BRB No. 98-0735

DONALD WAUGH	)	
	)	
Claimant-Respondent	)	DATE ISSUED:
	)	
v.	)	
	)	
MATT'S ENTERPRISES, INCORPORATED	)	
	)	
	)	
Self-Insured Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of J. Michael O'Neill, Administrative Law Judge, United States Department of Labor.

R. Matthew Moore and Steven C. Schletker (Schletker, Hornbeck & Moore), Covington, Kentucky, for claimant.

Phillip Bruce Leslie (McBrayer, McGinnis, Leslie & Kirkland), Greenup, Kentucky, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order (96-LHC-1148) of Administrative Law Judge J. Michael O'Neill 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, a trucking company wholly owned by Mr. Tom Hatfield, is in the business of hauling metal scrap from a dock location known as South Point. Scrap metal is unloaded at South Point from barges by means of a cable with an attached magnet; the metal is then loaded onto trucks at which time claimant, a truck driver for employer, would deliver the loaded metal to either nearby steel companies or to a field located 500 feet from the dock for storage. In performing his employment duties, claimant, to ensure against a possible flat tire, would often pick up pieces of scrap that had fallen on either side of his truck and pitch them onto the truck. The company which operated the loading and unloading facility at South Point is named Barge & Rail Terminals (Barge & Rail), and is 50 percent owned by Mr. Hatfield.

Claimant suffered a work-related injury on March 27, 1995, while his truck was being loaded with metal from the scrap field, when he bent down to pick up a piece of scrap metal and the counterweight of the crane struck him in the back. Claimant was diagnosed as suffering from a herniated disc and a hyperreflexic neurogenic bladder. Claimant, who has not worked since the date of the work accident, filed a claim under the Act seeking temporary total and permanent total disability compensation.

In his Decision and Order, the administrative law judge found that claimant satisfied the situs and status requirements for jurisdiction under the Act. Specifically, the administrative law judge determined that claimant's injury occurred on an "adjoining area" under Section 3(a) of the Act, 33 U.S.C. §903(a)(1994). With regard to status, the administrative law judge, relying on the decision of the United States Court of Appeals for the Sixth Circuit in *Warren Brothers v. Nelson*, 635 F.2d 552, 12 BRBS 714 (6th Cir. 1980), found that claimant's activities as a truck driver were an integral part of the unloading process. In addition, the administrative law judge credited claimant's testimony and the testimony of Robert McKee and Don Tackett, truck drivers who also worked for employer, and found that claimant regularly boarded barges to assist in the unloading process by performing various tasks such as spotting for the crane operator, taking the covers off barges, moving barges, hooking the magnet on the crane, and splicing or untangling the cable on the magnet. Although claimant assisted in the unloading process at the request of employees of Barge & Rail, the administrative law judge determined that claimant performed these tasks with employer's awareness, never received disciplinary action for performing such work, and received his usual wages from employer for those periods of time; accordingly, the administrative law judge rejected employer's argument that claimant was a gratuitous worker. Thus, the administrative law judge found that claimant established the status element under Section 2(3) of the Act, 33 U.S.C. §902(3)(1994). Having found that claimant established causation, the administrative law judge determined that claimant reached maximum medical

improvement on March 7, 1997, and awarded claimant temporary total disability compensation from March 27, 1995 through March 6, 1997, *see* 33 U.S.C. §908(b), and permanent total disability compensation commencing on March 7, 1997 and continuing. 33 U.S.C. §908(a).

On appeal, employer challenges the administrative law judge's determination that claimant satisfied the status and situs requirements for jurisdiction. Claimant responds, urging affirmance of the administrative law judge's decision.

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). 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 ship-breaker . . . ." 33 U.S.C. §902(3)(1994). While maritime employment is not limited to the occupations specifically enumerated in Section 2(3), claimant's employment must bear a relationship 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). Moreover, an employee is engaged in maritime employment as long as some portion of his job activities constitutes covered employment. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 275-276, 6 BRBS 150, 166 (1977). 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). 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 duties at the time of injury. *See, e.g., Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

Employer initially challenges the administrative law judge's conclusion that claimant satisfied the status requirement of the Act, contending that claimant's job as a truck driver was not maritime employment, and that any time claimant did spend in maritime activities was small and episodic. We reject employer's contentions. In rendering his decision, the administrative law judge initially found that claimant's work involving the transporting of scrap metal from barges to the scrap field was an integral part of the unloading process. In *Caputo*, the Supreme Court held that "employees such as truck drivers, 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 266-267, 6 BRBS at 161.[1]

Thereafter, in *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979), 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. 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*

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[1]In *Caputo*, 432 U.S. at 265 n. 27, 6 BRBS at 161 n. 27, the Court looked to the legislative history of Section 2(3) and cited a Committee Report, which 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 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.

Schwalb, 493 U.S. at 40, 23 BRBS at 96 (CRT).

In the instant case, in determining that claimant satisfied the status requirement, the administrative law judge relied on the decision of the Sixth Circuit in *Nelson*. In that case, the claimant was a truck driver who was injured while transporting gravel from a hopper located on a floating platform, where gravel had been unloaded from barges, to a storage pile adjacent to a manufacturing facility. The court reasoned that unloading in this instance required a two-step process, in which gravel was unloaded from barges to the hopper and, thereafter, from the hopper to the stockpile by truck; the dumping of gravel from the barges to the hopper, the court stated, did not complete the process. Though the claimant did not leave the cab of his truck to assist in the actual loading, the court held that the claimant satisfied the status element for jurisdiction under Section 2(3), as the trucking of gravel from shipside to the factory was an integral part of the overall process of unloading the barges. *Nelson*, 635 F.2d at 555, 12 BRBS at 717. In the present case, claimant's job duties as a truck driver included transporting metal that had been unloaded from barges onto his truck to the scrap field located at the South Point facility. Like the hopper in *Nelson*, the scrap field in the instant case constituted an intermediary storage site, since the metal would be subsequently loaded onto trucks for delivery to local steel plants. Thus, claimant's task of transporting metal from barges to the scrap field involved an intermediate step in the process of moving cargo between ship and land transportation. As it is undisputed that transporting metal from barges to the scrap field was a regular part of claimant's job assignments, *see* Tr. 30-33; Employer's Brief at 4, pursuant to *Ford* and *Nelson*, we affirm the administrative law judge's finding that this activity is sufficient to confer coverage under Section 2(3).

In this regard, we note that employer's reliance on *Dorris v. Director, OWCP*, 808 F.2d 1362, 19 BRBS 82 (CRT)(9th Cir. 1987), is misplaced. Initially, in *Dorris*, the claimant's truck driving duties did not involve an intermediate step in the loading process at the dock but overland transport of goods between the harbor and consignee or between berths at different harbors. Moreover, the administrative law judge specifically distinguished *Dorris* inasmuch as the court in that case credited testimony that any maritime activities performed by claimant were episodic. In the instant case, the administrative law judge found that in addition to claimant's duties as a truck driver, claimant regularly performed tasks that assisted the process of unloading scrap metal from barges to his truck. The administrative law judge credited claimant's testimony in this regard and found that claimant performed spotting duties, whereby he would direct the crane operator to the location of scrap at the bottom of the barge. He further found that claimant helped move barges, untwisted cables on the crane, spliced cables, took the covers off of barges,

changed cables, hooked the magnet on the crane, helped repair the crane, and leveled the crane. *See* Decision and Order at 11, 14; Tr. at 34-43, 76-78. The administrative law judge additionally credited claimant's testimony that these activities in assistance of the unloading of barges occurred regularly, especially claimant's spotting duties, which occurred on a daily basis. Tr. at 34-36. These activities, which directly assisted the unloading of barges, are clearly maritime employment and covered under the Act. *See* 33 U.S.C. §902(3)(1994). As claimant's trucking duties, as well as his other specific tasks which assisted the unloading of barges, were not extraordinary or episodic, and in fact, formed the regular part of claimant's job assignments, we affirm the administrative law judge's conclusion that claimant spent at least some of his time engaged in clearly maritime employment. *See Caputo*, 432 U.S. at 275-276, 6 BRBS at 166; *Boudloche*, 632 F.2d at 1346, 12 BRBS at 732; *see also Schwabenland v. Sanger Boats*, 683 F.2d 309, 16 BRBS 78 (CRT)(9th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997); *McGoey v. Chiquita Brands Int'l*, 30 BRBS 237 (1997).

Lastly, in challenging the administrative law judge's conclusion that claimant satisfied the status requirement under the Act, employer contends that assuming claimant did perform activities in assistance of the unloading process, these tasks occurred without the consent of employer and, thus, claimant's work constituted gratuitous or voluntary employment, outside the scope of claimant's employment. We disagree. In his decision, the administrative law judge credited claimant's testimony, as supported by the testimony of Robert McKee and Don Tackett, other truck drivers for employer, that employer's official policy was that truck drivers were to stay off the barges but, in practice, they were asked to go aboard barges either by Burl Hankins, claimant's supervisor, or Danny Hineman, Barge & Rail's operating manager, to assist the crane operator in the unloading of barges. The administrative law judge gave little weight to the testimony of Tom Hatfield, employer's sole owner, and Burl Hankins, as they spent little time at the South Point dock. Decision and Order at 14; Tr. at 168, 287; Hankins depo. at 54. In addition, the administrative law judge discredited the testimony of Danny Hineman, as he gave conflicting testimony with regard to whether he asked the truck drivers to assist in the unloading operation. Tr. at 300, 304-305. Thus, it is clear from the record that employer was aware of claimant's activities and nevertheless took no disciplinary action against him, thereby providing claimant with tacit approval for his actions. Accordingly, we affirm the administrative law judge's finding that claimant was not a gratuitous worker, and his ultimate conclusion that claimant satisfied the status requirement for jurisdiction under Section 2(3). *See generally Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 23 (CRT)(1st Cir. 1984).

Employer next contends that the administrative law judge erred in finding that claimant satisfied the situs requirement for coverage under the Act. Specifically, employer contends that the scrap field where claimant was injured does not constitute an "adjoining area" under Section 3(a) of the Act.

Section 3(a) of the Act provides that:

> Except as otherwise provided in this section, compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring on the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel).

33 U.S.C. §903(a)(1994).

In determining whether claimant's injury occurred on an "adjoining area" under Section 3(a), the administrative law judge applied the functional relationship test enunciated in *Brady-Hamilton Stevedore Co. v. Herron*, 568 F.2d 137, 7 BRBS 409 (9th Cir. 1978). Factors to be considered in determining whether a site is an "adjoining area" under that test include: 1) the particular suitability of the site for the maritime uses referred to in the Act; 2) whether adjoining properties are devoted primarily to uses in maritime commerce; 3) the proximity of the site to the waterway; and 4) whether the site is as close to the waterway as feasible given all the circumstances of the case. *Id.*, 568 F.2d at 141, 7 BRBS at 411.

Applying the aforementional criteria, the administrative law judge found that the scrap field where claimant suffered his injury, which was 500 feet from the water's edge, needed to be close to the waterway in order to provide for the efficient unloading of barges. Next, the administrative law judge noted that the surrounding area was engaged in maritime commerce; specifically, one side of the South Point facility involved the loading of scrap metal onto barges while the other side involved the loading of grain onto barges. The administrative law judge further found that the scrap field was part of the overall unloading process at the South Point location, noting that scrap was either unloaded from barges to trucks and transported to steel companies, or loaded from barges to trucks and transported to the field, where at a subsequent time the scrap would be loaded from the field by crane onto trucks for delivery to local steel companies. Thus, the administrative law judge determined that the field where claimant was injured was customarily used by employer in the overall process of unloading vessels. *See* Decision and Order at 9.

On appeal, employer concedes that the scrap field is only 500 feet from the water's edge, *see* Employer's Brief at 27, and does not contest that the field was located at the South Point dock, an area where Barge & Rail operated two facilities, one to unload scrap from barges and the other to load grain onto barges. Rather, employer argues that the field itself was not customarily used in loading or unloading a vessel. We reject employer's contention. In this regard, the administrative law judge properly found that the field was used in the overall process of unloading barges. As the Supreme Court held in *Ford*, the process of unloading cargo is not divided into arbitrary units according to the fortuitous placement of the goods on the dock. *Ford*, 444 U.S. at 69, 11 BRBS at 320; *see Caputo*, 432 U.S. at 249, 6 BRBS at 150. As stated above, the unloading of scrap metal from trucks onto the scrap field was an intermediate step in the overall process of unloading scrap from barges and delivering it to local steel companies. Thus, the administrative law judge's finding that the scrap field was customarily used by employer in the overall process of unloading vessels is rational and in accordance with law. Moreover, the scrap field is part of the South Point waterfront facility wherein the loading and unloading of barges occurs, and therefore, the area where claimant was injured is part of a general "maritime area" sufficient to constitute an "adjoining area" under Section 3(a) of the Act. *See Hagenzeiker v. Norton Lilly & Co.*, 22 BRBS 313 (1989); *Jackson v. Straus Systems, Inc.*, 21 BRBS 266 (1988). We therefore affirm the administrative law judge's determination that claimant satisfied the situs requirement under Section 3(a) of the Act.

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

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH

Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge