

§ 784.106

Act as amended in 1961 is to be determined by the practical and functional relationship of the employee's work to the performance of the operations specifically named in section 13(a)(5) and section 13(b)(4).

PRINCIPLES APPLICABLE TO THE TWO EXEMPTIONS

§ 784.106 Relationship of employee's work to the named operations.

It is clear from the language of section 13(a)(5) and section 13(b)(4) of the Act, and from their legislative history as discussed in §§ 784.102-784.105, that the exemptions which they provide are applicable only to those employees who are "employed in" the named operations. Under the Act as amended in 1961 and in accordance with the evident legislative intent (see § 784.105), an employee will be considered to be "employed in" an operation named in section 13(a)(5) or 13(b)(4) where his work is an essential and integrated step in performing such named operation (see *Mitchell v. Myrtle Grove Packing Co.*, 350 U.S. 891, approving *Tobin v. Blue Channel Corp.*, 198 F. 2d 245; *Mitchell v. Stinson*, 217 F. 2d 210), or where the employee is engaged in activities which are functionally so related to a named operation under the particular facts and circumstances that they are necessary to the conduct of such operation and his employment is, as a practical matter, necessarily and directly a part of carrying on the operation for which exemption was intended (*Mitchell v. Trade Winds, Inc.*, 289 F. 2d 278; see also *Waller v. Humphreys*, 133 F. 2d 193 and *McComb v. Consolidated Fisheries Co.*, 174 F. 2d 74). Under these principles, generally an employee performing functions without which the named operations could not go on is, as a practical matter, "employed in" such operations. It is also possible for an employee to come within the exemption provided by section 13(a)(5) or section 13(b)(4) even though he does not directly participate in the physical acts which are performed on the enumerated marine products in carrying on the operations which are named in that section of the Act. However, it is not enough to establish the applicability of such an exemption that an employee is

29 CFR Ch. V (7-1-05 Edition)

hired by an employer who is engaged in one or more of the named operations or that the employee is employed by an establishment or in an industry in which operations enumerated in section 13(a)(5) or section 13(b)(4) are performed. The relationship between what he does and the performance of the named operations must be examined to determine whether an application of the above-stated principles to all the facts and circumstances will justify the conclusion that he is "employed in" such operations within the intentment of the exemption provision.

§ 784.107 Relationship of employee's work to operations on the specified aquatic products.

It is also necessary to the application of the exemptions that the operation of which the employee's work is a part be performed on the marine products named in the Act. Thus the operations described in section 13(a)(5) must be performed with respect to "any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life." The operations enumerated in section 13(b)(4) must be performed with respect to "any kind of fish, shellfish, or other aquatic forms of animal or vegetable life, or any by-product thereof". Work performed on products which do not fall within these descriptions is not within the exemptions (*Fleming v. Hawkeye Pearl Button Co.*, 113 F. 2d 52; *Mitchell v. Trade Winds, Inc.*, 289 F. 2d 278; *Walling v. Haden*, 153 F. 2d 196).

§ 784.108 Operations not included in named operations on forms of aquatic "life."

Since the subject matter of the exemptions is concerned with "aquatic forms of animal and vegetable life," the courts have held that the manufacture of buttons from clam shells or the dredging of shells to be made into lime and cement are not exempt operations because the shells are not living things (*Fleming v. Hawkeye Pearl Button Co.*, 113 F. 2d 52; *Walling v. Haden*, 153 F. 2d 196, certiorari denied 328 U.S. 866). Similarly, the production of such items as crushed shell and grit, shell lime, pearl buttons, knife handles, novelties, liquid glue, isinglass, pearl essence,