BRB No. 12-0587

TIMOTHY S. GELINAS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 05/29/2013
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Jonathan C. Calianos, Administrative Law Judge, United States Department of Labor.

Scott N. Roberts (Law Office of Scott Roberts, LLC), Groton, Connecticut, for claimant.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2011-LHC-00022) of Administrative Law Judge Jonathan C. Calianos 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).

This case has previously been before the Board. Claimant is employed by employer as a security guard at employer's Quonset Point facility, which produces submarines. Claimant's position as a security guard required that he obtain an emergency medical technician (EMT) certificate. During the regular work week, claimant is assigned primarily to the entry gates of employer's facility; during weekends, claimant performs security rounds through, inter alia, employer's submarine production areas. In addition to his usual security-related duties, claimant is required to respond, as a consequence of his EMT certification, to medical incidents which occur at employer's facility. On April 21, 2010, claimant filed a claim for benefits under the Act contending

that his exposure to loud industrial noise while working for employer resulted in a bilateral hearing impairment.

In his initial Decision and Order, the administrative law judge found that while claimant's employment as a security guard also involved additional duties as an EMT, claimant's employment duties are neither maritime in nature, integral to the loading, unloading, constructing, or repairing of vessels, or such that claimant is exposed to traditional maritime hazards. The administrative law judge thus concluded that claimant did not meet the status requirement necessary for coverage under the Act, and he denied claimant's claim for benefits. 33 U.S.C. §902(3).

On claimant's appeal, the Board held that the administrative law judge did not fully address the evidence of record nor consider that evidence in light of case precedent when determining whether claimant's employment duties as a security guard/EMT constitute maritime employment. The Board therefore vacated the administrative law judge's finding that claimant did not meet the status requirement for coverage under the Act and remanded the case for the administrative law judge to determine if claimant's employment duties as a security guard/EMT are integral to the shipbuilding process. *Gelinas v. Electric Boat Corp.*, 45 BRBS 69 (2011).[1]

On remand, the administrative law judge cited the Supreme Court's decision in *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989), as well as circuit court and Board case precedent relevant to the issue of whether claimant's work as a security guard/EMT is integral to employer's shipbuilding process. In particular, the administrative law judge cited the circuit court decisions in *Arbeeny v. McRoberts Protective Agency*, 642 F.2d 672, 13 BRBS 177 (2d Cir.), *cert. denied*, 454 U.S. 836 (1981), *Sea-Land Serv., Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112(CRT) (3d Cir. 1992), and *Coloma v. Director, OWCP*, 897 F.2d 394, 23 BRBS 136(CRT) (9th Cir.), *cert. denied*, 498 U.S. 818 (1990), and the Board's decisions in *Gelinas v. Electric Boat Corp.*, 44 BRBS 85 (2010), *B.E. [Ellis] v. Electric Boat Corp.*, 42 BRBS 35 (2008), *Gonzalez v. Merchants Building Maintenance*, 33 BRBS 146 (1991), *Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991), and *Birdwell v. Western Tug & Barge*, 16 BRBS 321 (1984), in concluding that claimant was not engaged in maritime employment as he was not employed on navigable waters, did not protect cargo, and the non-performance of claimant's duties would not have impeded employer's shipbuilding activities. The

[1]The Board affirmed the finding that claimant is not excluded from the Act's coverage pursuant to Section 2(3)(A) because he is not "exclusively" a security guard and is not confined, physically or by function, to an office or administrative area. *Gelinas*, 45 BRBS at 70.

administrative law judge thus concluded that claimant's employment duties were not integral to employer's shipbuilding process and that claimant was not a covered employee pursuant to Section 2(3) of the Act. Consequently, the administrative law judge denied claimant's claim.

Claimant appeals the administrative law judge's denial of his claim. Employer has not responded to claimant's appeal.

In challenging the administrative law judge's finding that his work for employer as a security guard/EMT is not covered by the Act, claimant contends that the requirement that he respond to injuries sustained by employer's employees constitutes an integral part of employer's overall shipbuilding process. Specifically, claimant avers that the administrative law judge misapplied the holdings of the Second Circuit in *Arbeeny* and the Board in *Spear* and *Birdwell* in concluding that his employment duties are not covered under the Act.

Section 2(3) 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-brealer . . . ." 33 U.S.C. §902(3); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983). Generally, a claimant satisfies the "status" requirement if he is an employee at least some of whose work is integral to the loading, unloading, constructing, or repairing of vessels. *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). Employees whose work is not integral to these maritime purposes are not covered by the Act. *See, e.g., Rock*, 953 F.2d 56, 25 BRBS 112(CRT); *Coloma*, 897 F.2d 394, 23 BRBS 136(CRT); *Gelinas*, 44 BRBS 85.

The seminal case on the issue of status is *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT), in which the Supreme Court reasoned that employees "who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act." *Schwalb*, 493 U.S. at 47, 23 BRBS at 99(CRT). The Court stressed that coverage "is not limited to employees who are denominated 'longshoremen' or who physically handle the cargo," *id.*, and 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 a vessel." *Id.*, 493 U.S. at 45, 23 BRBS at 98(CRT); *see P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 82, 11 BRBS 320, 328 (1979). In *Coloma*, 897 F.2d at 400, 23 BRBS at 142(CRT), the Ninth Circuit held, pursuant to *Schwalb*, that the duties of a messman/cook at a wharf were not

essential to the loading process; specifically, the court noted that longshoring operations continued uninterrupted when the mess hall was closed down.

Specifically, the issue of the status of various guards has been discussed in *Arbeeny, Spear* and *Birdwell.* In *Arbeeny*, 642 F.2d 672, 13 BRBS 177, the Second Circuit found coverage under the Act for "pier guards" whose duties were described as insuring the protection of cargo against theft, pilferage, vandalism, and fire. Noting that the Supreme Court in *Caputo*, 432 U.S. 249, 6 BRBS 150, suggested that an expansive view of coverage should be taken, the court determined that the "pervasive surveillance conducted by claimants on the pier and occasionally on board ship is essential to the longshoring operation" and that, thus, the employee's duties were an inextricable part of the loading and unloading function. *Arbeeny*, 642 F.2d at 675, 13 BRBS at 181-182.

In *Spear*, 25 BRBS 132, the claimant patrolled the shipyard for intruders or saboteurs, assured that other employees observed the safety rules, and prohibited unauthorized personnel from entering the reactor chambers on the submarines. Claimant also worked in the dry dock or wet dock areas on an as-needed or overtime basis, and he served as a relief watchman on board submarines. The Board held that the administrative law judge rationally found that the 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. *Spear*, 25 BRBS at 136. Similarly, in *Birdwell*, 16 BRBS 321, the Board affirmed the administrative law judge's finding that the claimant, whose watchman duties made him responsible for the security of employer's yard and vessel, was engaged in maritime employment.

We reject claimant's argument that the decisions in *Arbeeny, Spear* and *Birdwell* mandate that his employment duties are covered under the Act. The administrative law judge rationally found those cases distinguishable from the facts presented here. Specifically, in this case, claimant acknowledges that his employment duties did not involve the protection or checking of cargo, or working on a pier. *See* Cl. Br. at 2. Rather, claimant maintains that because his employment duties involved responding to accidents and injuries, and that the investigation of an accident could result in the stoppage of work, those duties constituted an integral part of employer's larger shipbuilding process.[2] *Id.* at 2-3; *see generally Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 52 (2002); *Watkins v. Newport News Shipbuilding & Dry Dock*

[2]The administrative law judge's findings that claimant did not work on navigable waters, piers, or onboard a vessel, that claimant is not employed as a watchman or pier guard, and that claimant did not engage in the protection of cargo are unchallenged on appeal. Decision and Order at 14. They are therefore affirmed.

Co., 36 BRBS 21 (2002)(claimants, industrial cleaners, were engaged in maritime employment since the failure to perform their jobs would impede the ship repair process). The administrative law judge found that claimant did not have the unilateral authority to order a work stoppage in the event of an accident but, rather, such a decision rests with employer's production supervisors who make that determination prior to claimant's arrival at the scene of an accident or injury. Decision and Order at 16. The administrative law judge determined that no evidence was presented to support a finding that claimant's failure to respond to work incidents would disrupt employer's shipbuilding process and he consequently concluded that, like the claimants in *Gelinas*, *Ellis*, and *Gonzalez*, claimant's work is not covered by the Act.[3] *Id.* at 15-17*; Rock*, 953 F.2d 56, 25 BRBS 112(CRT); *Coloma*, 897 F.2d 394, 23 BRBS 136(CRT); *Gelinas*, 44 BRBS 85; *Ellis*, 42 BRBS 35; *Gonzalez*, 33 BRBS 146. As "Congress did not seek to cover all those who breathe salt air[,]" *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423, 17 BRBS 78, 82(CRT) (1985), employees who are on a shipyard site but do not perform duties essential to the shipbuilding process are not covered by the Act. As the administrative law judge properly applied the law to claimant's employment duties, and as he rationally determined that those duties were not integral to employer's shipbuilding process, we affirm the administrative law judge's finding that claimant is not a maritime employee pursuant to Section 2(3) and his consequent denial of claimant's claim for benefits under the Act.

[3]In *Gelinas*, 44 BRBS 85, the Board affirmed the administrative law judge's determination that claimant's work as a nurse was not integral to the shipbuilding process. In *Ellis*, 42 BRBS 35, and *Gonzalez*, 33 BRBS 146, the Board affirmed the administrative law judge's findings that claimants, who in both cases were employed as janitors, were not covered employees pursuant to Section 2(3) since their duties were not integral to their respective employer's shipbuilding operations as failure to perform their jobs would not disrupt the shipbuilding process. *Cf. Ruffin*, 36 BRBS 52; *Watkins*, 36 BRBS 21.

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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REGINA C. McGRANERY
Administrative Appeals Judge