *Holcomb v. Robert W. Kirk & Associates, Inc.*, 655 F.2d 589, 13 BRBS 839 (5th Cir. 1981), *cert. denied*, 459 U.S. 1170 (1983), and *Arbeeny v. McRoberts Protective Agency*, 642 F.2d 672, 13 BRBS 177 (2d Cir. 1981), *cert. denied*, 454 U.S. 836 (1981), in which the courts held covered a ship's watchman and pier guards, respectively, as their work was integral to the ship repair and loading/unloading process. *Spear*, 25 BRBS at 136.

In *Dobey*, 33 BRBS 63, the claimant worked primarily as a traffic officer at Cape Canaveral. Claimant also was qualified to work as marine patrol officer, and, on occasion was called upon to take out a patrol boat to verify the security of the missile basin and the Navy docks by keeping unauthorized vessels away, to escort submarines into and out of the port, and to rescue any sailors who fell off the submarines. The claimant was injured on the patrol boat.

The administrative law judge in *Dobey* found claimant excluded under Section 2(3)(A) because he worked "exclusively" in security and his occasional forays onto the water were not a regular part of his employment. The Board reversed this finding. The Board first held that the administrative law judge erred in finding claimant's marine patrol duties, although infrequent, were not a regular part of the duties to which the claimant could be assigned. Second, the Board held that the marine patrol duties were not the type of security work intended to be excluded from the Act's coverage because claimant's work was not confined to the "administrative areas" of employer's facility. The Board noted that claimant's duties subjected him to traditional hazards of maritime work on navigable waters and stated that the legislative history indicates that Section 2(3)(A) was not intended to exclude those employees who are subjected to such traditional dangers even if, in broad terms, they are engaged in activities that can be categorized as "security" work. *Dobey*, 33 BRBS at 67. Thus, the Board held that claimant was not excluded from the Act's coverage and was covered by virtue of his injury in the course of his employment on navigable waters.

In this case, the administrative law judge discussed *Dobey* and the legislative history of the 1984 Amendments. The administrative law judge found that as claimant was not working in an office or administrative space, but was working on a vessel subject to the marine hazards attendant thereto, he is not excluded by Section 2(3)(A) and is covered under the Act. This finding is supported by substantial evidence, as the parties stipulated that claimant's employment occurred on vessels on the Mississippi River.

Furthermore, the finding is in accordance with law, as Congress intended that the Section 2(3)(A) exclusion be interpreted narrowly. *Dobey*, 33 BRBS at 66-67, *citing* H.R. Rep. No. 98-570, *reprinted in* 1984 U.S.C.C.A.N. 2734, 2736.[5] Thus, Congress stated that covered employees

> are to be distinguished from those other employees of waterfront employers, such as office clerical, secretarial, security or data processing workers, who are not intimately concerned with the movement and processing of ocean cargo, and who themselves are confined, physically and by function, to the administrative areas of the employer's operations.

130 Cong. Rec. H9731 (Sept. 18, 1984) (emphasis added); *see also* H. Conf. Rep. No. 98-1027, *reprinted in* 1984 U.S.C.C.A.N. 2734, 2772 ("this exemption reflects that these individuals are land-based workers . . . and their duties are performed in an office"). Thus, for example, in *Morganti*, the Board held that the employee, who was an engineer on a vessel at the time of his death, was not working in a business office and, moreover, was not a clerical or data processing worker. *Morganti*, 37 BRBS at 133.[6] Similarly, in *Boone*, 37 BRBS 1, the Board affirmed the finding that claimant, a materials supply clerk

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[5] Specifically, the legislative history states:

> The Committee intends that this exclusion be applicable to [office clerical, secretarial, security, or data processing] employees, because the nature of their work does not expose them to traditional maritime hazards. The Committee intends that this exclusion be read very narrowly.

H.R. Rep. No. 98-570, *reprinted in* 1984 U.S.C.C.A.N. 2734, 2736.

[6] In affirming the Board's decision, the Second Circuit did not reach the "office" issue, but stated that the Board properly held that the employee was not a "data processor." *Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006).

who worked in a warehouse, did not work in an "office," as computer work, telephoning, copying and other traditional business office functions were not performed in the warehouse. *See also Wheeler*, 39 BRBS 49 (senior engineering analyst not employed "exclusively as office clerical or data processing" worker).

In this case, claimant was not confined, physically and by function, to an office or other administrative area on land. Rather, his duties were performed on vessels on navigable waters. Thus, claimant is not the type of security officer intended to be excluded pursuant to Section 2(3)(A) as he was exposed to traditional maritime hazards. *See* H.R. Rep. No. 98-570, *reprinted in* 1984 U.S.C.C.A.N. 2734, 2736. Therefore, we affirm the administrative law judge's finding that claimant is not excluded from the Act's coverage pursuant to Section 2(3)(A). As claimant was injured on actual navigable waters in the course and scope of his duties on those waters, and was not transiently or fortuitously on navigable waters, he is covered under the Act pursuant to *Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT). *See Bienvenu*, 164 F.3d 901, 32 BRBS 217(CRT); *Ezell v. Direct Labor, Inc.*, 37 BRBS 11 (2003).

Accordingly, the administrative law judge's Decision and Order finding claimant entitled to the Act's coverage is affirmed. The case is remanded to the administrative law judge for findings regarding any remaining disputed issues and for the entry of a compensation order awarding or denying benefits.

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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REGINA C. McGRANERY
Administrative Appeals Judge