BRB No. 92-2589

JAMES E. GARMON	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ALUMINUM COMPANY OF AMERICA - MOBILE WORKS	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and Decision on Motion for Reconsideration of Kenneth A. Jennings, Administrative Law Judge, United States Department of Labor.

John D. Gibbons (Gardner, Middlebrooks & Fleming, P.C.), Mobile, Alabama, for claimant.

Gregory C. Buffalow and C. William Rasure, Jr, (Johnston, Adams, Bailey, Gordon & Harris) Mobile, Alabama, for self-insured employer.

Mark A. Reinhalter (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and Decision on Motion for Reconsideration (90-LHC-2356) of Administrative Law Judge Kenneth A. Jennings 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 if they 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). Oral argument was held in this case on January 11, 1994, in Mobile, Alabama.

Claimant was employed by employer in various capacities from 1942 through 1979. Most recently, claimant worked as a bulldozer operator in employer's storage building, where he was exposed to loud noise. Claimant filed a claim for benefits under the Act for a 26 percent binaural work-related hearing loss on January 20, 1989, and notified employer of his injury on the same date.

Employer's storage building holds bauxite, which is used by employer in the manufacture of aluminum. Ships transport the bauxite to state-owned docks, where state employees unload it and place it on state-owned conveyer belts. These conveyer belts transfer the bauxite to employer's conveyer belts, which lead into the storage building where claimant worked, and deposit the bauxite onto the floor.[1] Trapdoors located in the floor of the storage building open when bauxite is needed for processing, and the bauxite flows down onto an underground conveyer belt which conveys it to employer's plant for manufacturing. Bauxite may be stored in the storage building for as long as three months prior to its conveyance to the manufacturing plant. Claimant's employment duties as a bulldozer driver in employer's storage building consisted of bulldozing the bauxite into piles, thereby regulating the flow of the bauxite through the trapdoors, onto the underground conveyor belts and into the plant.

Claimant testified that, in addition to his regular employment duties with employer, he removed scrap iron from the conveyer belt leading into the storage building and placed bauxite which fell off the conveyer belts back on them. Claimant deposed that the scrap iron had to be removed in order not to damage the machinery in the grinding building. Empl.'s Ex. 15, p. 21; Transcript at 35. Employer's plant manager, Donald Applegate, testified that at times angle iron, rubble or wood would block the opening through which the bauxite passed to reach the underground conveyer belt and would have to be removed while the bauxite flowed from the storage building into the tunnel. Tr. 85.

[1]The storage building is located approximately 75 to 100 yards from the docks. Tr. 83.

In his Decision and Order, the administrative law judge denied the claim, finding that claimant failed to meet the status requirement of Section 2(3) of the Act, 33 U.S.C. §902(3). Specifically, the administrative law judge determined that claimant's bulldozing duties in employer's bauxite storage building did not constitute an intermediate step in moving the bauxite between a vessel and land transportation, but rather directly involved the manufacturing process at employer's facility. Claimant thereafter filed a motion for reconsideration, which was summarily denied by the administrative law judge.

On appeal, claimant challenges the administrative law judge's finding that he was not a covered employee. Employer responds, urging affirmance. The Director, Office of Workers' Compensation Programs (the Director), filed a brief in support of claimant's appeal, asserting that claimant's work duties both removing debris from the conveyor belts and placing bauxite which had fallen off the conveyor belts back on them constitutes covered employment since that work was part of the overall unloading process.

To be covered under the Act, a claimant must satisfy the "status" requirement of Section 2(3) of the Act, 33 U.S.C. §902(3)(1988), and the "situs" requirement of Section 3(a), 33 U.S.C. §903(a)(1988). *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Section 2(3) of the Act provides, in pertinent part:

> 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.

33 U.S.C. §902(3)(1988). In *Caputo*, 432 U.S. at 249, 6 BRBS at 150, the United States Supreme Court held that in order to be covered under the Act as a longshoreman, an employee must be engaged in work which is integral to the overall process of loading and unloading vessels. Subsequently, the Court explicitly held that coverage extends to workers who, although not actually loading and unloading vessels, are involved in the intermediate steps of moving cargo between ship and land transportation. *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *see also Chesapeake and Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989); *Childs v. Western Rim Co.*, BRBS , BRB No. 91-1622 (Sept. 17, 1993).

Initially, we hold that the administrative law judge properly determined that claimant's bulldozing activities are not an integral part of the loading process and thus cannot confer coverage under Section 2(3). The record reflects, and the administrative law judge found, that the bauxite deposited onto the floor of employer's storage facility could be stored in that building for up to three months and that claimant would only bulldoze the bauxite when it was needed for production and did not flow freely through the floor openings. Thus, the administrative law judge found the instant case to be distinguishable

from *Caputo*, 432 U.S. at 249, 6 BRBS at 150, since claimant's bulldozing activities were directly

related to employer's manufacturing process rather than to unloading operations.[2]

In this regard, the administrative law judge further found that claimant's bulldozing duties were not necessarily concurrent with the unloading of the bauxite. The administrative law judge noted the testimony of Mr. Applegate, who stated that if claimant's bulldozing activities occurred while the bauxite was being deposited into the storage building, claimant would have to work at the other end of the building to avoid being struck by the falling bauxite. The administrative law judge found claimant's argument that if he had not bulldozed the deposited bauxite, the storage buildings would have eventually filled up, thus preventing further unloading, to be "tenuous at best," noting that there was no evidence that employer ever faced a shortage of available storage space.

Despite claimant's attempts to characterize his bulldozing activities as integral to the unloading process, we agree with the administrative law judge that the bulldozing activities performed by claimant for employer in this case involved the movement of bauxite as part of the process for manufacturing aluminum, rather than as part of the process of unloading the bauxite from a vessel. Claimant's bulldozing duties were not necessitated by unloading operations but by employer's use of bauxite in the process of manufacturing aluminum. Inasmuch as claimant's bulldozing duties were integral to employer's manufacturing process rather than to longshoring activities, we affirm the administrative law judge's determination that these duties are insufficient to confer coverage under the Act. *See Caputo*, 432 U.S. at 249, 6 BRBS at 150; *Schwalb*, 493 U.S. at 40, 23 BRBS at 96 (CRT).

We agree with claimant and the Director, however, that the administrative law judge erred in not addressing claimant's testimony regarding the time he spent removing debris from the conveyor belts and placing on those belts the bauxite which had fallen from them. The Supreme Court has held that the status test focuses on claimant's overall duties; thus, an employee is covered under the Act if he spends "at least some" of his time in loading and unloading. *Caputo*, 432 U.S. at 273, 6 BRBS at 165. *See also Ford*, 444 U.S. at 337, 11 BRBS at 328.

[2]We agree with the Director that claimant's argument that his work was analogous to a checker or other longshoreman at a dockside storage facility must be rejected. It is correct that *Caputo* rejected the "point-of-rest" theory under which coverage ended at the initial point of rest in favor of coverage of intermediate steps up to the point where cargo leaves the stream of maritime commerce and enters into land transportation. In this case, however, the unloading process is complete when the bauxite is received for storage. It is not stored for further transhipment, but has reached its consignee and is stored to await use in the manufacturing process.

In the instant case, claimant testified that he removed debris from the conveyer belt leading into the storage facility and placed bauxite which fell off the conveyer belt back on the belt. This testimony, if credited by the administrative law judge, could establish that claimant performed work which was covered, since ensuring that the conveyor belts leading from the ships to the storage facility continued operating entails part of the "overall unloading process" discussed by the Supreme Court in *Schwalb*, 493 U.S. at 40, 23 BRBS at 96 (CRT). In not addressing this testimony, the administrative law judge violated the Administrative Procedure Act, which states that a decision must include a statement of "findings and conclusions, and the reasons or basis therefore, on all material issues of fact, law, or discretion presented in the record." 5 U.S.C. §557(c)(3)(A). *See Cotton v. Newport News Shipbuilding and Dry Dock Co.*, 23 BRBS 380, 382 (1990). We therefore vacate the administrative law judge's denial of benefits, and remand the case for the administrative law judge to analyze and discuss claimant's hearing and deposition testimony, and determine whether that testimony establishes that claimant performed work on the conveyer belts which constituted part of the unloading process and which is covered under the Act.

Accordingly, the administrative law judge's determination that claimant's bulldozing activities are not covered under the Act is affirmed. The administrative law judge's Decision and Order Denying Benefits and Decision on Motion for Reconsideration are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge