BRB No. 96-593

PETER L. McGOEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
CHIQUITA BRANDS INTERNATIONAL	)	DATE ISSUED:
	)	
and	)	
	)	
GENERAL REINSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits for Lack of Jurisdiction and Decisions on Motion for Reconsideration of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Timothy D. Crawley (Hopkins, Dodson, Crawley, Bagwell, Upshaw & Persons), Gulfport, Mississippi, for claimant.

Stephen A. Anderson (Bryant, Clark, Dukes, Blakeslee, Ramsay & Hammond), Gulfport, Mississippi, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits for Lack of Jurisdiction and Decisions on Motion for Reconsideration (95-LHC-146) of Administrative Law Judge C. Richard Avery 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 worked for employer from 1950 until 1992, except for six or seven months. Claimant testified that on June 25, 1991, when he went to sit down in the chair at his desk, the chair had rolled away and claimant fell on the tile floor. He filed an accident report at work, but did not immediately seek medical treatment. Claimant went to a chiropractor in April 1992 for pain in his lower back, but received no relief from treatment. Thus, claimant sought treatment from his family physician who referred him to an orthopedic surgeon, Dr. Hopper. In January 1993, Dr. Hopper performed back surgery on claimant for a herniated disc at L3-4. Claimant has not returned to work, although he has applied for numerous jobs identified by Mr. Tingle, a vocational counselor. Claimant sought permanent total disability benefits under the Act.

The administrative law judge found that claimant's injury occurred while he was performing his primary duties which are clerical in nature and thus excluded from coverage under the Act. *See* 33 U.S.C. §902(3)(A)(1988). In addition, the administrative law judge found that claimant's maritime work of supervising the loading and unloading of cargo was merely episodic or occasional, and he thus concluded that claimant failed to establish the status requirement for coverage under the Act.

On appeal, claimant contends that the administrative law judge erred in finding that his occasional supervision of the unloading process is insufficient to bring him within the Act's coverage. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

A claimant is covered under the Act if he spends "at least some of his time engaged in indisputably covered activities." *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 69, 6 BRBS 150 (1977); *Smith v. Universal Fabricators, Inc.*, 21 BRBS 83 (1988), *aff'd*, 878 F.2d 843, 22 BRBS 104 (CRT)(5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *Howard v. Rebel Well Service*, 632 F.2d 1348, 12 BRBS 734 (5th Cir. 1980). A claimant's time need not be spent primarily in longshoring operations if the time spent is more than episodic or momentary. *See Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). Those whose work is integral to the unloading process are engaged in covered employment. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989).

In the present case, the administrative law judge found that employer imports bananas from South America shipped primarily in a container ship which arrives every week and is unloaded in one day. The administrative law judge also found that claimant only assisted in the unloading of this ship when his supervisor, Mr. Franz, was absent on the day the ship arrived, which occurred only once in the year prior to the injury. In addition, if the container ship is under repair, the bananas are shipped on a break bulk ship, and the administrative law judge found that claimant always assisted in the unloading of a break bulk ship. In all of 1989, the break bulk ship arrived twice.[1]

[1]A third type of ship, a drum ship carrying banana puree, also unloaded at employer's pier, but the administrative law judge found that claimant had no duties associated with this ship.

Although claimant's title is "wharf superintendent," the administrative law judge credited claimant's supervisor's testimony that this title is not reflective of claimant's duties, but was given in order to facilitate a raise in pay. The vast majority of claimant's time was spent in an office where he supervised the office operations involving the dispatch of trucks loaded with bananas to customers, entered information into a computer, and took orders from the sales department in Cincinnati, Ohio. Claimant's supervisor, credited by the administrative law judge, testified that he estimated claimant spent 3 to 5 percent of his time on the pier. The administrative law judge found that claimant was perhaps engaged in covered employment when he supervised the unloading of the ships, but nonetheless found that he is not a covered employee under the Act as the "majority" of his duties were not "wholly" or "substantially" devoted to maritime work. Decision and Order at 8. The administrative law judge also noted that claimant was not injured while he was performing the arguably maritime duties.

We hold that the administrative law judge applied the wrong legal standards in determining claimant's status under the Act. Applying the proper legal standards to the facts found by the administrative law judge, we further hold that claimant's employment is covered by the Act. The United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, found covered in *Boudloche*, 632 F.2d at 1346, 12 BRBS at 732, an employee who was engaged in unloading ships 2½ to 5 percent of his overall work time; the court rejected the Board's holding that a "substantial" portion of the claimant's work must be in covered employment. As the claimant was "directed to regularly perform *some* portion of what was indisputably longshore work" he was covered under the Act. *Id.*, 632 F.2d at 1348, 12 BRBS at 734 (emphasis in original); *see also Schwabenland v. Sanger Boats*, 683 F.2d 309, 16 BRBS 78 (CRT) (9th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981) (cases rejecting the Board's use of a "substantial portion" test). In this case, in finding no coverage under the Act, the administrative law judge noted that claimant was not required to spend a "substantial portion" of his work in covered activity. The administrative law judge credited claimant's supervisor's testimony that claimant spent 3 to 5 percent of his time on the pier supervising the unloading of ships and serving as the weighmaster. Under the precedent set in *Caputo* and *Boudloche*, claimant is entitled to coverage based on this finding alone, as it establishes that claimant spent at least some of his time engaged in the unloading process. *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993).

Moreover, the court in *Boudloche* also stated "[o]ur decision does not undertake to define the point at which a worker's employment in maritime activity becomes so episodic it will not suffice to confer status. That point was clearly not reached here." 632 F.2d at 1348, 12 BRBS at 734. The United States Court of Appeals for the First Circuit defined the term "episodic" in *Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 24 (CRT) (1st Cir. 1984), as an activity that is "discretionary or extraordinary" as opposed to that which is "a regular portion of the *overall* tasks to which [claimant] could have been assigned...." *Id.*, 724 F.2d at 8, 16 BRBS at 33 (CRT). The administrative law judge in the instant case found that, although the occurrences were infrequent, claimant supervised the unloading process whenever his supervisor was absent on the day a container ship arrived or whenever a break bulk ship arrived. Thus, a regular portion of claimant's overall duties involved covered activity, and these duties cannot be said to have been "discretionary or extraordinary" merely because they were infrequent. *See generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994).

Finally, in denying coverage the administrative law judge erroneously focused on claimant's duties at the time of the injury. Decision and Order at 8-9. The Fifth Circuit has held that an employee is entitled to coverage under the Act if, pursuant to *Caputo*, his employment as a whole is maritime in nature or, if, at the "moment of injury" he is engaged in maritime employment. *See Hullinghorst Industries*, 650 F.2d at 754, 14 BRBS at 375; *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 8 BRBS 787 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979); *Henry v. Gentry Plumbing & Heating Co.*, 18 BRBS 95 (1986). The "moment of injury" inquiry is one intended to expand coverage to those who might not otherwise be covered. *Gilliam v. Wiley N. Jackson Co.*, 659 F.2d 54, 13 BRBS 1048 (5th Cir. 1981), *cert. denied*, 459 U.S. 1169 (1983); *Hullinghorst Industries*, 650 F.2d at 757-758, 14 BRBS at 378. Its purpose is not to restrict coverage to those whose task at the time of the injury is not maritime in nature but whose work otherwise entails covered activity, as the holding in *Caputo* is intended to prevent workers from walking in and out of coverage. *See P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979).[2]

The administrative law judge's finding that claimant spent 3 to 5 percent of his time in covered activity is not challenged on appeal. Inasmuch as the administrative law judge improperly required both that claimant's work must be substantially devoted to covered activity and that his work at the moment of injury must be maritime in nature, we reverse his finding that claimant is not an employee covered under the Act. The denial of benefits is vacated, and the case is remanded to

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[2]In *Ford*, the Supreme Court stated

> Our observation that Ford and Bryant were engaged in maritime employment at the time of their injuries does not undermine the holding of [*Caputo*] that a worker is covered if he spends some of his time in indisputably longshoring operations and if, without the 1972 Act, he would be only partially covered."

444 U.S. at 83 n.18, 11 BRBS at 328 n. 18.

the administrative law judge for consideration of the merits of the claim.[3]

Accordingly, the administrative law judge's Decision and Order denying benefits is reversed, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

[3]Claimant also contends that the evidence establishes that he is permanently totally disabled by his work injury. As the administrative law judge did not reach these issues, we decline to address them on appeal.