BRB No. 09-0519

BETTY BALONEK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
TEXCOM, INCORPORATED	)	DATE ISSUED: 11/24/2009
	)	
and	)	
	)	
ST. PAUL FIRE AND MARINE INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order – Denying Benefits of Alan L. Bergstrom, Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna Klein Camden, L.L.P.), Norfolk, Virginia, for claimant.

F. Nash Bilisoly and Kimberley Herson Timms (Vandeventer Black, L.L.P.), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order – Denying Benefits (2008-LHC-1247) of Administrative Law Judge Alan L. Bergstrom 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 worked as a cable technician for employer for 15 years. Prior to February 2005, claimant's assignments involved installing telephone, computer, and super-high frequency systems on naval vessels. Tr. at 49-50. In February 2005, she was assigned to work on the Navy Marine Corps Intranet (NMCI) contract.[1] Claimant worked primarily at the Norfolk Naval Shipyard, although she also had jobs at other facilities. Her duties required her to pull cables, test the connectivity of those cables, and install wall plates and cable termination closets in various buildings. Tr. at 11-13, 16, 32, 49-51.

On November 29, 2005, while working in an upstairs office of Building 298 at the Norfolk Naval Shipyard, claimant fell approximately four feet off of an A-frame stepladder. She injured her back, right ankle, and right knee. Jt. Ex. 1. Claimant testified that she underwent two knee surgeries and her doctor recommends knee replacement surgery, that her back still causes her a lot of problems, and that her ankle is fine. Claimant performed light-duty work for employer, signing tools in and out at employer's administrative office, from January until August 2007 when employer hired someone to replace her. Tr. at 53-55. Employer compensated claimant under the Virginia workers' compensation law. Jt. Ex. 1. Claimant filed a claim for benefits under the Act. The administrative law judge denied benefits, finding that the decision of the United States Court of Appeals for the Fourth Circuit 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), controls the issue presented in this case and that claimant did not satisfy the status element of Section 2(3) of the Act, 33 U.S.C. §902(3). Decision and Order at 14. Claimant appeals, arguing that *Prevetire* is distinguishable, and employer responds, urging affirmance of the administrative law judge's decision.

Claimant contends the administrative law judge erred in finding that she is not a covered employee pursuant to Section 2(3). Specifically, claimant argues that her job as a cable technician was integral and essential to the operation of the shipyard and thus to the shipbuilding and ship repair at the yard. Claimant avers that *Prevetire* is distinguishable because she was not involved in the construction of a new building but,

[1]The NMCI contract, executed between the government (Navy) and a private company, EDS, involved installing supports and cables in buildings to provide wall access to cables for computer and phone hook-ups to link the Navy and Marine Corps to the same computer network system. The contract covered Navy and Marine Corps sites in the continental United States. EDS subcontracted with employer to perform this work in the Tidewater Region. When the cables were dropped and connectivity was assured at one site, employer would move its employees to another contract site. Tr. at 11-13, 15, 18, 29, 50. Claimant's former supervisor, Mr. Roscopf, testified that work on the NMCI contract continued for one to two years after claimant's injury. Tr. at 16.

rather, in the renovation of the wiring of an existing building at the water's edge and that shipyard work was being performed around her.[2] Employer asserts that claimant was on the premises only temporarily and was not involved in any aspect of loading, unloading, building or repairing ships. For the reasons below, we reject claimant's arguments and affirm the administrative law judge's finding that claimant is not a maritime employee.

Section 2(3) of the Act provides 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). Generally, a claimant satisfies the "status" requirement if she is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See* 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989); *Shives v. CSX Transportation, Inc.*, 151 F.3d 164, 32 BRBS 125(CRT) (4th Cir.), *cert. denied*, 525 U.S. 1019 (1998). The Act covers those workers injured while maintaining or repairing buildings and machinery essential to the shipbuilding and the loading/unloading processes. *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT); *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981); *Price v. Norfolk & Western Railway Co.*, 618 F.2d 1059 (4th Cir. 1980); *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). However, it does not cover "all those who breathe salt air." *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423, 17 BRBS 78, 82(CRT) (1985) (welder on fixed offshore drilling platform not covered); *Prevetire*, 27 F.3d at 990, 28 BRBS at 62(CRT) (pipefitter constructing power plant at shipyard not covered).

In *Prevetire*, the Fourth Circuit, within whose jurisdiction this case arises, held that the claimant, involved in the construction of a power plant, as distinguished from its later operation or maintenance, at the Norfolk Naval Shipyard which would eventually produce electricity for use at the shipyard and surrounding area, was not a covered employee. It reasoned that the claimant's job was not maritime in nature and, indeed, would not have changed "one iota" had the plant been constructed outside the shipyard fence. Moreover, his presence at the shipyard concluded once his job in the building construction was completed. *Prevetire*, 27 F.3d at 990, 28 BRBS at 62-63(CRT). Thus, the court stated that extending coverage to Prevetire would effectively eliminate the status requirement by combining it with the situs requirement. Because the claimant's job was not integral to building, loading or unloading ships, or repairing or maintaining equipment or structures used in the process of building, loading or unloading ships, and

[2]Claimant testified that welders, electricians, painters, shipfitters, pipefitters, and office employees were working in Building 298 while she was there. Tr. at 52-53, 60.

Congress did not intend to cover every employee at a shipyard regardless of function, the court, therefore, held that Prevetire was not a covered employee. *Id.*

Similarly, in *Moon v. Tidewater Constr. Co.*, 35 BRBS 151 (2001), the Board affirmed the administrative law judge's denial of benefits, relying on *Prevetire*, in a case involving a carpenter who was injured during the construction of a warehouse on a shipyard. Because the claimant was hired only to construct the warehouse, and the warehouse's use as a maritime facility was a future event, the Board held that the claimant did not have the requisite status to convey coverage. *Moon*, 35 BRBS at 154. In *Boyd v. Hodges & Bryant*, 39 BRBS 17 (2005), the decedent worked for a plumbing and heating company installing pipe in a ship shed at Newport News Shipyard in the 1960s and was allegedly exposed to asbestos. The Board held that the decedent's work was not maritime, as the ship shed had been gutted, was being renovated, and was not being used for shipbuilding when the decedent was there. Rather, the decedent was engaged in a building renovation that was not related to shipbuilding, and he was only on the premises temporarily. *Boyd*, 39 BRBS at 18, 21. In *Southcombe v. A Mark, B Mark, C Mark*, 37 BRBS 169 (2003), the claimant was hired by a subcontractor to build a "mega-yacht" service facility at a marina under construction. The Board affirmed the administrative law judge's determination that the claimant was not building an inherently maritime structure and that he was on the premises only temporarily. The Board held that the future maritime use of the structure was insufficient to confer coverage to the claimant during the building phase. *Southcombe*, 37 BRBS at 172.

In this case, claimant was assigned to install cables in a building at a shipyard, and the cables were to be used to link the Navy and the Marine Corps to the same computer system. The administrative law judge found that claimant's work as a technician under the NMCI contract "did not include building or repairing ships, did not involve loading or unloading ships, and did not involve maintaining or repairing equipment used in the loading or unloading process." Decision and Order at 14. He also found that even if shipbuilding work occurred around her, claimant "has established that she was not involved with such activity in even an incremental manner, let alone the minimal 'integral or essential' level of involvement required by the Act." *Id.* Although claimant attempts to distinguish *Prevetire* from this case by demonstrating that shipyard work was taking place in and around Building 298 where she was assigned, and the building was not under construction, this distinction is immaterial. Like the claimant in *Prevetire*, claimant's presence at the shipyard was temporary and would cease when she completed her job assignment.[3] Further, the cable system on which claimant worked was under

[3]Accordingly, we reject claimant's analogy to the employees in *Graziano*, *Price* and *Kerby*. The claimants in those cases performed continuing maintenance and repairs to shipyard equipment and/or buildings that were used for maritime purposes.

construction and was not in use at the time of her injury. Even if the system would later be integral to a maritime purpose, such future use is insufficient to confer coverage. *Prevetire*, 27 F.3d at 990, 28 BRBS at 62-63(CRT); *Boyd*, 39 BRBS at 21; *Southcombe*, 37 BRBS at 172; *Moon*, 35 BRBS at 154.

Moreover, the administrative law judge found that the evidence in this case does not establish that the cabling installed by claimant was essential or integral to the building, repairing, loading, or unloading of ships. Rather, the purpose of the NMCI contract was to connect branches of the military on the same network system. *See Wilson v. General Engineering & Machine Works, Inc.*, 20 BRBS 73 (1988); Tr. at 18-23. As claimant's work did not involve maintenance or repair to a system that was integral to the construction, repair, loading or unloading of a vessel, it does not satisfy the status element of Section 2(3), and we affirm the administrative law judge's denial of benefits. *See Coloma v. Director, OWCP*, 897 F.2d 394, 23 BRBS 136(CRT) (9th Cir.), *cert. denied*, 498 U.S. 818 (1990) (cook not covered); *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112(CRT) (3d Cir. 1992) (courtesy van driver not covered); *B.E. v. Electric Boat Corp.*, 42 BRBS 35 (2008) (janitor in offices on shipyard not covered); *Gonzalez v. Merchants Building Maintenance*, 33 BRBS 146 (1999) (janitor on ships not covered); *compare with Schwalb*, 493 U.S. at 47-48, 23 BRBS at 99(CRT) (janitors who cleaned coal from conveyor belts covered); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002) (laborer who emptied shipbuilding debris from 55-gallon drums on the docks was covered).

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