BRB No. 00-0999

BRIAN J. SCHILHAB	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
INTERCONTINENTAL TERMINALS, INCORPORATED	)	DATE ISSUED: June 29, 2001
	)	
and	)	
	)	
INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order and the Order Denying Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Gary B. Pitts (Pitts and Associates), Houston, Texas, for claimant.

Michael D. Murphy (Murphy & Walker, L.L.P.), Houston, Texas, employer/ carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and the Order Denying Motion for Reconsideration (1999-LHC-02461) of Administrative Law Judge Clement J. Kennington 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).

Employer operates a facility consisting of ship, barge, rail and truck terminals adjoining the Houston Ship Channel. The purpose of employer=s facility is to load and unload various liquid products for either storage or shipment to other locations via ship, barge, railcar, truck or pipeline.[1]

Claimant worked for employer as a railcar supervisor, a position which was responsible for the loading and unloading of railcars which ran throughout employer=s facility. As a railcar supervisor, claimant was required to, *inter alia*, open railcar domes and attach a hose from the railcar header to a ground header so that liquid product could be pumped between railcars and vessels, storage tanks, pipelines, or trucks. Claimant testified that he also worked as a substitute dockman, pumper, and special services worker as needed by employer. On April 15, 1996, claimant injured his neck and back while attempting to connect a hose to a header so that liquid product could be pumped directly to a vessel that was expected to dock at employer's facility. Employer thereafter voluntarily paid claimant benefits under the Texas workers' compensation statute.

In his Decision and Order, the administrative law judge found that claimant satisfied the situs and status requirements for coverage under the Act.[2] Specifically, the administrative law judge determined that, pursuant to the decisions of the United States Supreme Court in *P.C. Pfeiffer v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979), and *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977), claimant's regular employment duties as a railcar supervisor required him to spend a portion of his time in covered maritime activities and thus claimant established the status element under Section 2(3) of the Act, 33 U.S.C. §902(3). In rendering this determination, the administrative law judge further found that claimant was required to substitute for employer's dockmen, a position also covered under the Act, when those dockmen were absent. Accordingly, the administrative law judge awarded claimant temporary total disability benefits under the Act pursuant to the parties'

[1]Examples of the liquid products transferred within employer's facility include ally alcohol, glacial methacrylic acid, sioprene, neopentyl glycol, isoamylene, and butene. *See* Emp. Exs. 1-13.

[2]The parties agreed that employer's facility constitutes a maritime situs under Section 3(a) of the Act, 33 U.S.C. §903(a).

stipulations. Employer's motion for reconsideration was denied by the administrative law judge.

On appeal, employer challenges the administrative law judge's finding that claimant satisfied the status requirement for jurisdiction under the Act. Claimant responds, urging affirmance.

Generally, a claimant satisfies the "status" requirement for coverage under the Act if he is an employee engaged in work that is integral to the loading, unloading, constructing, or repairing of vessels. *See* 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT)(1989). To satisfy this requirement, claimant need only "spend at least some of [his] time in indisputably longshoring operations." *Caputo*, 432 U.S. 249, 6 BRBS 150. A claimant's time need not be spent primarily in longshoring operations if the time spent is more than episodic or momentary.[3] *See Boudloche v. Howard Trucking Co.,* 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). Moreover, under *Caputo*, a claimant need not be engaged in maritime employment at the time of injury to be covered under the Act, as the Act focuses on occupation rather than on the duties at the time of injury. *See Gavranovic v. Mobil Mining & Minerals,* 33 BRBS 1 (1999). Thus, in *Boudloche*, 632 F.2d 1346, 12 BRBS 732, an employee who drove a truck and spent 2.5 to 5 percent of his time loading and unloading without assistance and "some" additional time assisting in loading and unloading was held to have status under the "some of the time" test of *Caputo*.

In the instant case, the administrative law judge found that claimant's primary employment duties as a railcar supervisor consisted of loading and unloading railcars of liquid product, that these duties specifically required claimant to attach a hose to both railcar and ground headers, and that these duties were necessary for the direct transfer of liquid product either to or from marine vessels. Thus, he concluded that these duties involved an essential and integral step in either the loading or unloading of vessels. Based upon these findings, the administrative law judge concluded that claimant satisfied the status requirement for coverage under the Act. In challenging the administrative law judge's finding on this issue, employer

[3]The United States Court of Appeals for the First Circuit has held that work, to be considered "episodic," must be "discretionary or extraordinary" as opposed to that which is "a regular portion of the overall tasks to which [claimant] could have been assigned." *Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 24(CRT)(1st Cir. 1984). *See McGoey v. Chiquita Brands Int'l,* 30 BRBS 237 (1997).

avers that claimant was not engaged in undisputed maritime employment, that claimant never engaged in the overall process of loading or unloading a vessel, and that claimant's work may be considered transient. We reject employer's arguments and affirm the administrative law judge's conclusion that claimant engaged in maritime work sufficient to establish coverage under the Act.

As the administrative law judge found when addressing this issue, both claimant and employer are in agreement that claimant's work as a railcar supervisor required him to open railcar domes and attach a hose from the railcar header to a ground header so that liquid product could be directly transferred from the railcar to a vessel or vice versa. *See* Tr. at 29-33. Mr. Holley, employer's loss control manager, acknowledged that claimant's employment duties were a part of the process of transferring liquid product between railcars and vessels, and that in the year prior to claimant's injury 52 direct transfers of liquid product between vessels and railcars were performed by employer. *See* Tr. at 159-162, 173. Furthermore, employer concedes in its brief on appeal that only after the attachment of a hose to the railcar and ground headers could liquid product be transferred between railcars and marine vessels. *See* Emp. brief at 2, 3. Thus, all parties are in agreement that claimant's employment activities as a rail supervisor involved this function, which is necessary to commence the direct transfer of liquid product between railcars and marine vessels. Inasmuch as substantial evidence supports the finding that claimant performed this work as part of his regular duty assignments, and that such direct transfers were undertaken by employer at least 52 times in the year preceding claimant's injury, the administrative law judge properly concluded that claimant was engaged in the loading and unloading of vessels "at least some of the time." He, therefore, meets the status requirement of Section 2(3) of the Act.[4] *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT); *Caputo*, 432 U.S. 249, 6 BRBS 150; *Boudloche,* 632 F.2d 1346, 12 BRBS 732; *see Lennon v. Waterfront Transport,* 20 F.3d 658, 28 BRBS 22(CRT)(5th Cir. 1994); *Peter v. Hess Oil Virgin Islands Corp.,* 903 F. 2d 935, *reh'g denied,* 910 F. 2d 1179, *cert. denied,* 111 S.Ct. 743 (1991)(court holds that the "hose around" and connection of fuel hoses on vessels were tasks necessary to the loading of vessels and were therefore sufficient to satisfy the status requirement).

[4]Contrary to employer's assertion, the fact that the actual transfer of liquid product from the railcar to the vessel in this case occurred hours after claimant's work-injury does not render claimant's work activities non-maritime as it is undisputed that such a transfer could not take place without the attachment of hoses to the railcar and ground headers.

The uncontradicted evidence of record establishes that claimant's loading and unloading activities were a regular part of his job and thus were more than episodic, momentary, or incidental to non-maritime work. *See Levins v. Benefits Review Board,* 724 F.2d 4, 16 BRBS 24(CRT) (1st Cir. 1984); *Zeringue v. McDermott, Inc.,* 32 BRBS 275 (1998); *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997). In addition, at the time of injury, claimant was engaged in the work of attaching a hose so that a vessel could be loaded. Under the law of the United States Court of Appeals for the Fifth Circuit, where this case arises, a claimant may be covered either because his overall employment is maritime or because he was performing maritime employment at the moment of injury. *See Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 8 BRBS 787 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979); *Gavranovic v. Mobil Mining & Minerals*, 33 BRBS 1 (1999). Claimant here is therefore entitled to coverage based on both his overall job and the employment duties that he was performing at the moment of injury. Accordingly, we affirm the administrative law judge's finding that claimant satisfied the status requirement under Section 2(3) of the Act.[5]

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

[5]Pursuant to our holding that claimant's employment duties as a railcar supervisor are sufficient to satisfy the status requirement, we need not address employer's contentions regarding claimant's alleged work as a substitute dockman. We note, however, that employer conceded at trial that claimant could have been assigned to dockman duties at any time a substitute was needed. *See* Tr. at 148-151, 167-175. The Supreme Court has stated that the "crucial factor" in assessing "status" is the nature of the activity to which an employee may be assigned. *Ford,* 444 U.S. at 82, 11 BRBS at 328. Thus, the administrative law judge committed no error considering the nature of the work to which claimant could have been assigned when addressing claimant's employment duties with employer.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge