BRB No. 99-884

PHYLLIS L. JERNIGAN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

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

Benjamin M. Mason (Mason & Mason), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (98-LHC-1577) of Administrative Law Judge Fletcher E. Campbell, Jr., denying benefits 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 findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant injured her back on February 2, 1996, when she slipped and fell while salting the steps leading to employer's yard after it had snowed. She sought temporary total disability benefits from October 25, 1997, to July 7, 1998. Claimant has worked for employer for 22 years as a cleaner in the janitorial department. She works in the recycling

building and goes out into the yard side when it is her turn to respond to a call requesting that something be cleaned up. Tr. at 24. She testified that her duties consist of recycling oil, paper and cardboard from all over the shipyard, and include salting steps in the winter, cleaning blood from industrial accidents occurring on shipyard property, including aboard ships and in warehouses, Tr. at 32, and cleaning oil spills on roads, docks and piers from equipment that leaked oil or from barrels that were leaking or knocked over. Tr. at 16. The paper and cardboard which comes off the ships consists of computer paper and boxes which held items such as parts. Tr. at 16. Claimant's duties also include picking up iron and wood under ship skids, and other cleaning duties, including picking up debris, such as wood, steel, welding rods and trash left after shipbuilders finish working, or left after a christening or tour. Tr. at 13-18. She testified that she drove a forklift to carry out some of her duties. Tr. at 32. The recycling comprises claimant's principal job and takes place in Building 4687, inside the gate of employer's shipbuilding facility. Tr. at 18. Claimant testified that she spent most of her time in the recycling building shredding paper, and on occasion would go out in the yard. Tr. at 24.

In his decision, the administrative law judge determined that claimant was not covered under Section 2(3) of the Act, 33 U.S.C. §902(3), because her general cleaning duties do not have a sufficiently strong nexus with loading, unloading, or shipbuilding. Consequently, the administrative law judge denied benefits without considering the remaining issues. On appeal, claimant contests the administrative law judge's finding that she did not meet the status test, alleging that she performed maritime work and that her duties were integral to shipbuilding functions. Employer responds, urging affirmance on the ground that claimant's was an unskilled position merely incidental to the shipbuilding process.[1]

Generally, a claimant satisfies the "status" requirement if she is an employee engaged in work which involves loading, unloading, constructing, or repairing vessels. *See* 33 U.S.C. §902(3);[2] *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989).

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[1]The parties stipulated that situs is not an issue. 33 U.S.C. §903(a); Decision and Order at 3, Stipulation 10.

[2]Section 2(3) provides that "the term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring

Moreover, to satisfy this requirement, claimant need only "spend at least some of [her] time in indisputably longshoring operations." *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 273, 6 BRBS 150, 165 (1977).

In finding that claimant was not covered by Section 2(3) of the Act, the administrative law judge found the issue of coverage controlled by the decision of the United States Court of Appeals for the Third Circuit in *Dravo Corp. v. Banks,* 567 F.2d 593, 7 BRBS 197 (3d Cir. 1977). He found that as claimant here had exactly the same job duties as the claimant in *Banks*, who was held not to have met the status requirement under the Act, claimant is not covered as a matter of law. The administrative law judge noted that *Banks* was cited with approval by the United States Court of Appeals for the Fourth Circuit, in whose jurisdiction the instant case arises, in *Newport News Shipbuilding & Dry Dock Co. v. Graham,* 573 F.2d 167, 8 BRBS 241 (4th Cir.), *cert. denied*, 439 U.S. 979 (1978), and *White v. Newport News Shipbuilding & Dry Dock Co.,* 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980). Lastly, he acknowledged that these decisions were decided before the Supreme Court's decision in *Schwalb,* but found that they remain valid authority as they all require a "sufficiently strong nexus with either loading/unloading or shipbuilding." Decision and Order at 6. As he found that claimant's duties lack this nexus, he denied coverage under the Act. For the reasons that follow, we remand the case to the administrative law judge for further consideration.

We first address the legal standard for coverage applied by the administrative law judge. In *Schwalb,* the Supreme Court upheld coverage for "janitorial" employees whose duties included cleaning spilled coal from loading equipment in order to prevent equipment malfunctions and for an employee whose job it was to maintain and repair loading equipment, on the rationale 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." 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); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 272-274, 6 BRBS 150, 165 (1977).

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operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker. . . ." 33 U.S.C. §902(3)(1998).

The test for coverage set forth in *Banks* is not inconsistent with this test. The Third Circuit held that in order for a claimant to be covered under the Act, his "job should have been a necessary 'ingredient' in the shipbuilding process . . . ." *Banks*, 567 F.2d at 595-596, 7 BRBS at 200-201.[3] Similarly, the Fourth Circuit's decision in *White*, 633 F.2d at 1074, 12 BRBS at 605-606, recognizes that the employee's work must be "integral" to the shipbuilding process in order to be covered by the Act, citing the "necessary ingredient" test of *Banks* as a phrase used to describe functions covered by the Act. *See also Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). Thus, insofar as it relies on this language, the administrative law judge's decision reflects the proper recitation of the standard for coverage under the Act.

Nonetheless, we must remand this case for further application of the facts to this law, as well as for consideration of additional case law not cited by the administrative law judge. The claimant in *Banks* was a general laborer, essentially involved in unskilled jobs related to plant maintenance. He was injured while spreading salt on icy walkways and steps. In denying coverage in the present case, the administrative law judge relied on the following language from *Banks*:

> Banks' duties have no traditional maritime characteristics, but rather are typical of the support services performed in any production entity, maritime or not. "Plant maintenance" is required in any business . . . Clearing ice is a necessary "incident" of any operation. We suggest that in order to be covered, Banks' job should have been a necessary "ingredient" in the shipbuilding process, which it was not.

Banks, 567 F.2d at 595-596, 7 BRBS at 200-201. In *Banks*, the United States Court of Appeals for the Third Circuit, in denying coverage, analogized claimant's duties, described as "typical of support services performed in any production entity," to those of a clerical worker who was excluded from coverage in *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476, 5 BRBS 393 (3d Cir. 1977), for lack of a maritime nexus. Following *Banks*, the Board adopted this "support services" rationale, and denied coverage to those engaged in support services typical of those found in any business. *See Graziano v. General Dynamics Corp.*, 13 BRBS 16 (1980) (Miller, J., dissenting), *rev'd*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981); *Neely v. Pittston Stevedoring Corp.*, 12 BRBS 859 (1980) (Miller, J., dissenting) (claims

[3] *See also Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112(CRT) (3d Cir. 1992), wherein the Third Circuit evaluated its prior case law in light of *Schwalb* and found it consistent in requiring an integral relationship between loading, unloading or shipbuilding.

examiner not covered); *Castro v. Hugo Neu-Proler Co.*, 10 BRBS 35 (1979) (Miller, J., dissenting) (general clean-up work around shiploading conveyor and around the gantry crane not covered); *White v. Newport News Shipbuilding & Dry Dock Co.*, 9 BRBS 493 (1978)(Miller, J., dissenting), *rev'd,* 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980)(claimant unloaded pipe and marked it for identification).

The Board's holdings in *White* and *Graziano* were reversed by the Fourth and First Circuits, respectively. In *White,* the Fourth Circuit held that the employee's color coding of pipe for use in ship fabrication was the first step taken to physically alter the pipe for use in ship construction. The claimant's work therefore was an integral part of and directly involved in shipbuilding, and he was covered under the Act. *White,* 633 F.2d at 1074, 12 BRBS at 605-606. In *Graziano*, the claimant was employed as a maintenance-mason, whose duties involved the repair of masonry in shipyard buildings, but also included digging ditches, breaking up cement with a jackhammer, laying cement, grouting, removing asbestos from pipes, repairing boilers and manholes, and cleaning acid tanks in places throughout the shipyard. The First Circuit reversed the Board's holding that these duties are not covered under the Act, and held that claimant's overall masonry work on shipyard facilities was sufficient to establish coverage because maintenance and repair of shipyard facilities was essential to the building and repairing of ships. The court reasoned that the claimant's work was a necessary link in the chain of work that resulted in the building and repairing of ships. *Graziano*, 663 F.2d at 343, 14 BRBS at 56. In view of the court's decisions in these cases, as well as those reversing the Board's holding that security guards are excluded from coverage on a similar rationale, *see Miller v. Central Dispatch, Inc.*, 673 F.2d 773, 14 BRBS 752 (5th Cir. 1982)*; Arbeeny v. McRoberts Protective Agency*, 642 F.2d 672, 13 BRBS 177 (2d Cir. 1981), *cert. denied*, 454 U.S. 836 (1981), the Board disavowed the support services test in *Jackson v. Atlantic Container Corp.*, 15 BRBS 473, 474 (1983). *See also Bazemore v. Hardway Constr., Inc.*, 20 BRBS 23 (1987). Thus, the administrative law judge's denial of coverage cannot be affirmed to the extent it is grounded in the language from *Banks* denying coverage on the rationale that claimant performed "support services."[4]

[4]In fact, the administrative law judge appears to focus on the particular task claimant was performing at the time of her injury, clearing ice from steps, and finding that it does not qualify claimant for status. Even if claimant's duties at the time of injury are not integral to the shipbuilding process, coverage cannot be denied on that basis, as it is the nature of the

overall tasks to which the employee may be assigned which controls. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 273, 6 BRBS 150, 165 (1977); *see* discussion, *infra*.

We next address claimant's contention that her work duties are indeed integral to the shipbuilding process, and we find merit in claimant's contention that the administrative law judge erred in focusing on the description of her duties as janitorial rather than on whether the duties themselves were integral to the shipbuilding process.[5] In *Graziano,* 663 F.2d at 343, 14 BRBS at 56, the First Circuit held that "[t]he maintenance of structures housing shipyard machinery and in which shipbuilding operations are carried on is no less essential to shipbuilding than is the repair of the machinery itself."[6] The court also held that, based on claimant's masonry duties alone, coverage was mandated, holding such duties to be "a necessary link in the chain of work that resulted in ships being built and repaired." *Id.* The administrative law judge did not discuss this case or consider if claimant's duties are in any way analogous to those of claimant in *Graziano.* On remand, the administrative law judge must consider whether claimant's work removing iron and wood from under ship skids, picking up debris such as wood, steel, welding rods and paper trash left after shipbuilders finish working, as well as cleaning up oil from leaking equipment and drums around the shipyard constitutes maintenance of shipyard facilities essential to the building and repairing of ships.

In this regard, as claimant argues, if the by-products of shipbuilding were to pile up without being removed, it could hinder further shipbuilding.[7] The finding of coverage in *Schwalb* was that "the ship loading process could not continue unless the [equipment that the employee] worked on was operating properly." *Schwalb*, 493 U.S. at 48, 23 BRBS at 99 (CRT). The Supreme Court stated that the determinative consideration is whether the ship loading/unloading process could continue without the claimant's function, and it noted that it is irrelevant whether the employee may have other duties unconnected to loading or

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[5]As the claimants who were held covered in *Schwalb* were employed as laborers doing housekeeping and janitorial services, claimant correctly contends that her job title is irrelevant to coverage.

[6]Thus, there is law contrary to *Banks* regarding plant maintenance. Inasmuch as this case arises within the jurisdiction of the Fourth Circuit, there is no reason for finding *Banks* more persuasive that *Graziano* on this point.

[7]Claimant further alleges that her duties are analogous to one who removes cargo from the dock after it has been unloaded from the vessel. Such persons are covered under the Act. *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *see also Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (coverage is not limited to employees who physically handle cargo); *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994) (the items loaded or unloaded need not be "cargo" or freight, but may be ship supplies such as steam, water and fuel).

unloading or whether his contribution to the loading process is not continuous. *Id.* The court in *Graziano* proposed a similar test, stating that "the shipbuilding process of [employer] would not have come to an immediate halt if [claimant's] duties were not successfully discharged, but the failure to perform routine maintenance would have led eventually to a stoppage or curtailment of shipbuilding and repairs." 663 F.2d at 343, 14 BRBS at 56.

Furthermore, the fact that this work does not comprise the majority of claimant's duties cannot prevent a finding of coverage.[8] *Shives v. CSX Transportation, Inc.*, 151 F.3d 164, 32 BRBS 125(CRT) (4th Cir. 1998), *cert. denied*, 119 S.Ct. 547 (1998). As long as the claimant spends "at least some of [her] time in indisputably longshore operations," *Caputo*, 432 U.S. at 273, 6 BRBS at 165, claimant is covered under the Act. The key factor in the inquiry is the nature of the work to which claimant could be assigned, *see Levins v. Benefits Review Board*, 724 F.2d 4, 8, 16 BRBS 23, 33 (CRT)(1st Cir. 1984); *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997). As the Supreme Court stated in *Schwalb*, "It is irrelevant that an employee's contribution to the loading process is not continuous or that . . . maintenance is not always needed." 493 U.S. at 385, 23 BRBS at 99 (CRT). Thus, if, on remand, the administrative law judge finds that the tasks claimant performed in the yard were integral to the shipbuilding process, the fact that the amount of time she spent on the tasks comprised a small part of her duties does not deprive her of the Act's coverage.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated, and the case is remanded for further consideration consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

[8]Claimant testified that most of her day was spent in a building where she recycled and shredded paper. This work cannot be considered integral to the shipbuilding process, as it is immaterial how the waste is disposed of once it is removed from the yard.

Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge