BRB No. 12-0581

LUIS E. DeJESUS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
VIKING YACHT COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
SEABRIGHT INSURANCE COMPANY	)	DATE ISSUED: Jan. 28, 2014
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and the Supplemental Decision and Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

David C. Barnett (Barnett & Lerner, P.A.), Fort Lauderdale, Florida, for claimant.

Robert B. Griffis, Orlando, Florida, for employer/carrier.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, 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, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order and the Supplemental Decision and Order (2010-LHC-01598) of Administrative Law Judge Donald W. Mosser 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).

This is a case of first impression concerning the amended version of Section 2(3)(F) of the Act, 33 U.S.C. §902(3)(F) (amended 2009) (Supp. 2011), and its implementing regulation, 20 C.F.R. §701.501. The facts of this case are not in dispute; rather, it is the application of the amended law to those facts on which the parties disagree.

At employer's facility in New Jersey (hereinafter NJ division), employer builds and sells sport-fishing and recreational yachts, ranging from 42 to 82 feet in length. Employer also operates two facilities in Riviera Beach, Florida, where claimant works (hereinafter employer).[1] Services at the Florida facilities include general repairs and maintenance of sport-fishing yachts manufactured and sold by the NJ division, as well as other sport-fishing boats and private motor yachts.[2] Employer's Florida facility also maintains and repairs the stock vessels the NJ division uses in boat shows and sea trials.

Claimant has worked for employer in the two service facilities in Florida since 2006, and his duties include patching, painting, and repairing fiberglass boats. Claimant's repair work could occur either on the water or in drydock. On February 2, 2010, he suffered a forehead contusion while working on a 63.5-foot yacht. Employer paid claimant medical and disability benefits for this injury under the Florida workers' compensation law. Claimant filed a claim contending his injury is covered by the Longshore Act. Employer controverted the claim, asserting that the 2009 amended version of Section 2(3)(F) excludes claimant from coverage under the Longshore Act because its service facilities are used to repair only recreational vessels.[3] The

[1] As of the date of the hearing in 2011, claimant remained employed by employer. Decision and Order at 2.

[2] Services also include warranty repairs.

[3] Section 2(3)(F) previously excluded from coverage "individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length[.]" 33 U.S.C. §902(3)(F) (2006). The amended version excludes: "individuals employed to

administrative law judge accepted claimant's assertion that, because employer repaired/maintained some vessels that were used by the NJ division for boat shows and sea trials, those vessels were "commercial," and not "recreational," as they were promotional vessels used to generate sales. Accordingly, he found that claimant was not excluded from the Act's coverage pursuant to amended Section 2(3)(F); as claimant was engaged in ship repair, his injury was covered under the Act. Decision and Order at 3-6. Both parties moved for reconsideration. The administrative law judge denied employer's motion and affirmed his decision that claimant's work is covered by the Act. On claimant's motion, he modified his decision by generally ordering employer to pay claimant medical benefits under Section 7 of the Act, 33 U.S.C. §907, and compensation under Section 8 of the Act, 33 U.S.C. §908. Supp. Decision and Order at 3-4.[4]

Employer appeals, contending the administrative law judge erred in finding claimant's injury covered by the Longshore Act because he works on "commercial" or "non-recreational" vessels, as it avers it services only recreational vessels within the meaning of amended Section 2(3)(F). Employer asserts that the administrative law judge erred in using his own definition of "commercial" rather than adhering to the regulation at 20 C.F.R. §701.501 which incorporates the Coast Guard's definition of that term. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, separately, urging affirmance.[5] Claimant and the Director assert that the stock

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build any recreational vessel under sixty-five feet in length, or individuals employed to repair any recreational vessel, or to dismantle any part of a recreational vessel in connection with the repair of such vessel[.]" 33 U.S.C. §902(3)(F) (amended 2009) (Supp. 2011).

[4] The administrative law judge noted there is no evidence in the record regarding the amount to which claimant may be entitled under either section, and he stated: "I leave this matter to be resolved by the parties either administratively or through further litigation, if deemed necessary."

[5] The Director originally responded to the appeal by urging the Board to dismiss the appeal for lack of a justiciable controversy as no benefits were awarded. *See* n.4, *supra*. The Board denied the Director's motion to dismiss. *DeJesus v. Viking Yacht Co., Inc.*, BRB No. 12-0581 (Aug. 15, 2013). In a footnote in his brief now before us, the Director renews his motion to dismiss the appeal, asserting, again, that employer has no financial stake in the decision and also asserting that the Board erred in stating the parties would be without a remedy if the appeal is dismissed. The Director's contention is untimely as a motion for reconsideration of the Order dated August 15, 2013. 20 C.F.R. §802.219(i) (motion for reconsideration may be filed within 10 days of the filing of the order). Moreover, the motion was not made in a separate document. 20 C.F.R. §802.219(b).

vessels which claimant repaired, although manufactured to be recreational vessels, were used for the commercial purpose of promoting sales for the NJ division. Therefore, they aver, claimant's repairs of the stock, or promotional, vessels constitute covered work.[6]

Section 2(3)(F) of the Act, as amended in 2009, provides:

> (3) 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- . . .
>
> (F) individuals employed to build any recreational vessel under sixty-five feet in length, or individuals employed to *repair any recreational vessel*, or to dismantle any part of a recreational vessel in connection with the repair of such vessel; . . .
>
> if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. §902(3)(F) (Supp. 2011) (emphasis added); *see* 20 C.F.R. §701.501 *et seq*. The effective date of this amendment was February 17, 2009.[7] 20 C.F.R. §701.503. As claimant's traumatic injury occurred in February 2010, the amended version of Section

[6] Although the number of stock vessels in the facilities fluctuates, at the time of claimant's injury nine of 40 vessels being serviced were stock vessels, and the parties do not dispute that repair of these vessels is a regular part of employer's business. Based on the ratio of stock boats to customer boats in service at the time of claimant's injury, the administrative law judge determined that claimant spent enough of his work time working on the company-owned boats to satisfy the "some of the time" requirement of Section 2(3), 33 U.S.C. §902(3). Decision and Order at 6; *see Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Employer does not challenge this finding.

[7] Employer asserts, and the administrative law judge found, that claimant would not have been covered under the prior version of Section 2(3)(F) for this injury because he was injured while working on a vessel less than 65 feet in length. As the Director observes, this statement incorrectly rests on the length of the vessel on which claimant was working when he was injured and not on the length of the vessels on which he worked overall. *See Redmond v. Sea Ray Boats*, 32 BRBS 195 (1998), *vacating in part on recon.* 32 BRBS 1 (1998).

2(3)(F) applies to ascertain whether he is covered by the Act.[8] 20 C.F.R. §701.504(b)-(c); *see generally Czikowsky v. Ocean Performance, Inc.*, 47 BRBS 35 (2013).

The Department of Labor promulgated regulations to implement Section 2(3)(F). The final regulations became effective on January 30, 2012.[9] 76 Fed. Reg. at 82117 (Dec. 30, 2011). Section 701.501(a) of the regulations defines "recreational vessel" as a vessel:

> (1) Being manufactured or operated primarily for pleasure; or
> (2) Leased, rented, or chartered to another for the latter's pleasure.

20 C.F.R. §701.501(a); *see also* 46 U.S.C. §2101(25). There are different rules for applying this definition, depending on whether, at the time of the injury, the vessel is being manufactured or repaired. Section 701.501(b) provides:

> In applying the definition in paragraph (a) of this section, the following rules apply:
> (1) A vessel being manufactured or built, or being repaired under warranty by its manufacturer or builder, is a recreational vessel, if the vessel appears to be intended, based on its design and construction, to be

[8] The Director notes that employer and the administrative law judge erroneously, albeit harmlessly, focused on the nature of the work at employer's facilities rather than on the nature of claimant's work. The Director is correct that the focus of the exclusion at Section 2(3)(F) is on the type of work a claimant performs and not the overall services provided by his employer. *See Stork v. Clark Seafood, Inc.*, 46 BRBS 45 (2012) (comparing the exclusions under Section 2(3) - nature of an employer's work vs. nature of an employee's work). Thus, while employer states that its purpose at the Florida facilities where claimant works is to repair and maintain recreational vessels, the issue is whether the vessels on which claimant worked were "recreational vessels" within the meaning of the Act.

[9] The administrative law judge correctly noted that the regulations had not been issued at the time of claimant's injury. Decision and Order at 5 n.3. However, he properly applied the new regulations, as they specify when and how to implement amended Section 2(3)(F). 20 C.F.R. §§701.502-701.504. As claimant's injury occurred on February 2, 2010, making the amendment applicable, and as the regulations are "intended to implement amended section 2(3)(F) and clarify its application[,]" 76 Fed. Reg. at 82118, and not to make a change to a law, the regulations apply to pending cases. *See Wilson v. United States*, 588 F.2d 1168 (6th Cir. 1978); *Anderson, Clayton & Co. v. United States*, 562 F.2d 972 (5th Cir. 1977).

> for ultimate recreational uses. The manufacturer or builder bears the burden of establishing that a vessel is recreational under this standard.
> (2) *A vessel being repaired*, dismantled for repair, or dismantled at the end of its life *is not a recreational vessel if the vessel had been operating, around the time of its repair or dismantling, in one or more of the following categories on more than an infrequent basis* -
> (A) "Passenger vessel" as defined by 46 U.S.C. §2101(22);
> (B) "Small passenger vessel" as defined by 46 U.S.C. §2101(35);
> (C) "Uninspected passenger vessel" as defined by 46 U.S.C. §2101(42);
> (D) Vessel routinely engaged in "commercial service" as defined by 46 U.S.C. §2101(5); or
> (E) Vessel that routinely carries "passengers for hire" as defined by 46 U.S.C. §2101(21a).

20 C.F.R. §701.501(b) (emphasis added).

After stating that the definition of "recreational vessel" in the Act is overly vague, and that the purpose of the regulation is to provide a more workable definition, the administrative law judge stated that the regulation "provides categories of use of a vessel that will not be considered recreational, including a vessel routinely engaged in 'commercial service.'" Decision and Order at 5 (citing 20 C.F.R. §701.501(b)(2)(D)). Although he cited the "commercial service" category of the regulation, he did not specifically address how that phrase is defined or how it applies here. Nevertheless, he concluded that claimant's work repairing the stock vessels is not excluded from coverage because the stock vessels serve a "commercial" purpose.[10] Decision and Order at 5-6. On reconsideration, the administrative law judge addressed and rejected employer's contention regarding the definition of "commercial service," stating:

> I disagree [with employer's contention] as the evidence in the record indicates the boats were used to transport customers on trial runs obviously with the hope that the customers being transported would be impressed with the capabilities of the vessels and purchase one. I find this type of transportation qualifies as "commercial service" within the definition of 20 C.F.R. §701.501(b)(2)(D) and 46 U.S.C. §2101(5).

[10] Only claimant's repair work on vessels owned and operated by the NJ division for promotional purposes was addressed by the administrative law judge and is at issue in this appeal. No party has addressed the warranty work, *see* 20 C.F.R. §701.501(b)(1), and no party has raised the issue of how the vessels brought in by the general public were used; however, employer stated it did not know whether any private vessels were used "commercially."

Supp. Decision and Order at 3.

Employer contends on appeal that the vessels on which claimant works do not fit within any category listed in Section 701.501(b)(2) and are, therefore, recreational vessels, excluding claimant's work from coverage.[11] It asserts the administrative law judge erroneously extended the definition of "commercial service" in Section 701.501(b)(2)(D) to convert the stock vessels in this case to non-recreational status. Specifically, employer argues that the subsection (b)(2) "commercial service" exclusion is limited to vessels in the business of transporting people or goods, 46 U.S.C. §2101(5), and it is not in that business. Employer additionally avers it does not have a license to transport passengers or goods, so the promotional vessels cannot be considered "commercial." The Director responds, urging affirmance of the administrative law judge's decision on the grounds that the starting point of the analysis is Section 701.501(a), and not (b), because Section 701.501(a) contains the "overarching definition" of a "recreational vessel" which must be met before looking to the categories of non-recreational activities. The Director further asserts that employer incorrectly reads the list in Section 701.501(b)(2) as an exclusive list rather than an illustrative list and that those categories are not intended to limit the scope of the overarching definition. The Director thus argues that the stock boats which are used in boat shows and sea trials are not operated *primarily for pleasure* because they are used to promote sales. As they are used to generate income, even if not in one of the ways enumerated in the regulation, the Director states it was reasonable for the administrative law judge to consider them "commercial" pursuant to the regulation.

The words of a regulation are to be given their plain meaning. *Tesoro Hawaii Corp. v. United States*, 405 F.3d 1339 (Fed. Cir. 2005); *Powers v. Sea Ray Boats, Inc.*, 31 BRBS 206 (1998). The Director's interpretation of the agency's own regulations is controlling unless that interpretation is plainly erroneous or inconsistent with the text of the statute they implement or the regulations themselves. *Galle v. Director, OWCP*, 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir.), *cert. denied*, 534 U.S. 1002 (2001); *Alabama Dry Dock & Shipbuilding Corp. v. Sowell*, 933 F.2d 1561, 24 BRBS 229(CRT) (11th Cir. 1991). The Board has granted deference to the Director's reasonable interpretations of the Act and the regulations. *Galle v. Ingalls Shipbuilding, Inc.*, 33 BRBS 141 (1999), *aff'd sub nom. Galle v. Director, OWCP,* 246 F.3d 440, 35 BRBS 17(CRT) (5th Cir.), *cert. denied*, 534 U.S. 1002 (2001). In this case, however, the Director's interpretation of

[11] It is undisputed that employer's NJ division built the promotional boats to be recreational, just like the vessels being sold, and the administrative law judge so found. Decision and Order at 4.

the regulation conflicts with the plain language of the regulation and thus is neither rational nor persuasive.

As stated above, Section 701.501(a) provides that the definition of recreational vessels includes those vessels that are operated primarily for pleasure. "Pleasure" is not defined; however, Section 701.501(b) specifically provides: "[i]n applying the definition in paragraph (a) of this section, the following rules apply[.]" 20 C.F.R. §701.501(b). Paragraph (b)(2) then lists specific categories of uses that would render vessels under repair "non-recreational." 20 C.F.R. §701.501(b)(2)(A)-(E).[12] The Director's position ignores this language. Indeed, he acknowledges Section 701.501(b)(2) only in the most oblique way by stating that a vessel which generates income "even if not in one of the precise ways enumerated in Section 701.501(b)(2)(A)-(E)" does not qualify as a recreational vessel. That is not what the regulation states, and a review of the preamble to the final regulation refutes the Director's assertion.

In addressing a commenter's concern about the tension between paragraph (a), where the regulation discusses use of a vessel for pleasure, and paragraph (b)(2), where the regulation discusses usage that would render the vessel non-recreational, the Department explained:

> occasional non-recreational use does not alter the vessel's core recreational purpose and should not take a vessel outside of the "recreational vessel" definition. *To clarify this point* and to resolve the tension the commenter notes between paragraphs (a) and (b), *the final rule provides that a vessel remains recreational unless it falls within the designated Coast Guard vessel categories on a more than infrequent basis during the time the vessel is in operation.*

76 Fed. Reg. at 82121 (emphasis added). Thus, the only way an apparently recreational vessel becomes "non-recreational" is if its use falls within one or more of the categories listed in subsection (b)(2). To hold otherwise would be to ignore a portion of the regulation. Moreover, to give credence to the Director's assertion that the list of categories in paragraph (b)(2) is merely a list of examples that could be expanded depending on the facts of a case, we would have to add words to that effect into the regulation, which we are not at liberty to do. As noted above, the Director's interpretation is not what the Department intended, 76 Fed. Reg. at 82121, and we reject the Director's interpretation and application of the regulation. Rather, both paragraphs

[12] Section 701.501(b)(2) is applicable to this case, as claimant is employed to repair vessels, and it is the use of the vessels at the time of the repair that identifies whether they are recreational or non-recreational.

(a) and (b) of Section 701.501 must apply in assessing whether a vessel is "recreational" within the meaning of the Act.

In promulgating the regulation, the Department explained:

> Essentially, *the Coast Guard deems the following to be recreational: Any unchartered passenger vessel used for pleasure and carrying no passengers-for-hire (i.e., paying passengers);* and any chartered passenger vessel used for pleasure with no crew provided and with fewer than twelve passengers, none of whom is for hire. All other passenger-carrying vessels fall into one of the following three non-recreational categories: Uninspected passenger vessel; small passenger vessel; and passenger vessel.

76 Fed. Reg. at 82120 (Dec. 30, 2011) (emphasis added). The vessels used by the NJ division for sea trials and test runs to promote sales are not chartered vessels, they carry no passengers-for-hire, and, arguably, they are operated for the passengers' pleasure, as it is they who must be pleased in order to generate the sale. Thus, although the stock vessels are used for the NJ division's business of generating sales, they may reasonably be said to be operated "primarily for pleasure" pursuant to Section 701.501(a).[13] Accordingly, unless the NJ division's promotional vessels satisfy one or more of the paragraph (b)(2) categories, they remain "recreational" under the regulation. 20 C.F.R. §701.501(a), (b)(2); 76 Fed. Reg. at 82120-82121.

The Section 701.501(b)(2) categories include definitions set forth in sections of another statute, 46 U.S.C. §2101. When interpreting a statute, the starting point is the plain meaning of the words of the statute, *Mallard v. U.S. Dist. Ct. for the Southern Dist. of Iowa*, 490 U.S. 296 (1989), and it is a settled principle of statutory construction that courts should give effect, if possible, to every word of the statute. *Connecticut Dep't of Income Maintenance v. Heckler*, 471 U.S. 524, 530 n.15 (1985); *Bowsher v. Merck & Co.*, 460 U.S. 824, 833 (1983); *Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270, 298 (1956). Of the paragraph (b)(2) categories, the only one which could potentially alter the status of the stock vessels, and the only category the administrative

[13] The stock vessels are more akin to chartered or leased vessels than they are to working boats such as fishing boats or ferries. Like the chartered or leased vessel, operation of the stock vessel would be for the passenger's pleasure, not the captain's or the owner's. Moreover, operation of a chartered or leased vessel generates guaranteed income, whereas operation of the stock vessels does not, yet the leased vessel is still considered to be operating "primarily for pleasure" despite any business that has been conducted. 20 C.F.R. §701.501(a)(2).

law judge addressed, is the "commercial service" category at 20 C.F.R. §701.501(b)(2)(D). The rest of the categories involve carrying at least one paying passenger and are not applicable here.[14] 20 C.F.R. §701.501(b)(2)(A)-(C), (E); *see* 46 U.S.C. §2101(21a), (22), (35), (42).

Section 701.501(b)(2)(D) incorporates Section 2101(5) of the Shipping Code which provides: "'commercial service' includes any type of trade or business involving the transportation of goods or individuals, except service performed by a combatant vessel." 46 U.S.C. §2101(5). The administrative law judge found that taking customers on test runs to entice them to purchase vessels satisfies the "transportation" element in the definition of "commercial service." Supp. Decision and Order at 3. Employer asserts this is an improper expansion of the definition of commercial service. Neither claimant nor the Director addresses the administrative law judge's finding. We hold that, as employer asserts, the administrative law judge's finding is contrary to law and to the plain meaning of the word "transportation."

"Transportation" is the act or process of moving or conveying goods or people from one place to another. *See Lozman v. City of Riviera Beach, Florida*, 133 S.Ct. 735, 741 (2013) (citing 18 Oxford English Dictionary 424 (2d ed. 1989); N. Webster, An American Dictionary of the English Language 1406 (C. Goodrich & N. Porter eds. 1873)). Thus, "commercial service" involves moving goods or people from one place to another. Potential customers of the NJ division ride on the stock vessels for sea trials and return to their starting point when the test run is finished. They are not being conveyed from one place to another. Consequently, the stock vessels are not "transporting" people, *see Lozman*, 133 S.Ct. at 741, and are not in "commercial service," 46 U.S.C. §2101(5).[15] As the stock vessels are not engaged in commercial service, and as no other subsection (b)(2) category applies, the stock vessels retain their status as "recreational vessels." 20 C.F.R. §701.501(a)(1), (b)(2). Therefore, we reverse the administrative law judge's findings that the stock vessels engaged in commercial service within the meaning of the

[14] Claimant asserts there was sufficient testimony to find that employer's stock vessels were "undocumented passenger vessels." Cl. Brief at 8. As customers ride for free, the vessels cannot be considered "passenger vessels." 46 U.S.C. §2101(21a), (22), (35), (42); 20 C.F.R. §701.501(b)(2)(A)-(C), (E).

[15] In response to employer's argument that the vessels used on display in boat shows also are not being used for a commercial purpose, the administrative law judge stated that the trial runs qualify as a "commercial purpose." Supp. Decision and Order at 3. To the extent there is any question, vessels on display in a boat show are not being used in "commercial service" within the meaning of the Act, as they are not transporting any goods or people anywhere.

regulation and the Act and that the vessels on which claimant worked were non-recreational. As claimant repaired only recreational vessels, and as he is covered by a state workers' compensation law, he is excluded from coverage pursuant to Section 2(3)(F). *See generally Peru v. Sharpshooter Spectrum Venture, LLC*, 493 F.3d 1058, 41 BRBS 28(CRT) (9th Cir. 2007). Absent the Act's coverage, we reverse the administrative law judge's award of benefits under the Act.

Accordingly, the administrative law judge's Decision and Order and Supplemental Decision and Order are reversed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge