BRB No. 01-0538

LINDA WATKINS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	DATE ISSUED: March 5, 2002
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

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

John H. Klein (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Whitney R. Given (Eugene Scalia, Solicitor of Labor; Carol DeDeo, Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order (00-LHC-1616) 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 administrative law judge's findings of fact and conclusions of law if they 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 was assigned to employer's Cleaning and Janitorial Department as a cleaner. Claimant testified that from 4:30 to 8:00 p.m. every day, which was the first half of her shift, she drove a barrel dumpster, which is a machine that empties debris from 55-gallon drums. Tr. I at 16. She or her partner drove the dumpster to the ships' sides, where the dumpster would pick up the full drums and dump them into the machine. The barrels contained trash and shipbuilding materials such as welding rods and strips of iron. *Id.* at 17. Claimant testified that the shipbuilders would fill the barrels during the course of the day, and the crane would take the full barrels off the vessels and place the barrels at the ships' sides. *Id.* at 36. In addition, claimant and her partner would drive around to other shipyard buildings and dump dumpsters. During the second half of her shift, claimant and her partner would drive around the shipyard with a truck and physically pick up cardboard and bags of trash that were put outside by the "indoor cleaners" and load them on the truck. *Id.* at 18-19, 38-39; Tr. II at 16-17. At the end of their shift, they had to unload the trash from the truck. Claimant testified she did not load or unload ships, repair ships or build components. She did not use or clean any equipment used in the shipbuilding or repair process. Claimant sustained a work-related back injury on June 15, 1998, which the parties stipulated has resulted in claimant's inability to return to her usual work. Claimant sought disability benefits under the Act.

The administrative law judge accurately described claimant's job duties, and found that she was not a covered employee pursuant to Section 2(3) of the Act, 33 U.S.C. §902(3).[1] The administrative law judge found that claimant's job was not essential to shipbuilding, to loading or unloading, or to the repair of equipment. The administrative law judge stated that in *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989), the Supreme Court held covered janitorial workers whose work entailed cleaning spilled coal from loading equipment, as the failure to keep the equipment clean would impede the loading process. In the instant case, the administrative law judge stated that claimant did not establish that her failure to remove debris would lead to a shutdown of shipbuilding or ship repair operations. The administrative law judge stated,

> Although I assume that welding rods and iron are essential to the shipbuilding process, the record yields no evidence that failure to remove scrap would seriously impede that process. It is possible to imagine a situation in which a buildup of scrap and waste aboard ship would bring shipbuilding to a halt, but the record does not provide any specifics to allow me to so find in this case.

Decision and Order at 8. In a footnote, the administrative law judge then stated,

[1]The administrative law judge found the claimant's injury occurred on a covered situs, and this finding is not contested on appeal. 33 U.S.C. §903(a).

> I envision that an adequate record might contain the following: testimony from welders and other construction workers as to what trash is generated in the shipbuilding or ship repair process; testimony from them that accumulation of such trash would impede their work; and testimony from shipboard janitors as to what goes into the bags that are deposited in dumpsters and how much of it accumulates aboard ships on a regular basis.

Id. at 4.

On appeal, claimant contends the administrative law judge erred in finding that she was not a covered employee pursuant to Section 2(3). Claimant contends the administrative law judge misapplied *Schwalb* in finding that her work was not essential to the shipbuilding process, and that she is not required to offer "negative evidence" to establish what would happen if her work was not performed. Claimant contends that the only inference which can be drawn from the evidence is that without her work the shipbuilding process would be impeded. In support of claimant's appeal, the Director, Office of Workers' Compensation Programs, contends that the administrative law judge erred in failing to give claimant the benefit of the Section 20(a) presumption, 33 U.S.C. §920(a), and thus require that employer establish that claimant's job was not essential or had no effect on the shipbuilding process. The Director contends that such rebuttal evidence is wholly lacking in this case. The Director further agrees with claimant that the administrative law judge misapplied *Schwalb* and failed to draw the only reasonable inference in this case regarding the necessity of claimant's work. Employer has not responded to this appeal.

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); *Shives v. CSX Transportation, Inc.*, 151 F.3d 164, 32 BRBS 125(CRT)(4th Cir. 1998), *cert. denied*, 525 U.S. 1019 (1998). To satisfy the status requirement, a 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 *Schwalb,* the Supreme Court upheld coverage for two laborers performing janitorial and housekeeping jobs whose duties included cleaning spilled coal from loading equipment in order to prevent equipment malfunctions and for a machinist whose job 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

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

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). The Court further stated that "[e]quipment cleaning that is necessary to keep machines operative is a form of maintenance and is only different in degree from repair work." *Schwalb,* 493 U.S. at 48, 23 BRBS at 99(CRT). The *Schwalb* court stated that the record in that case contained evidence that the rollers and conveyor belts would become clogged if the spilled coal was not periodically removed, and that an eventual shutdown would occur if the coal was not removed. With regard to the machinist, the Court noted evidence that the loading process actually ceased while he made his repairs to the equipment. *Id.* The administrative law judge in the instant case stated that he was requiring this type of affirmative evidence before he would find that claimant's work was essential to the shipbuilding process. Decision and Order at 8.

Section 20(a) of the Act states, "it shall be presumed, in the absence of substantial evidence to the contrary that the claim comes within the provisions of this chapter." We need not address the general scope of the Section 20(a) presumption in coverage cases, as the courts have held that the Section 20(a) presumption is not applicable to the legal interpretation of the Act's coverage provisions. *See Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir. 1998), *cert. denied*, 525 U.S. 981 (1998); *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 6 BRBS 229 (5th Cir.), *cert. denied*, 434 U.S. 903 (1977); *Pittston Stevedoring Corp. v. Dellaventura*, 544 F.2d 35, 4 BRBS 156 (2d Cir. 1976), *aff'd sub nom. Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249 (1977); *Stockman v. John T. Clark & Son of Boston, Inc.*, 539 F.2d 264, 4 BRBS 304 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977). In this case, there is no dispute about the facts concerning claimant's job duties. What is disputed is the legal import of those job duties: are they essential or not essential to the shipbuilding process?

In this regard, we hold that the administrative law judge, based on the record before him, erred in failing to draw the inference mandated by *Schwalb,* namely that claimant's failure to do her job would lead to the kind of shutdowns described in *Schwalb.* Claimant's job, *for four hours every day*, was to go to the ships' sides to empty 55 gallon drums filled with the debris of shipbuilding, namely strips of iron and welding rods, as well as trash. The administrative law judge specifically found that welding rods and iron are essential to the shipbuilding process, yet failed to conclude that claimant's failure to remove these items would impede the shipbuilding process. The failure to draw this conclusion is irrational, and

thus the administrative law judge's decision is not supported by substantial evidence. *See O'Keeffe*, 380 U.S. at 361-62. This is not a case where competing inferences can be drawn from the record evidence. *See generally Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 25 BRBS 78(CRT) (5th Cir. 1991). Rather, given the facts that welding rods and iron are essential to shipbuilding, the trash barrels are filled with this debris, and that claimant spends four hours every day emptying the barrels, the only possible conclusion is that claimant's failure to remove them eventually would lead to such a build-up of trash that work on the ships could not continue.[3] Thus, claimant's work is essential to the shipbuilding process.[4] *Schwalb*, 493 U.S. at 48, 23 BRBS at 99(CRT). The Supreme Court stated in

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[3]Claimant cites an Occupational Safety and Health Administration regulation in further support of her case. 29 C.F.R. §1915 is entitled "OCCUPATIONAL SAFETY AND HEALTH STANDARDS FOR SHIPYARD EMPLOYMENT." Section 1915.91 is entitled "Housekeeping" and it states, in pertinent part:

> The provisions of this section shall apply to ship repairing, shipbuilding and shipbreaking except that paragraphs (c) and (e) of this section do not apply to shipbreaking.
>
> (a) Good housekeeping conditions shall be maintained at all times. Adequate aisles and passageways shall be maintained in all work areas. All staging platforms, ramps, stairways, walkways, aisles, and passageways on vessels or dry docks *shall be kept clear of* all tools, materials, and equipment except that which is in use, and *all debris such as welding rod tips, bolts, nuts, and similar material*. Hose and electric conductors shall be elevated over or placed under the walkway or working surfaces or covered by adequate crossover planks.
>
> (b) *All working areas on or immediately surrounding vessels and dry docks, graving docks, or marine railways shall be kept reasonably free of debris, and construction material shall be so piled as not to present a hazard to employees*.

(emphasis added).

[4]We note that this case is factually distinguishable from *Jernigan v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 01-0413 (Jan. 18, 2002). In *Jernigan*, the claimant spent most of her work time in the recycling building shredding and recycling paper. The Board held in its initial decision that the administrative law judge rationally found such work was not integral to the shipbuilding process, as "it is immaterial how the waste is disposed of once it is removed from the yard." *Jernigan v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 99-0884 (May 23, 2000). The Board remanded the case for the

Schwalb that "It is irrelevant that an employee's contribution to the loading process is not continuous or that repair or maintenance is not always needed." *Schwalb*, 493 U.S. at 47, 23 BRBS at 99(CRT). Thus, that the trash's impediment to shipbuilding may not be immediate does not compel the conclusion that claimant's work removing shipbuilding debris is not integral to the shipbuilding process. Based on the evidence of record, we hold, therefore, that claimant's work emptying trash barrels from the ships' sides constitutes maritime employment as it is integral to the shipbuilding and repair process, and moreover, is in furtherance of employer's compliance with a federal regulation. *See* n.3, *supra*. The administrative law judge's finding to the contrary is reversed.

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administrative law judge to determine if claimant's remaining duties were essential to shipbuilding. Claimant Jernigan testified that she also had to pick up debris, such as iron and wood from under ship's skids, steel, welding rods, and trash after the shipbuilders finished working. The Board affirmed the administrative law judge's decision on remand that claimant failed to establish that shipbuilding would be impeded if claimant did not perform her cleaning tasks, holding that the administrative law judge was not required, on the facts presented, to infer that her failure to clean would impede ship construction. The claimant had not testified regarding whether her work was performed on an ongoing basis or provide any other details which would lead "inexorably" to the conclusion that ship construction would have been impeded had she not performed her cleaning duties. *Jernigan*, BRB No. 01-0413, slip op. at 5 n.5. In the instant case, however, claimant testified she emptied the drums filled with shipbuilding debris for four hours every day, and thus presented a case in which only one inference concerning the import of her work can be drawn.

Accordingly, the administrative law judge's finding that claimant did not satisfy the status test of Section 2(3) is reversed. The case is remanded to the administrative law judge for resolution of any remaining issues.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge