BRB No. 96-0910

DOUGLAS LEWIS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
SUNNEN CRANE SERVICE, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Dismissing Claim for Lack of Jurisdiction and Denying Benefits of Christine McKenna, Administrative Law Judge, United States Department of Labor.

William D. Hochberg, Edmonds, Washington, for claimant.

Clemens H. Barnes and Russell R. Williams (Bogle & Gates, P.L.L.C.), Seattle, Washington, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (94-LHC-3070) of Administrative Law Judge Christine McKenna 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 as a crane operator and oiler[1] for employer Sunnen Crane Service, Incorporated in a variety of locations since the early 1970's. Claimant was injured on August 26, 1993, while operating a crane in the Port of Tacoma, moving heavy machinery. As claimant was exiting the cab of his crane, his left foot became tangled in one of the bottom rungs of the ladder causing him to tumble backwards, hurting his left knee and

[1]An oiler is an assistant engineer who provides support and assistance to the crane operator. Tr. at 102.

upper back. Claimant has not returned to work since this injury, and seeks permanent total disability compensation under the Act.

The administrative law judge denied the claim, finding that claimant was not an employee covered under Section 2(3) of the Act, 33 U.S.C. §902(3), based on the work he was performing at the time of his injury, because the unloading process had been completed by the time he started working and, thus, the goods moved by employer's crane had left the stream of maritime commerce. The administrative law judge also determined that claimant's overall work duties did not involve traditional maritime work, and that even assuming that claimant did engage in such activities they were at best episodic and incidental to his regular employment as a land-based crane operator. Decision and Order at 22.

On appeal, claimant argues that on the day of his injury he was transloading cargo from Mafi trailers, where they had been placed after being unloaded from a vessel, onto railroad cars for further transportation and that this work involved a step in moving cargo from ship to land transportation. As such work constitutes a "longshoring operation" under Supreme Court precedent, claimant asserts he is a covered employee. In the alternative, claimant maintains that he is covered under Section 2(3) because he regularly engaged in maritime work while working for employer . Employer responds, urging affirmance.

To be covered under the Act, a claimant must satisfy the "status" requirement of Section 2(3) of the Act and the "situs" requirement of Section 3(a), 33 U.S.C. §903(a)(1988).[2] *See P.C. Pfeiffer Co., Inc. v. Ford,* 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co., Inc. v. Caputo,* 432 U.S. 249, 6 BRBS 160 (1977). Under Section 2(3), a covered employee includes "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 shipbreaker...." 33 U.S.C. §902(3). A claimant is covered under the Act if he spends "at least some of his time in indisputably longshoring operations." *Caputo*, 432 U.S. at 273, 6 BRBS at 165. Workers are considered to be engaged in covered longshoring operations if they are "engaged in intermediate steps of moving cargo between ship and land transportation." *Ford*, 444 U.S. at 83, 11 BRBS at 328.

In the present case, employer is a crane rental company doing business in the Puget Sound area of the State of Washington. Employer employs about 28 employees, 23 of whom are crane operators, oilers, drivers and mechanics, with the remaining employees providing sales and administrative support. Tr. at 100-102. The company has a pool of about 25 cranes and leases them both with and without an accompanying operator.

[2]The administrative law judge's finding that claimant established the situs element, 33 U.S.C. §903(a), is not challenged on appeal. Decision and Order at 10 n.8.

Joseph Sunnen, employer's president, testified that the cranes are used for a variety of purposes, such as commercial building and general construction, moving machinery, placing large light standards, and putting up freeway girder and overpass signs. Tr. at 101-104. The cranes perform 20-25 jobs per day, Emp. Ex. 6, Tr. at 510, the company is on call seven days per week, and it logs about 70,000 crane hours per year. Tr. at 509. Approximately 400 or more jobs are dispatched per month, or as many as 6,000 a year. Tr. at 511, 655-656. Employer occasionally does work for companies located at or near the Port of Tacoma.

At the time of his injury, claimant was operating a crane in the Port of Tacoma, moving heavy machinery which had been offloaded from the ship *MADAME BUTTERFLY* onto a Mafi trailer five days previously and left on the pier.[3] The crane picked up crates containing the machinery off the trailer and set it on a railcar.

Relying on *Dorris v. Director, OWCP*, 808 F.2d 1362, 19 BRBS 82 (CRT) (9th Cir. 1987), the administrative law judge found that at the time of injury claimant was not engaged in maritime employment because the goods he was unloading had left the stream of maritime commerce and claimant accordingly was involved in the movement of stored cargo for further land shipment. The administrative law judge noted that in *Dorris* the United States Court of Appeals for the Ninth Circuit held that a truck driver was not a maritime employee because his regular duties consisted of driving a truck to the dock for receiving or removing containers, fastening the containers on the truck or chassis, delivering the containers to consignees, and trucking the containers between berths located in different harbors. The administrative law judge inferred from *Dorris* that when goods are unloaded from a ship and then shuttled by other workers to their next destinations, the functions of the interim transporter are not maritime.

The administrative law judge further determined that *Caputo* and its progeny stand for the proposition that unloading a container continues until the cargo is ready for delivery to the ultimate consignee. Accordingly, she found that when the goods are in the hands of the consignee, or someone acting on his behalf, the transition from maritime commerce to land transportation has been completed. She thus deduced that whether goods remain in maritime commerce depends to a large extent on whether the employee is servicing the ship in terms of loading or unloading, or is working on behalf of the recipient of the goods. The administrative law judge then found the claimant in the present case was not acting on behalf of the ship because the cargo had been sitting on the dock on a Mafi trailer for five days and there was no direct evidence as to who put the cargo there. Moreover, she inferred that since longshoremen unload cargo from the ship and immediately transport it to a place on the pier for storage, longshoremen had unloaded the piece of equipment from

[3]A Mafi is a small-wheeled trailer, having a very low profile capable of carrying relatively high weights, which can actually go on a vessel. Tr. at 71.

the *MADAME BUTTERFLY* and placed it on the dock on top of the trailer. She then found that as this established that the longshoremen were capable of handling this cargo with their own equipment, the Sunnen crane was not a substitute for longshore offloading cranes. The administrative law judge further inferred that longshoremen would have moved the equipment from the trailer to the railcar if that function had been a traditional longshore duty. Moreover, she found that the terminal probably called Sunnen on behalf of the consignee and that the terminal certainly did not summon longshoremen from the union hall to move the goods to rail.

We agree with claimant that the administrative law judge's determination that claimant was not engaged in covered employment at the time of his injury cannot be affirmed, as it rests on findings relevant to the discredited "point of rest" theory rejected by the United States Supreme Court in *Caputo* and is contrary to case precedent which recognizes that coverage under the Act extends to land-based workers who, although not actually unloading vessels, are involved in intermediate steps of moving cargo between ship and land transportation. *See e.g.*, *Ford*, 444 U.S. at 69, 11 BRBS at 320; *see also Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989). The "point of rest" theory advocated coverage of only those employees who moved cargo from the vessel to its initial point of rest on the pier or terminal area, and vice versa. *Caputo,* 432 U.S. at 276-279, 6 BRBS at 166-169.[4] Virtually all of the factors relied upon by the administrative law judge here in finding claimant's work at the time of injury was not covered must be rejected based on case precedent rejecting this theory.

[4]The Court stated that "point of rest" is "claimed to be a term of art in the industry that denotes the point where the stevedoring operation ends (or, in the case of loading, begins) and the terminal operation function begins (or ends, in the case of loading)." *Caputo*, 432 U.S. at 276, 6 BRBS at 166.

Initially, we note that the administrative law judge clearly erred to the extent she relied on the fact that the machinery claimant was moving had been offloaded previously and sitting on the pier for 5 days to deny coverage. In *Caputo*, the Supreme Court specifically rejected a test for coverage based on moving cargo between its initial point of rest and the vessel, recognizing that the length of time cargo sits on a pier has no effect on the character of the work required to deliver cargo to its destination. *Id.,* 432 U.S. at 275 n.37, 6 BRBS at 166 n.37.[5] Under *Ford*, 444 U.S. at 82, 11 BRBS at 328, if longshoremen moving cargo directly from a vessel to a railcar would be covered while performing this work, then other workers who perform steps in the process are similarly covered. In addition, the fact that ownership of cargo transfers to a consignee at the initial point of rest is not determinative; the nature of the work performed controls rather than whether the person performing it is an agent of the consignee. *Novelties Distribution Corp. v. Molee*, 710 F.2d 992, 15 BRBS 168 (CRT) (3d Cir. 1983), *aff'g* 15 BRBS 1 (1982). Goods which are still within the terminal have not yet been delivered to the consignee. Thus, contrary to the administrative law judge's analysis, whether employer was working on behalf of the consignee, rather than the Port,[6] is not determinative in evaluating whether claimant was engaged in a step in the loading process.

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[5]In its underlying decision in *Blundo v. International Terminal Operating Co., Inc.*, 2 BRBS 376, 379 (1975), the Board concluded that cargo remains in maritime commerce until it is delivered to a consignee for further transhipment and moving a container from one location to another in preparation for delivery to consignees is not itself further transhipment so as to take it out of maritime commerce.

[6]Mr. Paulsen, the Director of Risk Management for the Port of Tacoma, testified that at the time of claimant's injury, the Port was working on behalf of Alliance International Freight Forwarders who were themselves working on behalf of the consignee. Tr. at 89. Moreover, Mr. Paulsen indicated that Alliance International had made direct arrangements with the Burlington Northern Railroad and in turn with the beltline railroad for the placement of those rail cars and then had direct communications with the Port requesting the Port to arrange the handling of the cargo with Sunnen Crane. Tr. at 90.

The administrative law judge also erred in relying on *Dorris* to conclude that claimant herein is not covered, as claimant's work moving cargo onto a railcar is not analogous to the work of claimant in that case. In *Dorris,* the Board and the Ninth Circuit held that a truck driver whose regular duties consisted of transporting containerized cargo away from the terminal to a consignee, fastening containers to a chassis, and trucking the containers between different harbors was not engaged in longshore operations covered under the Act, but in land transportation. In the present case, however, at the time of his injury claimant was engaged in the movement of goods within the terminal area, from a storage location onto a railcar. This work is similar to that performed by the claimants in *Ford*, 444 U.S. at 69, 11 BRBS at 320. Claimant Ford was working as a warehouseman when he was injured on a dock while securing military vehicles, unloaded earlier, to railroad cars for landward shipment. Claimant Bryant, in a consolidated case, was working as a cotton header when he was was injured while unloading a bale of cotton from a dray wagon into a pier warehouse where it was stored until loaded on a vessel. The United States Supreme Court held both claimants covered because they were engaged in intermediate steps in moving cargo between ship and land transportation. In the case of claimant Ford, the cargo had arrived by ship and had been stored for several days before being loaded onto the flat car. In finding claimant Ford covered, the Court concluded that he was performing the last step before the vehicles left on their landward journey. Similarly, claimant Bryant was performing the first step in removing cargo from a vehicle used in land transportation so that it could be readied for loading onto ships. In holding claimants covered, the Court reasoned that if the goods had been taken directly from the ship to the train, or from the truck directly to the ship, claimant's activities would have been performed by longshoremen[7] and that the only ground to distinguish claimants from those

[7]The Court noted that neither claimant was working out of the longshoremen's union and that labor agreements in the Port of Beaumont limited the work of warehousemen and cotton headers. Only longshoremen were allowed to move cargo directly from shoreside transportation or a shoreside point of rest to a vessel and from a vessel to those locations. Cotton headers and warehousemen could only move cargo from land transportation to a point of rest or within a terminal. The court held that these vagaries of union jurisdiction were not controlling. Thus, the administrative law judge erred here in relying on the fact that claimant was not a longshoreman to deny coverage. Moreover, her inference that

who do such "direct" loading would be the "point of rest" theory previously rejected in *Caputo. Ford*, 444 U.S. at 82, 11 BRBS at 328.

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longshoremen could have used cranes at the Port to move cargo directly to the rail cars supports, rather than detracts from, a finding of coverage under the analysis used by the Supreme Court.

A comparison of the facts in *Ford* and *Dorris* illustrates the distinction between movement of goods within a terminal area, where the steps in loading and unloading a vessel take place, and the point at which this process is complete and they enter land-based transportation. Claimants Ford and Bryant performed the initial steps of placing cargo onto, or removing it from, a vehicle of land transportation within the terminal, while claimant Dorris drove the vehicle transporting the goods overland.[8] Inasmuch as the claimant in the present case was working at the terminal moving cargo from a point where it was stored onto a railroad car for further shipment, claimant was performing essentially the same duties as claimant Ford.[9] As such work involving an intermediate step in moving cargo between ship and land transportation has been held covered, the administrative law judge erred in finding that the unloading process had been completed at the time of his injury and in concluding that claimant was thus not engaged in longshoring activities. *See also Hayes v. CSX Transp., Inc.*, 985 F.2d 137 (4th Cir. 1993) (same rationale applied to railroad employee injured while fastening cargo on flatbed railroad car). We thus conclude, based on the clear precedent established by the Supreme Court, that claimant was engaged in longshore work at the time of his injury.

Claimant asserts that the conclusion that he was engaged in maritime employment at the time of his injury leads to a holding that he is a covered employee under Section 2(3) of the Act, citing *Chesapeake & Ohio Ry. Co. v. Schwalb*, 494 U.S. 40, 23 BRBS 96 (CRT) (1989); *Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89 (CRT) (4th Cir. 1994); and *Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57 (CRT) (4th Cir. 1994), *cert. denied*, 115 S.Ct. 1691 (1995), in support of this contention. This issue arises as a result of the Supreme Court's emphasis in *Caputo* on the occupational nature of Section 2(3). Since *Caputo* rejected a claimant's duties at the moment of injury as a basis for denying status as a maritime employee, the Board held in subsequent cases that it followed that maritime employment at the time of injury also could not be used as a basis to find coverage. *See, e.g., Howard v. Rebel Well Service*, 11 BRBS 568 (1979), *rev'd on other grounds*, 632 F.2d 1348, 12 BRBS 734 (5th Cir. 1980); *Boudloche v. Howard Trucking Co., Inc.*, 11 BRBS 687 (1979), *rev'd on other grounds*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). In *Thibodaux*

[8]The Court noted a similar distinction in *Caputo* between claimant Caputo, a longshore worker whose injury occurred when he was assigned to load goods into a consignee's truck, and the consignee's truck drivers he was assisting. In holding that Caputo was not within the excluded category of employees picking up stored cargo for further shipment, the court stated the exclusion applies to those like the truck drivers "whose presence at the pier or terminal is for the purpose of picking up cargo for further shipment by land transportation." *Northeast Marine Terminals Co. v. Caputo,* 432 U.S. 249, 275 n.37, 6 BRBS 160, 166 n.37 (1977).

[9]As claimant Ford was also not working with containerized cargo, but offloaded military vehicles, the importance the administrative law judge attached to the fact that the cargo was "intact and bound for one consignee," Decision and Order at 16, is also misplaced.

v. Atlantic Richfield Co., 590 F.2d 841, 8 BRBS 787 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979), however, the United States Court of Appeals for the Fifth Circuit interpreted *Caputo* as providing alternative tests for determining whether a claimant satisfies the status requirement of Section 2(3). Thus, if claimant was engaged in longshore employment at the time he was injured, he was covered under Section 2(3); if he was not so engaged, he was nonetheless covered if his overall employment was maritime in nature, which required that he spend "at least some" of his time in covered employment. The Fifth Circuit's analysis was based on the facts in *Caputo:* claimant Blundo, who was injured while working as a checker, was held covered based on his activities at the moment of his injury while claimant Caputo, a member of a regular stevedoring "gang" injured while loading a ship's cargo onto a truck on the pier, was held covered based on the nature of his overall employment. *See also Hullinghorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). The Board, however, has applied the "moment of injury" test in finding coverage only in cases arising within the jurisdiction of the Fifth Circuit, noting its concern that this test would undermine the intent underlying the 1972 Amendments, *i.e.*, an emphasis on claimant's overall employment to provide continuous coverage. *See, e.g.*, *Henry v. Gentry Plumbing & Heating Co.*, 18 BRBS 95 (1986).

It is clear that, under *Caputo*, coverage may not be denied on the basis that claimant is engaged in non-maritime tasks at the time of his injury; claimant is covered if some portion of his overall employment is spent in maritime work. It does not necessarily follow from this test that the performance of maritime work at the time of injury is not a sufficient basis for finding coverage. In *Ford*, the Court found claimants Ford and Bryant were covered based on the specific duties performed at the time of their injuries. In so holding, the Court, noting Congressional concern that some workers might walk in and out of coverage, stated: "Our observation that Ford and Bryant were engaged in maritime employment at the time of their injuries does not undermine the holding of *Northeast Marine Terminal v. Caputo,* 432 U.S. at 273-274*,* that a worker is covered if he spends some of his time in indisputably longshoring operations and if, without the 1972 Act, he would only be partially covered." *Ford*, 444 U.S. at 83 n.18, 11 BRBS at 328 n.18. Most recently, in *Schwalb*, 493 U.S. at 40, 23 BRBS at 96 (CRT), the Court found covered three railroad employees whose only connection with the loading process was by way of the repair and maintenance services they were performing at the time they were injured, noting that no claim had been made that if those services are not maritime, the employees were nevertheless covered. In concurring, Justice Blackmun emphasized that despite the Court's finding of coverage based on the claimants' duties at the moment of injury, the occupational test articulated in *Caputo* was in no way repudiated.

Thus, there is support for the conclusion that a finding of coverage based on maritime duties at the time of injury is not inconsistent with *Caputo.*[10] The United States

[10]In addition to the above cases, a moment of injury analysis clearly applies under the United States Supreme Court's holding in *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT) (1983), that a claimant is covered under Section 2(3)

Court of Appeals for the Ninth Circuit, within whose appellate jurisdiction the present case arises, has not addressed this precise argument, however, noting that it was not necessary to do so where claimant was covered based on his performance of maritime work some of the time. *Schwabenland v. Sanger Boats*, 683 F.2d 309, 312 n.4, 16 BRBS 78, 81 n.4 (CRT)(9th Cir. 1982), *cert. denied,* 459 U.S. 1170 (1983). In this case, we also need not base a finding of coverage under Section 2(3) solely on claimant's performance of maritime work at the time of injury, as the administrative law judge's findings establish that claimant was subject to maritime assignments and spent "some of his time" in maritime work.

As discussed previously, under *Caputo* coverage of "longshoremen" under Section 2(3) covers those employees who spend "at least some of their time in indisputably longshore operations." 432 U.S. at 273, 6 BRBS at 165. In applying this test, the courts have rejected the notion that a substantial amount of time must be spent in such work. *See, e.g., Schwabenland,* 683 F.2d at 309, 16 BRBS at 78 (CRT); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). In *Boudloche*, the Fifth Circuit held a truck driver who performed loading work two and one-half to five percent of his overall time covered. The court stated that it was not necessary to define the point at which employment in maritime activity becomes so "momentary or episodic" that it will not confer status, as that point was not reached in that case. *Id.,* 632 F.2d at 1348, 12 BRBS at 734.

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where he is injured while on navigable waters during the course of his employment. Moreover, a finding of coverage where claimant is performing maritime work when injured is consistent with the Act as it provides a remedy for those exposed to the particular hazards associated with maritime employment. *See generally Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78 (CRT) (1985); *Weyher/Livsey Constructors, Inc. v. Prevetire*, 27 F.3d 985, 28 BRBS 57 (CRT) (4th Cir. 1994), *cert. denied*, 115 S.Ct. 1691 (1995).

In the present case, the administrative law judge concluded that claimant's connection to maritime activities was *de minimis* and thus insufficient to establish he spent "some of his time in indisputably longshore operations." The administrative law judge found, and the record reflects, that claimant worked 2452.5 hours in 1991 and was on the waterfront for 173 of those hours. She further determined that 60 of the 173 hours were arguably involved in ship repair or handling cargo; thus, she concluded that claimant spent 7 percent of his time on the waterfront, but only 2 percent[11] in unloading or ship repair work.[12] The administrative law judge further determined that in 1992 claimant worked on the waterfront on ten occasions; thus, of a total of 2468 hours, 90 hours were somewhere near the waterfront. The administrative law judge concluded that claimant spent 3 percent of his time on the waterfront, with only one percent spent in loading and unloading.[13]

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[11]Throughout her discussion of these percentages, the administrative law judge misplaced her decimal points. Thus, she actually stated that claimant spent "7% of his time on the waterfront, and only .02 percent in unloading or ship repair work," when in fact the calculation results in a figure of 2 percent. Decision and Order at 22. It is not clear whether this error affected her conclusion that the work was *de minimis*. In any event, employer concedes that these percentages are incorrect, and our discussion in this decision will use the corrected percentages.

[12]The administrative law judge noted that during this time claimant was at the waterfront performing work for the Army as part of the overseas transport of goods during Desert Storm. Decision and Order at 22. While it is not clear what significance the administrative law judge attached to this fact, in view of her statement that the United States government is not an entity usually involved in maritime commerce, the record reflects that the work involved loading vessels for the overseas shipment of military goods.

[13]The administrative law judge discounted any time where the nature of claimant's work

Moreover, the administrative law judge determined that in 1993 claimant was on the waterfront on 13 of his work days, which included time at an oil refinery and placing a generator on a ship with no explanation of the work performed on many of the other days. Claimant was injured at the waterfront on August 26, 1993. Finally, the administrative law judge found that claimant's work diaries for earlier years are similar.

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was not specified by his diaries or employer's job tickets.

Based on this analysis of the record, the administrative law judge reached her conclusion that claimant's maritime work was *de minimis* and insufficient to satisfy his burden of showing regular employment in indisputably longshoring or shipbuilding or repair activities.[14] We agree with claimant that this conclusion is contrary to law. Initially, claimant asserts that the administrative law judge erred in determining the percentages of maritime work in the years involved by excluding time spent setting up and taking down the cranes and other maritime work. Claimant contends that a proper analysis results in findings that his time during the years 1990 to 1993 ranged from 3.6 to 8.5 percent. Claimant's argument has merit. We need not remand this case for further consideration, however, as claimant is covered as a matter of law under the findings made by the administrative law judge.

Although the administrative law judge found claimant's maritime duties to constitute somewhat less than the 2.5 percent which the Fifth Circuit found sufficient to confer coverage in *Boudloche,* the determination as to whether a claimant spends some of his time in covered work is not dependent on mathematical percentages. The key factor is the nature of the work to which claimant could be assigned, and it is clear on this record that claimant was subject to regular maritime assignments. In fact, employer conceded in its post-hearing brief to the administrative law judge that claimant performed a substantial and disproportionate amount of employer's maritime work, explaining that perhaps this was due to the fact that claimant operated the type of large cranes used at the maritime locations. Brief at 14, n.7.

While the cases recognize that at some point, work is so episodic or momentary that claimant is not covered, they do not define where that point is reached. Work cannot be considered "episodic" when it is a part of the employee's regular job assignments. *See McGoey v. Chiquita Brands Internat'l*, BRBS , BRB No. 96-593 (January 28, 1997). Such a definition of the term "episodic" was enunciated by the United States Court of Appeals for the First Circuit in *Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 23

[14]In addition, the administrative law judge determined that waterfront work, which constituted between .3 percent and .4 percent of employer's overall activities was sufficiently sporadic to warrant a finding that it did not constitute anything more than a minor and irregular part of Sunnen's business. The percentage of time that employer performs maritime work, however, is not determinative; the relevant inquiry is whether claimant spent at least some time in indisputably covered activities. *Caputo*, 432 U.S. 69, 6 BRBS at 150.

(CRT)(1st Cir. 1984). Specifically, the court stated that to be considered “episodic” an activity 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...." *Id.*, 724 F.2d at 8, 16 BRBS at 33 (CRT). Inasmuch as the factual findings made by the administrative law judge establish that claimant did spend at least some of his time performing undisputedly maritime activities and these duties were a regular portion of the overall tasks to which claimant could be, and actually was, assigned, the administrative law judge erred in finding that these duties were too episodic to confer coverage based simply on their frequency. Because a regular portion of claimant’s overall duties involved covered activity and these duties, although infrequent, were neither “discretionary” nor “extraordinary,” we reverse the administrative law judge’s finding that claimant is not an employee covered under the Act based on the overall nature of his work duties. *See generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994).

Finally, we agree with claimant that the administrative law judge erred in finding that employer Sunnen Crane was not a maritime employer. Where, as here, an employer has an employee engaged in maritime employment, the employer is a statutory employer under Section 2(4), 33 U.S.C.§902(4). *Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984). In addition, the administrative law judge found maritime work was a part of employer's business. We therefore reverse the administrative law judge’s finding that employer is not a statutory employer under Section 2(4).

Inasmuch as claimant is a maritime employee under Section 2(3), he has satisfied the requirements for coverage under the Act. The denial of benefits is therefore vacated and the case is remanded for the administrative law judge to consider all remaining issues.

Accordingly, the administrative law judge’s Decision and Order denying benefits is reversed, and the case is remanded to the administrative law judge for consideration of all remaining issues.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge