BRB No. 98-1211

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| KEITH K. DOBEY | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| JOHNSON CONTROLS | ) | DATE ISSUED: May 17, 1999 |
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| and | ) | |
| | ) | |
| CIGNA INSURANCE | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | |
| | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Respondent | ) | DECISION and ORDER |

Appeal of the Decision and Order -- Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

John M. Schwartz (Blumenthal, Schwartz & Garfinkel, P.A.), Titusville, Florida, for claimant.

David F. Pope and Gregory P. Durham (Lau, Lane, Pieper, Conley & McCreadie, P.A.), Tampa, Florida, for employer/carrier.

LuAnn B. Kressley and Andrew Auerbach (Henry L. Solano, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, BROWN, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order -- Denying Benefits (97-LHC-1153) of Administrative Law Judge Ainsworth H. Brown 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). The Board held oral argument in this case in Savannah, Georgia, on January 27, 1999.

The facts of this case are not in dispute. Claimant worked for employer as a traffic officer on the Air Force facility at Cape Canaveral, Florida.[1] For the five years prior to his injury on October 31, 1995, claimant primarily worked on land as a traffic officer, and he had much the same duties as those of a police officer: he controlled the flow of traffic, controlled the speed of traffic via radar, investigated traffic accidents, and made out reports. These activities occurred on the entire facility, including the port area. Tr. at 31. According to the security liaison and head of marine security, Mr. Rickelman, claimant's land-based duties also included

[1]Employer is a contractor hired to provide security both on land and in the water for the Air Force and Navy at Cape Canaveral. The purpose of this facility is to launch unmanned missiles -- many of which are launched from submarines. Employer's mission is to provide ingress and egress security on the entire installation, including the water, traffic control, boat services to keep the Trident Basin secure, to patrol the Navy docks, and to provide maintenance services as necessary to the security boats. Tr. at 26, 28-29.

patrolling certain zones and assuring the security of buildings. Tr. at 82. In addition to these regular duties, claimant was one of a few officers who also was qualified to work in marine patrol.[2] As a result, on occasions when the marine patrol division was short of qualified people, claimant could be called upon for marine patrol duty. When such duty arose,[3] claimant was required to take out a patrol boat, to verify the security of the Trident 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. Tr. at 73, 79.

[2]Between 1985 and 1990, claimant's primary duties were in the marine patrol division. Once he transferred to land-based work, he remained as an alternate for marine work and he maintained his yearly training. Tr. at 75-78.

[3]It appears claimant served in marine patrol seven times between April 28, 1993, and October 31, 1995. Cl. Ex. 6 at exh. 1.

On October 31, 1995, claimant reported to work, fully expecting to work as a traffic officer. He arrived in his uniform and dress shoes. Tr. at 32. Once he arrived, he was told to report to marine patrol to work on a boat. Although claimant protested (the weather was bad that day and he did not have the proper shoes), he was told no one else was qualified.[4] Tr. at 32. Claimant testified that he checked out the boat, made his first required patrol of the Basin, and prepared to escort a submarine from the port at 11:00 a.m. While he was patrolling and checking the water conditions, a wave broke from under the boat and threw him down. Although he hurt his neck and back, he managed to steer the boat back to the dock to get medical help. Claimant was taken to the hospital and diagnosed with cervical and lumbar strains and degenerative disc disease. Cl. Exs. 13-14; Tr. at 33, 41, 66. Employer began paying disability and medical benefits under the Act but ceased payments upon claimant's return to work in December 1995. Cl. Ex. 5. Claimant attempted to work in various capacities, but was unable to do so. Tr. at 47-49. He filed a claim for permanent total disability benefits, and employer controverted the claim in September 1996, arguing that claimant was a security guard and therefore is excluded from coverage under the Act. *See* 33 U.S.C. §902(3)(A) (1994); Cl. Exs. 2, 10 at 8, 17-19. In November 1996, claimant was informed he would have to retire by the end of the year or be terminated from employment. Claimant opted to retire.

The administrative law judge found, based on the undisputed facts above, that claimant worked exclusively in "security" and is excluded from coverage pursuant to Section 2(3)(A) of the Act, 33 U.S.C. §902(3)(A). Decision and Order at 7. Specifically, the administrative law judge found that claimant's regular employment was land-based security, not marine patrol, and that his "occasional forays onto the

[4]According to Mr. Rickelman, alternates generally know a day in advance if they are going to work on the security boats. Claimant did not have this luxury, however, as many people called in sick that day. Tr. at 77-78.

water" were not expected, regular parts of his duties.[5] Decision and Order at 6. Claimant appeals the denial of benefits, and employer responds, urging affirmance. The Director, Office of Workers' Compensation (the Director), responds, supporting claimant's position.

Claimant first contends the administrative law judge erred in denying benefits inasmuch as he was injured on actual navigable waters and is therefore automatically covered under the Act. We reject this assertion. For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or that his injury occurred on a landward area covered by Section 3(a), 33 U.S.C. §903(a), and that his work is maritime in nature, 33 U.S.C. §902(3), and is not specifically excluded by another provision of the Act. *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996). Thus, in order to demonstrate that coverage exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id.*; *see also Crapanzano v. Rice Mohawk, U.S. Construction Co., Ltd.*, 30 BRBS 81 (1996).

[5]Nevertheless, the administrative law judge made alternate findings, concluding that claimant was temporarily totally disabled from October 31 through December 13, 1995, that his condition reached maximum medical improvement on April 15, 1996, and that he became permanently totally disabled on June 5, 1996. The administrative law judge stated that had claimant not been excluded from coverage, he would have been entitled to benefits accordingly, based on the stipulated average weekly wage of $651.98. Decision and Order at 2, 14.

Claimant argues that he has met both coverage requirements pursuant to the Supreme Court's decision in *Perini*, wherein the Court held that a claimant injured on actual navigable waters in the course of his employment on the those waters meets both the status and situs requirements. *Perini*, 459 U.S. at 323-324, 15 BRBS at 80-81 (CRT). Although claimant was injured on the Trident Basin, a navigable body of water, his argument is unpersuasive. A review of the remainder of the Supreme Court's decision makes it clear that *Perini* does not eliminate the status requirement; it merely provides that employees injured on navigable waters are engaged in maritime employment because they are in a maritime locale *and* because they are required to perform their employment duties on navigable waters.[6] *Id.* That is, an injury on navigable waters ensures coverage *if* the claimant is an "employee of a statutory 'employer,' and is not excluded by any other provisions of the Act." *Perini*, 459 U.S. at 323-324, 15 BRBS at 80-81 (CRT). As the issue here is whether claimant is excluded from coverage under another provision of the Act, claimant cannot claim "automatic" coverage by virtue of the fact that his injury occurred on navigable waters. *Daul v. Petroleum Communications, Inc.*, 32 BRBS 47 (1998); *Keating v. City of Titusville*, 31 BRBS 187 (1997); 20 C.F.R. §§701.301(a)(12), 701.401; *see also Bienvenu v. Texaco, Inc.*, 164 F.3d 901, 32 BRBS 217 (CRT) (5th Cir.1999) (*en banc*). Therefore, the next issue we consider is claimant's contention that he is not excluded by Section 2(3)(A) of the Act and that the administrative law judge erred in arriving at a contrary conclusion.

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--
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> (A) individuals employed *exclusively to perform office clerical, secretarial, security, or data processing work* [provided such persons are covered by State workers' compensation laws].

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[6]In *Perini*, the Supreme Court held that in enacting the 1972 Amendments to the Act Congress intended to expand coverage and not to withdraw coverage from workers injured on navigable waters who would have been covered by the Act prior to 1972. Further, the Court held that when a worker is injured on navigable waters, in the course of his employment, he is a maritime employee under Section 2(3), and thus he satisfies both the status and situs requirements, unless he is specifically excluded from coverage. *Perini*, 459 U.S. at 323-324, 15 BRBS at 80-81 (CRT).

33 U.S.C. §902(3)(A) (1994) (emphasis added). Claimant contends he is not an excluded employee because he did not work "exclusively" in "security" and because he was not performing "security" work at the time of his injury.[7] The Director responds in support of claimant's contention that he did not work exclusively in "security" and that he is not excluded from coverage by the provisions of Section 2(3)(A). Further, the Director argues that although the administrative law judge acted within his discretion in labeling claimant's work as a marine patrol officer "occasional," he erred in excluding claimant from coverage on this basis. Specifically, the Director maintains that claimant had a reasonable expectation of performing marine work and that this work subjected him to traditional maritime hazards.

In determining that claimant's employment was exclusively security work, the administrative law judge relied upon a dictionary definition of "security." That is, he defined "security" as:

> 1. Freedom from danger, loss or risk of harm; SAFETY. . . 3. Something that gives or assures safety. . . 8. Measures adopted to guard against attack or disclosure, as in wartime.

Decision and Order at 6 (citing *Webster's II New Riverside University Dictionary*). He stated that this definition "adequately captures the commonplace meaning of the

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[7]Additionally, claimant contends he is not covered by the Florida state workers' compensation law; therefore, he must be covered by the Act. He also asserts that the word "office" in Section 2(3)(A) modifies all four categories of enumerated jobs, not just "clerical" work, and that he is not excluded because he did not exclusively perform *office security work*. We note that the legislative history of the 1984 Amendments to the Act indicates that the word "exclusively" modifies all four classifications of work listed in the exclusion. H.R. Rep. No. 570, 98th Cong., 2d Sess. 2-3, *reprinted in* 1984 U.S.C.C.A.N. 2734, 2736; *see also Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209, 211 (1996); *Spear v. General Dynamics Corp.*, 25 BRBS 132, 135 (1991).

term as I understand it." Decision and Order at 6. Given claimant's job requirements, the administrative law judge then determined that claimant's "occasional forays" as a marine patrol officer were not expected nor were they included as part of his regular job duties. Therefore, the administrative law judge concluded that claimant's job, which is "aimed at base protection and safety [and] appears similar to police duties, [falls] within the rubric of security work." *Id.*

We hold that the administrative law judge erred in finding claimant excluded from the Act's coverage. Specifically, for the reasons that follow, we hold that claimant's work as a marine patrol office was not "episodic, momentary or incidental to non-maritime work," *see, e.g., Kilburn v. Colonial Sugars*, 32 BRBS 3 (1998), nor is it the type of security work intended by Congress to be excluded by virtue of the 1984 Amendments. Claimant, who was one of a small group of traffic control officers qualified to perform marine patrol duties when needed, was designated as an "alternate" by employer and, consequently, was required to keep his marine patrol skills current by attending a yearly training program. As an alternate, claimant had a reasonable expectation of being called upon to perform marine patrol work at any time, and, on the day he was injured, despite his objections, employer transferred him to the marine patrol division for the day and required him to patrol the Basin. The Supreme Court has stated that the "crucial factor" in assessing "status" is the nature of the activity to which an employee may be assigned. *Ford*, 444 U.S. at 82, 11 BRBS at 328; *see also Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 24 (CRT) (1st Cir. 1984) (discussing the difference between a "discretionary" or "extraordinary" activity which may not be covered from the "regular portion of the overall tasks to which a claimant may be assigned."). It is clear from the record that claimant could have been assigned to marine patrol duty at any time on an as-needed basis. *See* Tr. at 77-78. Therefore, although infrequent, claimant's marine patrol duties cannot be excluded from his list of regular job responsibilities. *See Thornton v. Brown & Root, Inc.*, 23 BRBS 75 (1989) (regular participation on as-needed basis in loading barges is sufficient for coverage); *see generally Bienvenu,* 164 F.3d at 901, 32 BRBS at 217 (CRT); *Lewis v. Sunnen Crane Service, Inc.,* 31 BRBS 34 (1997); *cf. Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991). The administrative law judge's conclusion that claimant's marine patrol work was not a regular part of his duties must therefore be reversed as it is neither supported by substantial evidence nor consistent with law.

Moreover, despite that claimant's duties as a marine patrol officer may have been for security purposes, these duties nonetheless subjected him to the traditional hazards of maritime work on navigable waters, as the Director contends. Indeed, in this instance, not only was claimant subjected to the hazards of the sea, but he

sustained a significant injury as a result. Pursuant to the legislative history, 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. This is readily apparent from the following passages:

> 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. As reported by Congressman Miller, the amendments to Section 2(3) were intended to "narrowly exclud[e] from coverage certain employees who are not exposed to maritime hazards. . . ." Thus, Congress intended 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."). It is clear from the record that claimant's job as a marine patrol officer confine him to the "administrative areas" of employer's facility but, rather, required him to perform duties on navigable waters. Categorizing his work in marine patrol with the types of land-based jobs enumerated in the statutory exclusion ignores the true maritime nature of that work, as does the administrative law judge's reliance on the dictionary definition of security work. We note in this regard that certain types of security work, notably that of a ship's watch, have been viewed as traditional maritime activity covered under the Act. *See, e.g., Miller v. Central Dispatch, Inc.*, 673 F.2d 773, 14 BRBS 752 (5th Cir. 1982); *Holcomb v. Robert W. Kirk & Associates, Inc.*, 655 F.2d 589, 13 BRBS 839 (5th Cir. 1981), *cert. denied*, 459 U.S. 1170 (1983); *Hillicone S.S. Co. v. Steffen*, 136 F.2d 965 (9th Cir. 1943); *Seneca Washed Gravel Corp. v. McManigal,* 65 F.2d 779 (2d Cir. 1933); *Union Oil Co. v. Pillsbury*, 63 F.2d 925 (9th Cir. 1933); *Puget Sound Nav. Co. v.*

*Marshall*, 31 F.Supp. 903 (W.D. Wash. 1940).[8]

In *Spear v. General Dynamics Corp.,* 25 BRBS 132 (1991), the Board addressed the issue of whether the claimant, hired as a "Guard and Watchman," was excluded from coverage pursuant to Section 2(3)(A). The Board first noted that the claimant's job title is not determinative of the claimant's status, citing *Levins*, 724 F.2d at 4, 16 BRBS at 24 (CRT). In affirming the administrative law judge's finding of coverage, the Board held that as the claimant was not confined to an office, patrolled the areas where the nuclear submarines were located, and was required to spend several hours a night on board the submarines as a relief night watchman, the claimant was not engaged "exclusively" in the type of security work contemplated by Section 2(3)(A), as such work is integral to the shipbuilding or ship repair process. *Spear*, 25 BRBS at 135, *citing Holcomb, supra.* Similarly, in this case, claimant's title as a traffic officer or as a marine patrol officer does not necessitate a finding that he was engaged in security work within the meaning of Section 2(3)(A). Moreover, as discussed, claimant's duties as a marine patrol officer subjected him to traditional maritime hazards; such persons are not excluded from the Act's coverage as evidenced by legislative intent.

Inasmuch as a regular portion of claimant's overall responsibilities required that he be available to perform marine patrol duty, and since such duty is not within

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[8]We note that these cases were decided prior to the enactment of the 1984 Amendments, and that in *Hillicone S.S. Co., Puget Sound, Seneca Washed Gravel,* and *Union Oil,* the issue was whether the claimant was precluded from recovery under the Longshore Act because he was a "member of a crew." Nevertheless, in view of the legislative history of the 1984 Amendments, we believe that the proposition for which they stand remains sound. Contrast these ships' watch cases with the situation in *Arbeeny v. McRoberts Protective Agency*, 642 F.2d 672, 13 BRBS 177 (2d Cir. 1981), *cert. denied*, 454 U.S. 836 (1981), wherein coverage was found for security guards who monitored cargo on the piers, and who occasionally went aboard ships.

the exclusion at Section 2(3)(A), we reverse the administrative law judge's contrary finding. We hold that claimant's duties as a marine patrol officer, while infrequent, removed him from the exclusion, as they were a necessary part of his regular duties and they subjected him to traditional maritime hazards. *Spear,* 25 BRBS at 132. Indeed,

> The Committee intends that these exemptions be applied in an "either-or" fashion–that is, either the worker is not covered because he or she is engaged exclusively in work which would qualify for the exemption; or the worker is always to come within the Longshore Act coverage because the worker is not exclusively and solely engaged in work which qualifies for the exemption. The Committee firmly believes that the situation in which a worker may be covered at one time, and not covered at another, depending on the nature of the work which the worker is performing at the time of injury must be avoided since such a result would be enormously destabilizing, and would thus defeat one of the essential purposes of these amendments.

H.R. Rep. No. 98-570, *reprinted in* 1984 U.S.C.C.A.N. 2734, 2736. This is consistent with the Supreme Court's admonition in *Caputo* that the Act provide continuous coverage for those who "spend at least some of their time in indisputably [covered] operations." *Caputo*, 432 U.S. at 273, 6 BRBS at 165; *see also Caldwell v. Universal Maritime Service Corp.*, 22 BRBS 398 (1989). As the administrative law judge made alternate findings awarding claimant temporary and permanent total disability benefits, and as no party has challenged that aspect of the decision, we hereby award claimant benefits pursuant to the administrative law judge's alternate findings.[9]

Accordingly, the administrative law judge's finding that claimant is excluded from coverage is reversed. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[9]In light of our holding, we need not address claimant's remaining arguments.

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge