BRB No. 12-0136

WESLEY STORK	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CLARK SEAFOOD, INCORPORATED	)	
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
NORTHROP GRUMMAN SHIPBUILDING	)	DATE ISSUED: 11/09/2012
	)	
and	)	
	)	
AMERICAN MUTUAL c/o MISSISSIPPI INSURANCE GUARANTY ASSOCIATION	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Robert E. O'Dell, Vancleave, Mississippi, for claimant.

Vincent J. Castigliola, Jr. (Bryan, Nelson, Schroeder, Castigliola & Banahan, P.L.L.C.), Pascagoula, Mississippi, for Clark Seafood, Incorporated.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2010-LHC-01850) of Administrative Law Judge Larry W. Price 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 filed claims for his hearing loss against Clark Seafood (employer) and Ingalls Shipbuilding. The administrative law judge found that claimant failed to file timely claims for compensation against either Ingalls or employer, *see* 33 U.S.C. §913(a), and he found that claimant failed to establish that his hearing loss is due to his work at Ingalls.[1] Decision and Order at 4-5, 8-9. With regard to the claim against employer, for whom claimant worked from 1952 until his retirement in 1991 or 1992, the administrative law judge found that employer is a commercial processor of fish and that claimant was an aquaculture worker specifically excluded from coverage by Section 2(3)(E) of the Act, 33 U.S.C. §902(3)(E).[2] Decision and Order at 6-7. Accordingly, the administrative law judge denied claimant's claim for benefits.

Claimant appeals the denial of benefits. He contends the administrative law judge failed to apply the Section 20(a), 33 U.S.C. §920(a), presumption to the coverage issue, incorrectly found claimant to be an excluded aquaculture worker, and erred in finding his claim untimely filed. Employer responds, urging affirmance. We shall first address claimant's contention that he is not an excluded aquaculture worker.

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, or that the injury occurred on a landward area covered by Section 3(a) and that the work is maritime in nature and is not

[1]Claimant last worked as a pipefitter for Ingalls, now Northrop Grumman, in 1944. He did not learn of a noise-related hearing loss until 2007 at the earliest, and the administrative law judge declined to find that claimant's hearing loss was related to work performed at Ingalls over 50 years earlier. Decision and Order at 8-9. Claimant does not challenge this finding on appeal.

[2]During the last six years of claimant's employment, he was the ice plant operator. His duties included controlling the switch that sent ice through pipes to either the plant for weighing and packing the fish that had been caught or to the dock for use on the fishing vessels.

specifically excluded by any provision in the Act. 33 U.S.C. §§902(3), 903(a); *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). Thus, if the injury occurred on land, in order to demonstrate that coverage exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id.* In this regard, we reject claimant's contention that Section 20(a) of the Act aids his claim. To the extent Section 20(a) applies to the Act's coverage provisions, it is limited to questions of fact and not those of law. *Texports Stevedore Co. v. Winchester*, 632 F.2d 504, 12 BRBS 719 (5th Cir. 1980) (*en banc*), *cert. denied*, 452 U.S. 905 (1981); *see also Fleischmann v. Director, OWCP*, 137 F.3d 131, 32 BRBS 28(CRT) (2d Cir.), *cert. denied*, 525 U.S. 981 (1998). In this case, the facts are undisputed, and the issue of coverage under the Act is a legal one to which the Section 20(a) presumption does not apply.

Section 2(3) of the Act 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 does not include –
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> * * *
>
> (E) aquaculture workers;
>
> if [they] are subject to coverage under a State workers' compensation law.

33 U.S.C. §902(3). With respect to this exclusion, the regulation defines such employees:

> (E) Aquaculture workers, meaning those *employed by* commercial enterprises involved in the controlled cultivation and harvest of aquatic plants and animals, including the cleaning, processing or canning of fish and fish products, the cultivation and harvesting of shellfish, and the controlled growing and harvesting of other aquatic species;

20 C.F.R. §701.301(a)(12)(iii)(E)(emphasis added).[3]

The administrative law judge found that employer is a commercial processor of fish. He then addressed claimant's duties in light of *Alcala v. Director, OWCP*, 141 F.3d 942, 32 BRBS 82(CRT) (9th Cir. 1998), holding that the claimant was not covered by the Act because his duties outside of aquaculture were infrequent or episodic and entirely discretionary in nature. The administrative law judge found that claimant in this case never worked on vessels but in the fish processing plant or the ice plant, and he found that less than five percent of claimant's duties involved blowing ice onto the vessels. Moreover, he found that claimant never left the ice plant because he was required only to push a switch to change the direction of the ice flow. As everything about claimant's employment "revolved around the processing of fish[,]" the administrative law judge found that claimant's duties were not maritime in nature. Therefore, he found that claimant was an aquaculture worker excluded by the Act's coverage. Decision and Order at 7.

Claimant contends that as "at least some" of his duties were "indisputably maritime," he is covered under the Act pursuant to the decisions in *Alcala* and *Ljubic v. United Food Processors*, 30 BRBS 143 (1996). In *Ljubic*, the administrative law judge

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[3]The legislative history to the 1984 Amendments to the Act, which added some exclusions to coverage, states that, for purposes of this exclusion, "aquaculture operations" are defined as:

> those commercial enterprises involved in the controlled cultivation and harvest of aquatic plants and animals. The committee recognizes and intends that this definition, as established in the National Aquaculture Act of 1980, 16 U.S.C. §1801, encompasses a substantial part of the domestic shellfish cultivation and harvesting industry which utilizes municipally leased and/or private growing waters and beds for the controlled growing and harvesting of shellfish species such as oysters, clams, mussels, and abalones. In addition the controlled growing and harvesting of other aquatic species such as salmon, trout and crayfish, would also fall within the meaning of aquaculture.

S. Rep. No. 98-81, 98th Cong., 1st Sess. at 29. The Conference Committee Report also states that, "to date, the definition of maritime employment has never been interpreted to mean the cleaning, processing or canning of fish and fish products. But to foreclose any future problem of interpretation, the term 'aquaculture operations' should be understood as including such activities." H. Conf. Rep. No. 98-1027, reprinted in 1984 U.S.C.C.A.N. 2734, 2773.

determined that the claimant, a maintenance supervisor and mechanic for a fish cannery who spent 40 percent of his time maintaining unloading equipment and repairing docking facilities, was not an aquaculture worker pursuant to Section 2(3)(E). As he spent "at least some of his time" in covered activity, the Board affirmed the finding that the claimant was not excluded from coverage as an aquaculture worker. *Ljubic*, 30 BRBS 143.

In *Alcala*, the United States Court of Appeals for the Ninth Circuit affirmed the administrative law judge's finding that a forklift operator who moved fish from an area near a cannery's freezer entrance into a freezer was an "aquaculture worker" excluded from coverage under the Act. Although he occasionally moved bins of fish on the dock when insufficient outside drivers were available, the court stated this activity was infrequent, episodic, and discretionary, and did not confer coverage. The court noted that a worker need not be engaged in canning or processing cultivated or harvested fish to be considered an excluded aquaculture worker, as the definition is broad enough to encompass those workers who clean, process, or can any fish. *Alcala*, 141 F.3d 942, 32 BRBS 81(CRT).

Although the decisions in *Alcala* and *Ljubic* addressed the nature of the claimants' work activities to determine if they were "maritime," we need not address claimant's contention that he spent "at least some" time in indisputably maritime activities. *See generally Caputo*, 432 U.S. 249, 6 BRBS 150. The United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, has held it is unnecessary to reach that issue in cases involving statutory exclusions to coverage that are based on the nature of the employing entity. Thus, although the Fifth Circuit has not addressed the aquaculture exclusion previously, its other exclusion cases are analogous and persuasive. Specifically, the Fifth Circuit has held that individuals who are *employed by* clubs, camps, recreational operations, etc.; marinas (with the exclusion of construction workers); or vendors, suppliers, or transporters, are not covered by the Act, provided they are covered under state law. 33 U.S.C. §902(3)(B), (C), (D);[4] *Boomtown Belle Casino v.*

[4]Section 2(3)(B), (C), (D) (emphasis added), states that the following are excluded from coverage:

> (B) individuals *employed by* a club, camp, recreational operation, restaurant, museum, or retail outlet;
>
> (C) individuals *employed by* a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);

Bazor, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003) (claimant excluded by Section 2(3)(B); *see* discussion *infra*); *Daul v. Petroleum Communications, Inc.*, 196 F.3d 611, 33 BRBS 193(CRT) (5th Cir. 1999) (consultant for a cell phone company who sold goods excluded under Section 2(3)(D) vendor exclusion as all elements were met); *Green v. Vermilion Corp.*, 144 F.3d 332, 32 BRBS 180(CRT) (5th Cir. 1998), *cert. denied*, 526 U.S. 1017 (1999) (despite being injured while tying up and unloading supplies from vessel, cook/maintenance man at a duck-hunting camp excluded by Section 2(3)(B) because his work was in furtherance of club/camp operation);[5] *see also Keating v. City of Titusville*, 31 BRBS 187 (1997) (employees of recreational marina, who were not involved in construction or repair, excluded under Section 2(3)(C)).

In *Bazor*, the Board held that the decedent, the chief engineer of the employer's vessel casino, was covered by the Act because his duties, were "shipbuilding" activities, performed prior to the completion of the vessel and some of these duties exposed him to maritime hazards, despite his being an employee of a recreational operation. *Bazor v. Boomtown Belle Casino*, 35 BRBS 121 (2001), *rev'd*, 313 F.3d 300, 36 BRBS 79(CRT) (5th Cir. 2002), *cert. denied*, 540 U.S. 814 (2003). Reversing this decision, the Fifth Circuit held that the decedent was excluded from coverage under the recreational operation exception of the Act, Section 2(3)(B), even though he was injured while the floating casino vessel was under construction, and the decedent's job duties, in part, furthered the construction of the vessel. The Fifth Circuit rejected the claimant's reliance on the Board's decisions in *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179 (1999), and *Shano v. Rene Cross Construction*, 32 BRBS 221 (1998), which adopted a *Caputo* "some of the time" test for cases under Sections 2(3)(B) and (C). The court stated that, to the contrary:

> [the] coverage exclusion turns, as an initial matter, on the nature of the employing entity, and not on the nature of the duties an employee performs. The plain language of § 902(3)(B) excludes from coverage "individuals

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> (D) individuals who (i) are *employed by* suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under this chapter[.]

[5]*Compare with Peru v. Sharpshooter Spectrum Venture, LLC*, 493 F.3d 1058, 41 BRBS 28(CRT) (9th Cir. 2007) (Ninth Circuit declined to limit analysis to the employer's business and stated that the claimant's activities also are pertinent under Section 2(3)(B)); *Alcala*, 141 F.3d 942, 32 BRBS 82(CRT) (Ninth Circuit considered the claimant's outside dock work insufficient to convey coverage under Section 2(3)(E)).

> employed by a club, camp, recreational operation, restaurant, museum, or retail outlet" without reference to the nature of the work they do.

Bazor, 313 F.3d at 303, 36 BRBS at 82(CRT).[6] As the employer's casino was a recreational operation, the court held that the decedent was not covered under the Act even if some of his duties exposed him to hazards associated with maritime commerce. *Id.*

The Fifth Circuit supported its decision by reference to the legislative history to the 1984 Amendments. The history states that the exclusions under Section 2(3)(B) and 2(3)(C):

> exclude employees because of the nature of the employing enterprise, as opposed to the exclusions in paragraph 2(3)(A), which are based on the nature of the work which the employee is performing. . . .

H.R. Rep. No. 98-570, reprinted in 1984 U.S.C.C.A.N. 2734, 2737.[7] As with subsections (B), (C), (D) where the statute defines the excluded individuals in terms of their employers, an aquaculture worker is defined by his employer in the regulation implementing Section 2(3)(E). 20 C.F.R. §701.301(a)(12)(iii)(E). Specifically, an "aquaculture worker" is defined as a worker who is "*employed by* [a] commercial enterprise[] involved in the controlled cultivation and harvest of aquatic plants and animals, including [the list of activities performed at the employer's facility.]" 20 C.F.R. §701.301(a)(12)(iii)(E) (emphasis added). The list of included tasks does not identify the

[6]*Compare* 33 U.S.C. §902(3)(A) (focuses on the nature of the work the employee performs) *with* 33 U.S.C. §902(3)(B), (C), (D) (focuses on the business of the employer). *See K.L. [Labit] v. Blue Marine Security, LLC*, 43 BRBS 45 (2009) (security guard on vessel covered); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005) (engineering analyst covered; work not "clerical" and employee not confined to office); *Stalinski v. Electric Boat Corp.*, 38 BRBS 85 (2005) (office clerical and data entry worker excluded from coverage).

[7]The history also states there may be employees of those enterprises who should remain covered. The Fifth Circuit in *Bazor*, 313 F.3d at 303, 36 BRBS at 82(CRT) noted that Section 2(3)(C) does not exclude marine construction work. 20 C.F.R. §701.301(a)(12)(iii)(A), (C), (D) (longshore cargo clerks and checkers covered; employees engaged in marina construction, replacement or expansion covered; vendors performing work normally performed by the employer's employees are covered).

worker's duties, but, rather, is a sample of the types of activities which would qualify the business as an "aquaculture operation," thereby excluding its workers from coverage.

Contrary to claimant's assertion that employer is not an "aquaculture operation," we affirm the administrative law judge's finding that employer is a commercial processor of fish – an aquaculture operation. Hearing testimony revealed that while claimant's last six years of employment were limited to his working in the ice plant, employer's business was not so limited. Mr. Horn, one of the owners, testified that his grandfather founded the company which is considered a "fish producer and distributor and wholesaler." Tr. at 43. He stated that employer purchases fish from other companies or individuals, receives the fish at the dock, processes it, and sells it to customers. *Id.* Mr. Horn also explained that, when claimant was a fish house employee, he performed activities which included sorting and packing fish. *Id.* at 45. Claimant confirmed this, and he explained that everyone had to clean and cut the heads off the fish, as well as "stake" them, which means "[u]sing a band saw to cut the fish and put [it] into cans." *Id.* at 36-37. Thus, although claimant did not perform fish house functions at the end of his career, these activities are central to employer's business. As it is undisputed that employer's business involves "the cleaning, processing, or canning of fish and fish products," and as the fish need not be a harvested or cultivated crop of fish for the aquaculture exclusion to apply, employer's business is an "aquaculture operation" within the meaning of the Act.[8] 33 U.S.C. §902(3)(E); 20 C.F.R. §701.301(a)(12)(iii)(E). Therefore, we affirm the administrative law judge's finding in this respect.

Once the employer's business has been identified as an excluded entity, the Fifth Circuit has held it is unnecessary to address the nature of the employee's activities in determining whether the exclusion to coverage applies. *See Bazor*, 313 F.3d at 303, 36 BRBS at 82(CRT); *see also* H.R. Rep. No. 98-570, reprinted in 1984 U.S.C.C.A.N. 2734, 2737. As this case involves an exclusion similar to the one addressed in *Bazor*, and as we have affirmed the administrative law judge's finding that employer is an aquaculture operation, it is unnecessary to address claimant's duties to determine whether the

[8]The legislative history explains that the term "aquaculture operations" includes "the cleaning, processing, or canning of fish and fish products." H. Conf. Rep. No. 98-1027, reprinted in 1984 U.S.C.C.A.N. 2734, 2773. It does not specify that the fish must be harvested or cultivated and is broad enough to encompass any type of fish. *See Alcala*, 141 F.3d 942, 32 BRBS 81(CRT); *cf. Barnard v. Zapata Haynie Corp.*, 23 BRBS 267 (1990), *aff'd*, 933 F.2d 256, 24 BRBS 160(CRT) (4th Cir. 1991) (airborne fish spotter who searched for free-ranging menhaden was not an aquaculture worker as defined by Section 2(3)(E), as he was engaged in fishing and not in processing fish and his duties did not involve the controlled cultivation and harvesting of fish).

aquaculture exclusion applies.[9] That is, claimant was *employed by* employer, an aquaculture operation, and, therefore, was an aquaculture worker excluded from the Act's coverage.[10] *See id.*; *Daul*, 196 F.3d 611, 33 BRBS 193(CRT); *Green*, 144 F.3d 332, 32 BRBS 180(CRT). Therefore, albeit on a different rationale, we affirm the administrative law judge's finding that claimant is excluded from coverage under Section 2(3)(E) of the Act. 33 U.S.C. §902(3)(E); *Bazor*, 313 F.3d 300, 36 BRBS 79(CRT); 20 C.F.R. §701.301(a)(12)(iii)(E). Consequently, we affirm the denial of benefits.[11]

Accordingly, the administrative law judge's Decision and Order 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

[9]Thus, we reject claimant's reliance on *Ljubic* and *Alcala*, as those cases arose within the jurisdiction of the Ninth Circuit. *See* n. 5, *supra*. Moreover, we need not address claimant's contention that the administrative law judge failed to discuss all evidence regarding the nature of claimant's work duties.

[10]Although claimant alleges there is no proof his injury is covered under state law, we note that claimant admitted he had a previous injury to his foot while working for employer, and he was paid under the state workers' compensation act. Tr. at 39, 41; *cf. Peru*, 493 F.3d 1058, 41 BRBS 28(CRT) (where the employer disputed coverage under both the Act and the state law, the court remanded the case for a determination of whether the claimant was covered by the state workers' compensation act).

[11]In light of our decision, we need not address claimant's remaining contention that the administrative law judge erred in finding his claim untimely filed.