BRB Nos. 96-1068
and 96-1068S

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| JOHN M. ZUBE | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| SUN REFINING AND MARKETING COMPANY | ) | DATE ISSUED: |
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| and | ) | |
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| TRAVELERS INSURANCE COMPANY | ) | |
| | ) | |
| Employer/Carrier-Respondents | ) | DECISION and ORDER |

Appeals of the Decision and Order of Vivian Schreter-Murray and the Final Order of Edward J. Murty, Jr., Administrative Law Judges, United States Department of Labor.

David Tykulsker (David Tykulsker & Associates), Montclair, New Jersey, for claimant.

Victoria E. Manes (Manes & Manes), Millwood, New York, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (95-LHC-1970) of Administrative Law Judge Vivian Schreter-Murray, and the Final Order (95-LHC-2422) of Administrative Law Judge Edward J. Murty, Jr., rendered on claims filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.* (the Act).[1] 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).

[1]By Order, dated January 15, 1997, the Board consolidated for purposes of decision the appeal of the Decision and Order of Administrative Law Judge Vivian Schreter-Murray, issued April 8, 1996, BRB No. 96-1068, with that of the Final Order of Administrative Law Judge Edward J. Murty, Jr., issued October 24, 1996. BRB No. 96-1068S.

Claimant is employed by employer as a tanker-truck driver; the employment duties required by this position include transferring petroleum products from a storage tank located at employer's Newark, New Jersey, terminal facility into his tanker-truck and thereafter transporting the product to service stations located in the New Jersey area. Claimant's employment duties thus require that he drive his truck into employer's terminal facility, park the vehicle alongside the storage tank, hook the storage tank's loading arm to the truck, activate the pump, record the amounts loaded, drive the truck from employer's facility to the service stations, deliver the product, and record the amounts delivered. The storage tank from which claimant receives his shipment contains petroleum products which arrive either by pipeline from employer's Philadelphia refinery or by barge; approximately 10 percent arrives by barge and 90 percent by pipeline. These products are then transported overland via tanker-trucks by drivers such as claimant to employer's service stations. Claimant sustained an injury during the course of his employment with employer on August 21, 1985, while attaching the storage tank's nozzle onto his tanker-truck. Although claimant had returned to his usual job duties at the time of his hearing before Judge Schreter-Murray (hereinafter the administrative law judge), he subsequently suffered another injury during the course of his employment on December 13, 1986, which was the subject of Judge Murty's Final Order.

Before the administrative law judge, employer conceded that its Newark terminal facility constituted a covered situs under the Act. *See* 33 U.S.C. §903(a)(1988). Thus, the only issue addressed by the administrative law judge was whether claimant satisfied the status element of coverage set forth in Section 2(3) of the Act, 33 U.S.C. §902(3)(1988). In her Decision and Order, the administrative law judge concluded that claimant's employment duties did not fall within the coverage provisions of the Act; specifically, the administrative law judge determined that claimant was not involved in maritime activities but, rather, was injured while picking up stored cargo for transportation overland. Accordingly, the administrative law judge denied claimant's claim for compensation under the Act. In his subsequent Final Order, Judge Murty found that, as the parties agreed to be bound by the holding of Judge Schreter-Murray regarding coverage under the Act, claimant's claim must be dismissed.

On appeal, claimant challenges the administrative law judge's conclusion that his loading of gasoline into his tanker-truck is insufficient to bring him within the Act's coverage, and the consequent dismissal of his claim for benefits by Judge Murty. Employer responds, urging that the administrative law judges' decisions be affirmed.

Initially, we note that the fact that claimant performed some of his job duties on a maritime situs does not, in and of itself, satisfy the status requirement for coverage under the Act. The status requirement of Section 2(3) limits coverage to "employees," defined as

those engaged in "maritime employment;" specifically, Section 2(3) provides, in pertinent part, that:

> 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). While maritime employment is not limited to the occupations specifically enumerated in Section 2(3), *see Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 423 n.9, 17 BRBS 78, 82 n.9 (CRT)(1985), claimant's employment must be an integral or essential part of the chain of events leading up to the loading, unloading, building or repairing of a vessel. *See generally Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989); *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112 (CRT)(3d Cir. 1992); *Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, *reh'g denied*, 910 F.2d 1179 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991). 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. 249, 6 BRBS 150 (1977). Accordingly, while maritime employment is not limited to those occupations specifically enumerated in Section 2(3), a claimant's employment must bear a relationship to the loading, unloading, building, or repairing of a vessel. *See Johnson v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992).

In the present case, claimant's employment duties as a tanker-truck driver specifically require him to load petroleum products from a storage tank located at employer's terminal facility into his tanker-truck and thereafter transport that product to service stations located in the New Jersey area. In seeking benefits under the Act, claimant contends that his injuries occurred while he was engaged in maritime activities, *i.e.*, a step in unloading a barge, and that these activities constitute the last segment in moving the cargo from the barge into the stream of land commerce. Claimant asserts that, although claimant was a truck driver, his work loading petroleum products from the storage tank into his truck leads to the conclusion he spent some portion of his time in maritime activities. In her Decision and Order, the administrative law judge, citing the Supreme Court's decisions in *Caputo* and *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979), as well as the decision of the United States Court of Appeals for the Ninth Circuit in *Dorris v. Director, OWCP*, 808 F.2d 1362, 19 BRBS 82 (CRT)(9th Cir. 1987), concluded that claimant was not engaged directly or indirectly in the loading or unloading of a vessel at the time of his injury, that claimant's employment duties are not intermediate steps in the movement of cargo from ship to shore, and that, accordingly, claimant's occupation does not serve a maritime purpose. Decision and Order at 7.

We affirm the administrative law judge's findings that claimant's employment duties are insufficient to satsify the status requirement of Section 2(3) of the Act. Specifically, we agree that claimant's filling his truck with petroleum products is not a step in the loading

process, and thus that claimant did not spend "at least some" of his time in maritime activities. Although Congress did not define the term “maritime employment” in the text of the Act or its legislative history, *see Caputo*, 432 U.S. at 265, 6 BRBS at 160, the Supreme Court has addressed this issue on a number of occasions. In *Caputo*, for example, the Court explained that coverage under the Act is limited to those whose work facilitates the loading, unloading, repair or construction of vessels:

> The closest Congress came to defining the key terms [in Section 902(3)] is the "typical example" of shoreward coverage provided in the Committee Reports. The example clearly indicates an intent to cover those workers involved in the essential elements of unloading a vessel - taking cargo out of the hold, moving it away from the ship’s side, and carrying it immediately to a storage or holding area. The example also makes it clear that persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. Thus, employees such as truckdrivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered.

*Caputo*, 432 U.S. at 266-67, 6 BRBS at 160-61.[2] Thereafter, in *Ford*, 444 U.S. at 66, 11 BRBS at 320, the Court recognized 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. 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 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.

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[2]The Committee Report referred to provides:

> The intent of the committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo . . . is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered.

H.R. Rep. No. 1441, 92d Cong., 2nd Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 4708.

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 and that the only ground to distinguish claimants from those 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; *see also Schwalb*, 493 U.S. at 40, 23 BRBS at 96 (CRT).

In *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112 (CRT)(3d Cir. 1992), the United States Court of Appeals for the Third Circuit, within whose jurisdiction the instant case arises, addressed the issue of status and found that an employee is not covered under the Act unless he is essential to the process of loading and unloading a vessel. Relying on the Supreme Court's decision in *Schwalb*, as well as its earlier decision in *Novelties Distribution Corp. v. Molee*, 710 F.2d 992, 15 BRBS 168 (CRT)(3d Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984)(in which the court found that the key factor in determining coverage was the functional relationship of the employee's activity to maritime transportation, as distinguished from such land-based activities as trucking, railroading or warehousing), the court held that maritime employment is applied to land-based work other than longshoring and the other occupations named in Section 2(3) for those employees engaged in loading and unloading; the court thus concluded that a covered employee must have an integral and/or essential part of the loading, unloading, or building of a vessel and that the employee's activities must have a close nexus to these operations. *See also Sea-Land Services v. Director, OWCP* [*Johns*], 540 F.2d 629, 4 BRBS 289 (3d Cir. 1976). Similarly, in *Dorris*, 808 F.2d at 1362, 19 BRBS at 82 (CRT), the Board and the United States Court of Appeals for 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 this regard, the Board has held that truck drivers whose responsibility is to pick up and/or deliver cargo unloaded from or destined for marine transportation are not under the Act. *See Garmon v. Aluminum Co. of America - Mobile Works*, 28 BRBS 46 (1994) *aff'd on recon.*, 29 BRBS 15 (1995)*; Coyne v. Refined Sugar, Inc.*, 28 BRBS 372 (1994); *Martinez v. Distribution Auto Services*, 19 BRBS 12 (1985).

In the instant case, the administrative law judge initially rejected claimant's assertion that he was directly involved in unloading a barge based on the theory that a barge could have been downloading employer's product at the precise moment that claimant was loading his tanker-truck. The administrative law judge's finding that claimant failed to produce any evidence that such an event occurred is rational and supported by the record; accordingly, we affirm the administrative law judge's determination in this regard.

Next, we reject claimant's attempts to analogize his job duties of moving petroleum products from a storage tank into his tanker-truck with claimant Ford's activities, which involved the last step before the train left the terminal. Claimants Ford and Bryant

performed the initial steps of placing cargo onto, or removing it from, a vehicle of land transportation within the terminal. In the instant case, however, once the product left the barge and entered the storage containers, it had ceased its maritime journey and was ready to be picked up by the next mode of transportation. Contrary to claimant's assertion, the storage tanks from which he obtained his product for land transport were not simply a "point of rest" but marked the product's exit from maritime commerce and its transfer into land transportation, since delivery to the owner who placed it into overland transportation was complete at that point. *See generally Molee*, 710 F.2d at 992, 15 BRBS at 168 (CRT). Thus, all longshoring operations had ceased once the product was placed into the storage containers, its point of delivery, prior to claimant's loading it onto his truck for overland transportation. *See, e.g., Atlantic Container Services Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101 (CRT)(11th Cir. 1990). Moreover, unlike claimants Ford and Bryant who worked at the terminal which was their base of operations and moved goods within that the terminal area, claimant in the case at bar was not employed specifically at the maritime situs but, rather, was required to visit employer's terminal facility for the sole purpose of picking up cargo for overland transport. Claimant's specific employment duties thus did not involve an intermediate step in moving cargo between ship and land transportation; rather, claimant's work involved the landward transport of employer's product. *See Johns,* 540 F.2d at 638, 4 BRBS at 296. Placing employer's product in his truck was simply a duty ancillary to his driving the truck. Accordingly, as all of claimant's duties involved the landward transportation of employer's product, claimant's duties are similar to those of claimant Dorris.[3] The Supreme 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." *Caputo*, 432 U.S. at 275 n.37, 6 BRBS at 166 n.37. Thus, while it is evident that coverage is extended to those workers involved in each step in unloading a vessel and delivering cargo to its owner, individuals such as claimant, who are on the situs to pick-up or deliver cargo unloaded from or destined for maritime transportation, are not covered. *Caputo*, 432 U.S. at 266-267, 6 BRBS at 160. The facts of this case support the administrative law judge's conclusion that claimant was involved in moving a product from its point of delivery to its point of consumption and that he was not involved in maritime activities; accordingly, pursuant to the precedents set forth by the Supreme Court, we affirm the administrative law judge's determination that none of claimant's employment duties are intermediate steps in the movement of cargo from ship to shore. Claimant is thus not covered by the Act.

Accordingly, the Decision and Order of Administrative Law Judge Schreter-Murray denying the claim, BRB No. 96-1068, and the Final Order of Administrative Law Judge Murty dismissing the subsequent claim, BRB No. 96-1068S, are affirmed.

SO ORDERED.

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[3]Claimant Dorris' usual duties as a truck driver included fastening containers to his truck chassis before leaving the terminal. Claimant's attachment of a nozzle to his tanker-truck is analogous to this activity, and does not render his activities part of the barge unloading process.

ROY P. SMITH,
Administrative Appeals Judge

JAMES F. BROWN,
Administrative Appeals Judge

NANCY S. DOLDER,
Administrative Appeals Judge