BRB No. 97-1055

MICHAEL P. DAUL	)	
Claimant-Petitioner	)	DATE ISSUED: 04/28/1998
v.		
	)	
PETROLEUM COMMUNICATIONS, INCORPORATED	)	
and	)	
TRAVELERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits on the Basis of Jurisdiction of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Randy J. Ungar and George W. Byrne, Jr. (Randy J. Ungar & Associates, Inc.), New Orleans, Louisiana, for claimant.

John M. Sartin, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits on the Basis of Jurisdiction (96-LHC-585) of Administrative Law Judge Richard D. Mills 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 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, employed as a communication consultant/salesman for Petroleum Communications, Incorporated (employer), a seller of cellular

communications (i.e., air time and equipment) in the Gulf of Mexico,[1] sustained injuries to his back, ribs and left arm as a result of a slip and fall while aboard the barge CHICKASAW on May 15, 1995. As a result of his injuries, claimant has been unable to perform his usual employment and has been receiving $323 per week from June 12, 1995, pursuant to the Louisiana Workers' Compensation Act. Claimant also sought temporary total disability benefits under the Longshore Act. Employer disputed the claim, arguing that the "vendor exclusion" provided by Section 2(3)(D) of the Act, 33 U.S.C. §902(3)(D), applies to bar claimant's coverage under the Act.

In his decision, the administrative law judge determined that claimant is excluded from coverage by operation of the "vendor exclusion" set out in Section 2(3)(D) of the Act.[2] Pursuant to 2(3)(D)(i), the administrative law judge found that employer, as a seller of cellular goods and air time, is a vendor. The administrative law judge next determined that claimant, in assisting in the installation of new equipment aboard the CHICKASAW was, as delineated by Section 2(3)(D)(ii), temporarily doing business on the premises of a maritime employer, Global Pipelines, which owned the barge. Lastly, reflecting on Section 2(3)(D)(iii), the administrative law judge found that the work performed by claimant aboard the barge was not work normally performed by Global Pipelines' employees. Thus, having determined that all of the criteria for the vendor exclusion are met, and having noted that claimant is covered and receiving compensation under the Louisiana Workers' Compensation Act, the administrative law judge concluded that claimant lacked coverage under the Act and, accordingly, denied benefits.

On appeal, claimant contests the administrative law judge's denial of his claim. Employer responds, urging affirmance.

Claimant initially argues that since the administrative law judge found that he satisfied the situs and status tests, he is covered under the Act; claimant therefore asserts that the administrative law judge erred by applying the vendor exclusion at Section 2(3)(D) to deny benefits in the instant case. Specifically, claimant argues that it is illogical and inconsistent for the administrative law judge to find that claimant is an "employee" under the Act but is also precluded from coverage by the vendor exclusion since by operation of the 1984 Amendments to

[1]Employer is one of two companies licensed to provide cellular communication services in the Gulf of Mexico.

[2]At the formal hearing the parties stipulated that, among other things, the situs requirement of the Act has been met in this case. At the time of claimant's injury, the barge was on actual navigable waters.

the Act, the term "employee" necessarily excludes those individuals encompassed within the vendor exception. Employer maintains that inasmuch as the administrative law judge determined that the vendor exception is applicable to the instant case, the issue of whether claimant can also satisfy the status test is moot.

In order for a claim to be covered under the Act, a claimant must establish that his injury occurred upon a site covered by Section 3(a) and that he was a maritime employee under Section 2(3) and *not subject to any specific statutory exclusions*. 33 U.S.C. §§902(3), 3(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983); *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996). Therefore, in order to demonstrate that he is covered by the Act, a claimant must satisfy both the "situs" and the "status" requirements. *Id.*

Generally, a claimant satisfies the "status" requirement if he is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46, 23 BRBS 96 (CRT)(1989). In 1984, Congress amended Section 2(3) to specifically exclude certain employees from coverage. *See* 33 U.S.C. §902(3)(A)(F) (1994). The legislative history explains that the excluded activities and occupations either lack a substantial nexus to maritime navigation and commerce or do not expose those employees to the hazards normally associated with longshoring, shipbuilding and harbor work. H.R. Rep. No. 570, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 2735. The Board has held that while a claimant's duties may arguably fall within the broad language of Section 2(3) as an employee engaged in maritime employment, such a claimant may nonetheless be explicitly excluded from coverage by the specific exceptions to coverage. *See Stone*, 30 BRBS at 209; *Bergquist v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 131(1989). Similarly, citing *Perini* the Board has held that where claimants are specifically excluded from coverage by one of the enumerated exceptions of Section 2(3)(A)-(F), they are not entitled to coverage by virtue of an injury on actual navigable waters. *King v. City of Titusville*, 31 BRBS 187 (1997) (discussing the Section 2(3)(C) exclusion of marina workers). In other words, a claimant may be able to satisfy the status test, but nevertheless be excluded from coverage by operation of one of the exceptions set out in Section 2(3)(A)-(F). *King*, 31 BRBS at 187; *Stone*, 30 BRBS at 209. Consequently, we reject claimant's contention and now consider the administrative law judge's determination that the vendor exclusion of Section 2(3)(D) applies to preclude claimant from coverage under the Act in light of claimant's other contentions.

Claimant argues that, contrary to the administrative law judge's determination, he does not fall within the provisions of the vendor exclusion. Claimant first avers that employer is not in any traditional sense a "vendor" as defined by Section 2(3)(D), nor is claimant simply a salesman. Claimant argues that under the Board's decision in *Ripley v. Century Concrete Services*, 23 BRBS 336 (1990), employer should be considered as a provider of a service and not a "vendor," *i.e.,* one who sells goods. Thus, claimant maintains that the facts of the instant case fail to support the administrative law judge's determination that the criterion of Section 2(3)(D)(i) has been met. Secondly, claimant asserts that since at the time of his accident he was engaged in work normally performed by employees of Global Pipelines, the administrative law judge erred in finding that the criterion set out at Section 2(3)(D)(iii) has been met. Claimant explicitly argues that the administrative law judge has defined the term "work" in Section 2(3)(D)(iii) to mean something more than routine duties, which, claimant asserts is far more exclusive than the definition envisioned by Congress in implementing the 1984 Amendments to the Act.

Section 2(3)(D) 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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> * * *
>
> (D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in [Section 902(4)], and (iii) are not engaged in work normally performed by employees of that employer under this chapter [if such persons are covered by a State workers' compensation law].

33 U.S.C. §902(3)(D) (1994).

SECTION 2(3)(D)(i)

In considering whether employer qualifies as a vendor for the purposes of Section 2(3)(D)(i), the administrative law judge first assessed the nature of employer's business and claimant's job duties. The administrative law judge found that employer derives 95 percent of its revenue from the sale of air time,

and thus that employer primarily sells an intangible product. The administrative law judge next found that the primary job of a salesman with employer is not only to sell equipment and air time to customers, but to retain his existing customers. As such, the administrative law judge determined that while claimant is spending little time selling tangible goods, his specific duties entailed the representation of his company in such a way that the end result was a sale to the customer. The administrative law judge therefore found that although claimant spends a majority of his work time in a "public relations" capacity, claimant's actions resulted in the sale of air time to customers such that claimant is engaged in "selling" employer's product. Consequently, the administrative law judge rationally classified claimant's position with employer as a salesman of cellular equipment and air time. Moreover, the administrative law judge concluded that although the bulk of employer's business involved the sale of intangible goods, employer still qualifies as a vendor for purposes of Section 2(3)(D). In so finding, the administrative law judge rationally distinguished the Board's decision in *Ripley*, 23 BRBS at 336, wherein a building contractor working under a contract to complete a construction project on a pier at a shipyard was found to provide a service instead of a product,[3] and thus did not qualify as a vendor under Section 2(3)(D)(i), since claimant herein sells air time and cellular equipment to employer's customers and therefore, in contrast to *Ripley*, "sells goods" rather than provides services such as manual labor.[4] Consequently, the administrative law judge's finding that employer is a vendor pursuant to Section 2(3)(D)(i) is affirmed as it is rational and supported by substantial evidence.

SECTION 2(3)(D)(ii)

The parties stipulated and the administrative law judge found that claimant meets the criterion at Section 2(3)(D)(ii) in the case at hand, since at the time of his injuries, claimant was temporarily doing business on the premises of Global Pipelines, a maritime employer within the meaning of 33 U.S.C. §902(4).

[3]The Board held that the employer in Ripley cannot be considered a "vendor," as that term refers to one who sells goods. Ripley v. Century Concrete Services, 23 BRBS 336, 340 (1990). Clearly, in contrast, the administrative law judge has in the instant case determined that claimant is a salesman for employer whose business essentially involves the sale of (intangible) goods.

[4]We note that Senate Report No. 98-81 (May 10, 1983) further exhibits Congressional intent to specifically exclude salesmen, such as claimant in the instant case, from coverage under Section 2(3)(D). In pertinent part, Senate Report 98-81 states: "For example, truck drivers, salesmen, and personnel engaged in supplying components, parts, and services to traditional maritime employers are excluded by this provision [Section 2(3)(D)]." (emphasis added).

SECTION 2(3)(D)(iii)

With regard to the last subsection of Section 2(3)(D), the administrative law judge first determined that the work which claimant performed aboard the CHICKASAW involved assisting in the installation of new cellular equipment, and in maintaining good relations with Global Pipelines in the hope of furthering sales of cellular air time. The administrative law judge properly concluded that employees of Global Pipelines did not normally perform either of these tasks. *See* EX 5. The administrative law judge then observed that, at times, claimant would perform some activities which were similar to those normally performed by employees of Global Pipelines. Specifically, the administrative law judge noted that claimant would, from time to time, assist with exchanging telephone equipment on the vessel, jobs normally performed by Global Pipelines' employees in maintaining the vessel's communication system. The administrative law judge, however, determined that claimant's work in this regard was akin to routine maintenance of the phone equipment and thus incidental to Global Pipelines' maritime work, and was not done in an effort to circumvent the Congressional intent behind enacting this third element to the provision, *i.e.*, claimant's performance of this work was not utilized by Global Pipelines as a means to evade coverage for its own employees under the Act.[5] In this regard, the administrative law judge specifically found that Global Pipelines did not subcontract any of its work to claimant. As it is supported by substantial evidence, we affirm the administrative law judge's finding that claimant was not engaged in work normally performed by employees of Global Pipelines, and thus, that the criterion of Section 2(3)(D)(iii) has been met.

As all of the requisite elements for the vendor exclusion at Section 2(3)(D) have been met,[6] we affirm the administrative law judge's finding that claimant is precluded from coverage under the Act. Moreover, as claimant is specifically

[5] Specifically, the legislative history states that:

> The Committee has added this last proviso to the Senate Language ("(iii) are not engaged in work normally performed by employees of that employer under the Act") specifically to insure that subcontracting is not used as a device by which work, which might be performed by covered employees, may be done by employees of suppliers or vendors in order to evade the coverage of this Act.

H.R. Rep. No. 570, 98th Cong., 2d Sess. (1984) reprinted in 1984 U.S.C.C.A.N. 2735 (emphasis added). In Ripley, 23 BRBS at 340, the Board suggested such a result if the subcontractor hired to work on the pier were considered a vendor and thus excluded.

[6] As previously noted, as required by Section 2(3) claimant is covered and has been receiving benefits under the Louisiana State Workers' Compensation Act for his work-related injuries in this case.

excluded by Section 2(3)(D), he is not entitled to coverage by virtue of an injury on actual navigable waters. *King*, 31 BRBS at 187.

Accordingly, the administrative law judge's Decision and Order Denying Benefits on the Basis of Jurisdiction is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge