

VINCENT J. RIGGIO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MAHER TERMINALS,	)	DATE ISSUED: <u>June 28, 2001</u>
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

William M. Broderick and Richard P. Stanton, Jr., New York, New York, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (1994-LHC-1948) of Administrative Law Judge Ralph A. Romano 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This is the second time this case has come before the Board. The facts are not in dispute. Claimant is a clerk/checker for employer. He belongs to the checker's local, and he is on employer's permanent hire list, but he is not on a specified job list, so he can be assigned any work. Tr.1 at 38, 42-43, 47. Claimant has worked for employer in an office setting as a clerk as well as in the field and in the lanes as a checker. *Id.* at 45-48. On

February 3, 1994, claimant was working as a delivery clerk in an office on Berth 62 of employer's facility in Port Shipley. He injured his shoulder when he pushed his chair back from the desk and one of the rollers got caught, tipping the chair. *Id.* at 36. Employer paid claimant benefits under the state workers' compensation law. Claimant filed a claim for benefits under the Act.

The sole issue before Administrative Law Judge Ainsworth Brown was whether claimant satisfied the Act's status requirement. Judge Brown found that claimant is a delivery clerk who falls within the clerical exclusion of Section 2(3)(A), 33 U.S.C. §902(3)(A), and that even if he "had occasional forays into the lanes," he did not change his status from that of a clerical worker. Decision and Order at 3. Moreover, Judge Brown found that, as claimant did not submit more than the two weeks of employment records submitted by employer, and as his legal arguments were not persuasive, claimant failed to meet his burden of proving that he has maritime status. Therefore, Judge Brown denied benefits. *Id.* Claimant appealed.<sup>1</sup>

The Board rejected claimant's assertion that his duties as a delivery clerk, which involve paperwork and computer work in an office setting, but are related to loading and unloading, are sufficient to confer status. *Riggio v. Maher Terminals, Inc.*, 31 BRBS 58 (1997). However, the Board held that it could not affirm Judge Brown's decision, as he thrice stated that claimant "occasionally" worked as a checker but concluded that claimant is an office-bound delivery clerk excluded from coverage. The Board stated that if claimant occasionally worked as a checker, then he did not work "exclusively" as an office clerk and the Section 2(3)(A) exclusion does not apply. *Id.* at 61. Consequently, the Board vacated the denial of benefits and remanded the case for further consideration using the proper standards. *Id.* at 61-62.

On remand, the case was assigned to Administrative Law Judge Ralph A. Romano (the administrative law judge). The administrative law judge first stated that the Board's decision was not to be interpreted as an order to automatically find in favor of claimant. Instead, he reviewed the decisions in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977), *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112(CRT) (3<sup>d</sup> Cir. 1992), *Maier Terminals, Inc. v. Farrell*, 548 F.2d 476, 5 BRBS 393 (3<sup>d</sup> Cir. 1977), and *Sette v. Maier Terminals, Inc.*, 27 BRBS 224 (1993), for guidance. The administrative law judge read *Caputo* as conferring coverage on a clerk only when that clerk is subject to

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<sup>1</sup>The Director, Office of Workers' Compensation Programs (the Director), filed a response brief in support of claimant's position.

maritime reassignment, such as a checker, during the course of his workday, and that to read it otherwise is to go beyond its scope. Therefore, the administrative law judge denied claimant coverage, as claimant had not shown he was subject to reassignment as a checker in the same day he worked as a clerk. He also noted that claimant's past work as a checker was insufficient to show coverage under *Caputo*. Decision and Order on Remand at 3. Claimant again appeals the denial of benefits, and employer responds, urging affirmance.

Claimant contends the administrative law judge misinterpreted the law, as he required reassignment to maritime work, or the potential for such, within one work day in order to confer coverage. Employer asserts this is a valid interpretation of the Supreme Court's holding and the law as set forth by the United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises. Before addressing the legal issues of this case, it is helpful to examine claimant's duties in more detail.

In this case, claimant testified that he worked as both a checker and a clerk. As such, he handled paperwork for both in-coming and out-going cargo. When claimant worked as either a delivery or a receiving clerk, his work was exclusively in an office. When claimant worked as a checker, he worked in the lanes and the field. He would check seals and container numbers as well as license plate numbers, generating a document verifying that all was in order.<sup>2</sup> Tr.1 at 38-41, 45-46, 48, 50-52, 55-56, 62-65. Claimant estimated his time was divided evenly between the two types of work. He also testified that he has worked for two or three years in Berth 80 as a receiving or delivery clerk and that his supervisor would assign him work as a clerk whenever he could, but if he could not, claimant would go into the lanes or do other checker jobs. Tr.1 at 48-49. If no work is available at employer's facility, claimant obtains work through the union hall as a checker or a clerk. Tr.1 at 76.

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<sup>2</sup>Claimant noted that clerks earn more than checkers because they use computers and add figures, and checkers do not, and he conceded he prefers office work. Tr.1 at 43, 48, 55-56.

Judge Brown questioned the veracity of claimant's testimony with regard to his work duties.<sup>3</sup> Decision and Order at 2-3. Due in part to this credibility issue, the Board remanded this case for reconsideration. *Riggio*, 31 BRBS at 61-62. On remand, employer conceded that claimant is subject to assignment as a checker and that he occasionally worked as a checker. Tr.2 at 25. The administrative law judge noted this concession and concluded that the decision was no longer affected by "Judge Brown's doubts as to the integrity of Claimant's testimony" regarding his duties. Decision and Order on Remand at 2 n.5. Thus, there remains no dispute that claimant could be assigned by and occasionally works for employer as a checker. The issue before the Board, therefore, is whether the administrative law judge correctly interpreted and applied *Caputo* to this case arising in the Third Circuit.

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or that his injury occurred on a landward area covered by Section 3(a) and that his work is maritime in nature and is not specifically excluded by the Act. 33 U.S.C. §§902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62(CRT) (1983); *P.C. Pfeiffer Co. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996). Thus, in order to demonstrate that jurisdiction exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id.*; see also *Crapanzano v. Rice Mohawk, U.S. Construction Co., Ltd.*, 30 BRBS 81 (1996).

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<sup>3</sup>Claimant testified he worked outdoors as a checker once during the week before he was injured, although on the date of the injury, he was working as a delivery clerk in an office. Tr.1 at 49-50, 65. On cross-examination, employer presented records which established that claimant worked solely as a delivery clerk between January 25 and February 4, 1994, the two weeks prior to his injury. Emp. Ex. 1; Tr.1 at 59-62. Although he presented no records to corroborate his assertions, claimant then testified that he may have mistaken the time period, but that he does occasionally work as a checker and did so as recently as a few days before the hearing. Tr.1 at 61-62.

Generally, a claimant satisfies the “status” requirement if he is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See* 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46, 23 BRBS 96(CRT) (1989). To satisfy this requirement, he need only “spend at least some of [his] time in indisputably longshoring operations.” *Caputo*, 432 U.S. at 273, 6 BRBS at 165. Although an employee is covered if some portion of his activities constitute covered employment, those activities must be more than episodic, momentary or incidental to non-maritime work.<sup>4</sup> *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5<sup>th</sup> Cir. 1980), *cert. denied*, 452 U.S. 915 (1981); *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff’d*, 904 F.2d 611, 23 BRBS 101(CRT) (11<sup>th</sup> Cir. 1990). Restating the *Schwalb* test, the Third Circuit deems activities “maritime” if they are “an integral or essential part of the chain of events leading up to the loading, unloading, or building of a vessel.” *Rock*, 953 F.2d at 67, 25 BRBS at 121(CRT). Employees who are hired exclusively to perform office clerical work are specifically excluded from coverage, 33 U.S.C. §902(3)(A);<sup>5</sup> *Stone*, 30 BRBS at 213, even if their work is integral to the loading or construction of ships.

Under the Act, checkers have maritime status. *Caputo*, 432 U.S. 249, 6 BRBS 150; *Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 24(CRT) (1<sup>st</sup> Cir. 1984); *see also Stone*, 30 BRBS at 211 n.4. Office-bound delivery clerks who process paperwork for the release of cargo are not covered. *Farrell*, 548 F.2d 476, 5 BRBS 393; *Stone*, 30 BRBS at

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<sup>4</sup>An “episodic” activity is one which is “discretionary or extraordinary” as opposed to one which is “a regular portion of the overall tasks to which a claimant may be assigned. . . .” *Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 24(CRT) (1<sup>st</sup> Cir. 1984); *see also McGoey v. Chiquita Brands Int’l*, 30 BRBS 237 (1997); *Stone*, 30 BRBS at 213.

<sup>5</sup>Section 2(3)(A) provides:

(3) 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, but such term does not include--

(A) individuals employed *exclusively to perform office clerical*, secretarial, security, or data processing *work* [if such persons are covered by State workers’ compensation laws];

33 U.S.C. §902(3)(A) (emphasis added).

213; *Sette*, 27 BRBS 224. In a case where these jobs were combined, and the claimant was subject to reassignment as a checker, the Board held that the employee is covered. *Caldwell v. Universal Maritime Service Corp.*, 22 BRBS 398 (1989).

Claimant first contends the administrative law judge erred in concluding he is an excluded clerical worker. Rather, he asserts that his occasional work as a checker removes him from the Section 2(3)(A) exclusion and brings him within the Act's coverage. The facts establish that claimant is on employer's permanent hire list and is assigned work as an office clerk. If there is no clerical work available, claimant may be assigned to work as a checker, and it is undisputed that claimant occasionally works for employer as a checker. Because Section 2(3)(A) excludes those "individuals employed exclusively to perform office clerical . . . work[.]" 33 U.S.C. §902(3)(A), and because it is undisputed claimant occasionally works as a checker, his work for employer is not *exclusively* office clerical work, and he is not excluded from coverage by Section 2(3)(A). Unlike the situations in *Farrell* and *Sette* where office-bound clerks were excluded from coverage, *Farrell*, 548 F.2d at 478, 5 BRBS at 396; *Sette*, 27 BRBS at 228-229, the distinguishing factors present in *Caldwell*, 22 BRBS 398, where the claimant regularly worked as a checker outside the office, are present here. Thus, as it is undisputed that claimant's regular work assignments for employer include assignment as a checker, as we stated in our prior decision, Section 2(3)(A) is inapplicable. *Jannuzzelli v. Maersk Container Service Co.*, 25 BRBS 66 (1991) (Clark, J., dissenting); *Caldwell*, 22 BRBS 398; compare with *Ladd v. Tampa Shipyards, Inc.*, 32 BRBS 228 (1998); *Stone*, 30 BRBS at 211. As claimant spent "some of his time" working for employer in covered longshoring activities, he is a covered employee. *Ford*, 444 U.S. 69, 11 BRBS 320; *Caputo*, 432 U.S. 249, 6 BRBS 150. Therefore, we reverse the administrative law judge's decision to exclude claimant from coverage based on his office clerical work.

Ordinarily, the fact that claimant regularly worked as a checker and is thus not excluded from coverage would end our inquiry into coverage. However, in this case, the administrative law judge created an additional requirement that claimant prove he was subject to reassignment to maritime work within the same work day in order to be covered.<sup>6</sup>

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<sup>6</sup>The administrative law judge noted that there was no evidence claimant was ever reassigned to checker or other traditional longshore duties during any work day when he worked as a clerk. Decision and Order at 2, n.4. There is, however, also no evidence claimant could not be so reassigned. In the initial appeal in this case, we found it unnecessary to address the Director's argument that Section 20(a), 33 U.S.C. §920(a), 33 U.S.C. §920(a), applies in the resolution of the case, noting that the Board has consistently held it does not apply to legal issues relating to coverage. *Riggio*, 31 BRBS at 62, n.4. However, Section 20(a) presumes, "in the absence of substantial evidence to the contrary . . . that the claim comes within the provisions of the Act." Thus, questions of fact underlying coverage may well be subject to Section 20(a), placing the burden of production of employer.

Therefore, we must address claimant's contention that the administrative law judge erred in interpreting case precedent to establish a "same day of injury" test.<sup>7</sup> In response, employer asserts that the administrative law judge has correctly interpreted the relevant cases.

In finding that claimant is not a covered employee, the administrative law judge declined to read *Caputo* as extending coverage to employees unless they are subject to reassignment to covered work on the same day they are assigned to non-covered work. The administrative law judge focused on the fact that neither claimant in *Caputo* was a clerk. One employee, Blundo, was working as a checker when injured and was covered. The other employee, Caputo, was working as a terminal laborer, and with regard to "the day" Caputo was hired and injured, the court stated:

In that capacity, he could have been assigned to any one of a number of tasks necessary to the transfer of cargo between land and maritime transportation. . . . Not only did he have no idea when he set out in the morning which of these tasks he might be assigned, but in fact his *assignment could have been changed during the day*. Thus, had Caputo avoided injury and completed loading the consignee's truck on the day of the accident, he then could have been assigned to unload a lighter. Since it is clear that he would have been covered while unloading such a vessel, *to exclude him from the Act's coverage in the morning but include him in the afternoon* would be to revitalize the shifting and fortuitous coverage that Congress intended to eliminate.

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*See Fleischman v. Director, OWCP*, 137 F.2d 131, 32 BRBS 28(CRT)(2d Cir. 1998), *cert. denied*, 119 S.Ct. 444 (1998). We need not fully explore this issue here, as this case is resolved based on the legal analysis.

<sup>7</sup>Resolution of the case before us does not raise the issue of the how much time claimant spent, or needed to spend, performing longshore work to satisfy the status requirement. Therefore, we need not address claimant's argument that he should be held to a lower "quantum of time" in covered employment because his non-covered clerical work has a strong nexus to maritime operations.

*Caputo*, 432 U.S. at 273-274, 6 BRBS at 165-166 (emphasis added) (citations omitted). The administrative law judge also cited *Rock* in summarizing employer's argument that a claimant normally subject to reassignment is not covered. In this regard, in discussing *Caputo*, the Third Circuit stated:

The [Supreme] Court sought to avoid the "shifting coverage" that the amendments attempted to eradicate by extending coverage to an employee who *throughout the day* might have been assigned to unload a vessel but at the hour of the accident had been temporarily assigned to a task that might not have been covered under the Act.

*Rock*, 953 F.2d at 62, 25 BRBS at 116-117(CRT) (emphasis added). The *Rock* court also noted:

Although the Director notes that *Rock* was officially subject to reassignment to longshoring positions and argues that under [*Caputo*], this fact entitles *Rock* to coverage, the Director misinterpreted [*Caputo*]. The Court in [*Caputo*] sought to prevent the hazards of shifting coverage by *covering employees who at one moment might be involved in loading but at another moment might be finishing that job and starting another that would not be covered*. The Court was following the clear intent of the statute, which was in part to avoid the shifting coverage caused by an employee's constant *movement during the workday* between sea and land. The [*Caputo*] position cannot be stretched to cover *Rock*, who voluntarily chose a position that would no longer involve him in the dangers of loading and unloading, and whose only occupation in the two years in which he held his new job was to drive the courtesy van. [*Caputo*] *protects those who walk in and out of coverage on a frequent basis, not those who are nominally subject to reassignment*.

*Rock*, 953 F.2d at 67 n.17, 25 BRBS at 121(CRT) n.17 (emphasis added). Contrary to the administrative law judge's analysis, these cases do not support the administrative law judge's creation of a "same day of injury" status test, particularly when the language quoted above is placed in context.

In *Caputo*, the Supreme Court addressed whether claimant *Caputo*, a member of a stevedoring gang who had been hired for the day as a terminal laborer and was injured while engaged in the non-maritime work of loading a truck, was a covered employee. The Supreme Court held that he met the status requirement based on his overall employment. In reaching its decision, and pertinent to the case herein, the Court rejected the notion that a claimant must be covered at the "moment of injury." It stated:

*The Act focuses primarily on occupations--longshoreman, harbor worker. . . . Both the text and the history demonstrate a desire to provide continuous coverage throughout their employment to these amphibious workers who, without the amendments, would be covered only for part of their activity. It seems clear, therefore, that when Congress said it wanted to cover "longshoremen," it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring operations and who, without the 1972 Amendments, would be covered for only part of their activity.*

*Caputo*, 432 U.S. at 273, 6 BRBS at 165 (emphasis added). Thus, although *Caputo* was injured during the performance of non-maritime work, he was covered because his occupation was longshoring. The Court continued its discussion with the example, quoted above, of a worker whose assignments could be changed within the course of one work day. However, it did not limit coverage to only those employees whose duties changed during a day as opposed to those assigned different tasks day by day. Rather, the Court used this example to demonstrate how incongruous application of a "moment of injury" test could be if an employee's afternoon work was covered but his morning duties were not. The same is true if an employee is covered Monday through Thursday, but happens to be assigned to load trucks all day Friday. Both employees perform the same occupation, that of a longshoreman, and are engaged in maritime work "some of the time." To read the *Caputo* language as limiting consideration of an employee's activities to a 24-hour period is to render moot the express focus on *occupations*. In addition, it converts the Court's holding that coverage extends to those who spend "some of their time" in longshoring operations to a requirement that they spend "some of the day" in such work.

Further support that "status" is an occupational test can be found in the Supreme Court's decision in *Ford*, 444 U.S. 69, 11 BRBS 320. In that case, the Supreme Court reiterated its rejection of the "point of rest" theory and held that two land-based workers involved in intermediate steps in the loading process were covered employees. The Court stated that "[i]n adopting an occupational test that focuses on loading and unloading, Congress anticipated" that some land-based "workers doing tasks traditionally performed by longshoremen" would be covered. *Ford*, 444 U.S. at 80, 82, 11 BRBS at 326, 328. Moreover, instead of making the coverage determination based upon which union the worker is in or upon "the employer's whim" in assigning work, "the crucial factor is the nature of the activity to which a worker may be assigned." *Id.*, 444 U.S. at 82-83, 11 BRBS at 328-239. There was no discussion of limiting consideration of work assignments to those within a specified time period.

Moreover, in following *Caputo*, the circuit courts have not restricted the occupational

test focusing on whether a worker spends “some of the time” in maritime work to situations where the maritime work was on the same day. The United States Court of Appeals for the Eleventh Circuit, in *Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101(CRT) (11<sup>th</sup> Cir. 1990), affirmed the Board’s holding that a chassis and container repairman was a covered employee. In addressing this issue, the Eleventh Circuit discussed the Supreme Court’s *Caputo* decision, stating:

Finding that the worker who was injured while loading trucks on land *could have been assigned, on any day*, to unload a vessel at the pier, the Court determined that he was therefore covered under the LHWCA for his purely land-based activities.

*Coleman*, 904 F.2d at 615, 23 BRBS at 104(CRT) (emphasis added). As Coleman’s overall duties facilitated the movement of cargo, because part of his time was spent in repairing chassis and containers used within the port facility, even though he was injured on a day he was assigned to repair a truck bound inland, he was covered. Additionally, in *Levins*, 724 F.2d 4, 16 BRBS 24(CRT), the United States Court of Appeals for the First Circuit reversed the Board’s decision and held that a book clerk who usually worked in an office but occasionally performed the duties of a checker was a covered employee. It stated that the issue of status must be resolved by looking to “the *actual* nature of [the claimant’s] regularly assigned duties as a whole,” that is, those to which he may be assigned “as a matter of course,” as opposed to his title, classification or his primary duties. *Id.*, 724 F.2d at 7, 9, 16 BRBS at 30, 33(CRT) (citing *Prolerized New England Co. v. Benefits Review Board*, 637 F.2d 30, 12 BRBS 808 (1<sup>st</sup> Cir. 1980), *cert. denied*, 452 U.S. 938 (1981) (emphasis in original)). In *Levins*, the claimant’s job required him to be physically present at the terminal during the loading and unloading of ships under 300 tons as well as to inspect cargo on an as needed basis. Thus, his “regular” clerical duties included tasks similar to those of a checker, although such work was not necessarily performed daily or even weekly. Accordingly, his title of “book clerk” did not preclude coverage as review of his occupation demonstrated that he regularly performed duties which were not “discretionary or extraordinary occurrences, but rather a regular portion of the *overall* tasks to which petitioner could have been assigned as a matter of course.” *Id.*, 724 F.2d at 9, 16 BRBS at 33(CRT)(emphasis in original). In *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104(CRT) (5<sup>th</sup> Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990), the United States Court of Appeals for the Fifth Circuit affirmed the Board’s holding that a structural fitter, who was injured while setting a floor, was a covered employee, as his regular duties included performing undeniably maritime activities, and his injury on a day when he performed non-maritime work did not divest him of coverage.

Cases previously decided by the Board also support claimant’s position that the administrative law judge interpreted *Caputo* too narrowly. For example, in *Zeringue v.*

*McDermott, Inc.*, 32 BRBS 75 (1998), the Board held that a bulldozer operator, injured during the course of non-maritime work, was covered because he spent some time, once every two to four months, using the bulldozer to assist in barge load-out operations. In *Jones v. Aluminum Co. of America*, 31 BRBS 130 (1997), the Board held that the decedent was a covered employee because his work maintaining and repairing the conveyor system used to unload bauxite, although infrequent, was a regular, non-discretionary part of his job, meeting the “some of the time” requirement. In *McGoey v. Chiquita Brands Int’l*, 30 BRBS 237 (1997), the Board concluded that a clerical employee, who was injured at his desk, was a covered employee because, although it occurred only once in the year before his injury, he was required to assist in the unloading process when his supervisor was absent. Similarly, a clerk-checker, who worked as a clerk but then was temporarily assigned by his employer as a checker for a period of eight or nine months, and was still subject to such reassignment upon returning to his duties as a clerk, was a covered employee. *Caldwell*, 22 BRBS 398. In *Thornton v. Brown & Root, Inc.*, 23 BRBS 75 (1989), the Board held that a crane rigger, who worked on the construction of offshore platforms and who was injured while dumping materials off a truck, was a covered employee because seven to ten times per year, as needed, he helped in load-out operations.

The common thread is whether the claimant performs maritime duties as a regular portion of his overall duties. *Dobey v Johnson Controls*, 33 BRBS 63 (1999) (traffic officer who alternated as marine policeman covered); *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997) (crane operator subject to regular maritime assignments covered); *Ljubic v. United Food Processors*, 30 BRBS 143 (1996) (maintenance supervisor with maritime duties covered); *Jannuzzelli*, 25 BRBS 66 (office clerk required to clock in dock workers covered); *Wuellet v. Scappoose Sand & Gravel Co.*, 18 BRBS 108 (1986) (mining facility welder/mechanic subject to assignment at barge facility covered). Provided the employee is required to perform some maritime work as a part of his regular duties, it is his overall occupation, and not his specific daily activities, which brings him within the Act’s coverage.

Despite such overwhelming precedent, employer argues that the Third Circuit’s comments in *Rock* demonstrate that the administrative law judge properly interpreted the *Caputo* ruling. However, reliance on *Rock* for creation of a “same day of injury” test is also misplaced. There is no indication in *Rock* that the Third Circuit intended to create a “daily” test. In *Rock*, the Third Circuit was faced with the issue of whether a courtesy van driver, who transported passengers within the marine terminal and had performed this job for several years, was a covered employee. In deciding the case, the court examined Supreme Court decisions, as well as its previous decisions, and it concluded there must be “some nexus between the employee’s activities and either cargo-handling or shipbuilding. . . .” *Rock*, 953 F.2d at 65, 25 BRBS at 119(CRT). Despite acknowledging a “slight nexus with the loading process” because *Rock* occasionally transported longshoremen, nevertheless the Third Circuit determined that a courtesy van driver is not covered by the Act because his job is “too

remote” from the loading and unloading process. *Rock*, 953 F.2d at 65-66, 25 BRBS at 119-120(CRT).

In discussing *Caputo* in *Rock*, the court stated that the Supreme Court sought to avoid a shifting coverage problem to a worker whose duties changed “throughout the day.” *Rock*, 953 F.2d at 62, 25 BRBS at 116-117(CRT). This statement reflects the facts relating to claimant Caputo’s job rather than a shift from the *Caputo* Court’s occupational focus. Additionally, in addressing the Director’s argument that *Rock* was subject to reassignment as a longshoreman and should be covered, the Third Circuit noted that *Caputo* protects those who “walk in and out of coverage on a frequent basis[.]” *Rock*, 953 F.2d at 62 n.17, 25 BRBS at 121 n.17(CRT). To infer that these phrases give rise to a “same day of injury” test by requiring an employee to be assigned maritime work at least part of every day to be covered is to read them out of context.<sup>8</sup> The specific facts in *Rock* demonstrated that the possibility of claimant’s walking in and out of coverage was remote. The court noted that although *Rock* may have been subject to reassignment as a longshoreman due to his union membership, such reassignment possibilities were nominal, as the evidence established that he had not been assigned maritime work for two years. As *Rock* essentially had little or no likelihood for reassignment, the Third Circuit was unwilling to confer coverage on the slim possibility that he could be reassigned. *Id.* These facts distinguish *Rock* from the present case, as claimant was actually assigned work as a checker and thus meets the occupational test as a longshoreman. The claimant in *Rock*, with no such reassignments, was not covered because his occupation as a van driver lacked a sufficient nexus to loading operations.

We also reject employer’s assertion that the Supreme Court, in its decision in *Harbor Tug & Barge Co. v. Papai*, 520 U.S. 548, 31 BRBS 34(CRT) (1997), eliminated the *Caputo* occupational test, making room for the administrative law judge’s “same day of injury” test. Initially, *Papai* is distinguishable in that it arises under the Jones Act, 46 U.S.C. §688(a), and not the Longshore Act, and the two are mutually exclusive. Because the two statutes were not designed in conjunction to serve the same purpose, they need not be reconciled or interpreted in the same way. *Erlenbaugh v. United States*, 409 U.S. 239 (1972); *Jones v. Aluminum Co. of America*, \_\_ BRBS \_\_, BRB Nos. 00-696/A (April 9, 2001); *Powers v. Sea Ray Boats, Inc.*, 31 BRBS 206, 211-212 (1998). The decision in *Papai* does not address the occupational test under the Longshore Act at all, as it is simply not relevant to the case or the test for coverage under the Jones Act. Moreover, the cases differ on the facts. In *Papai*, the Court addressed whether an employee, hired for the day to paint a docked tug boat, was a “seaman” under the Jones Act. The Supreme Court determined that *Papai* was not a

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<sup>8</sup>In *Rock*, the Third Circuit favorably cited the First Circuit’s decision in *Levins* wherein the claimant, on some days, performed the duties of a checker. *Rock*, 953 F.2d at 65, 25 BRBS at 119(CRT).

“seaman” under the Jones Act, as he did not have a substantial connection to a vessel, or fleet of vessels owned by a common employer, in navigation. *Papai*, 520 U.S. at 560, 31 BRBS at 37, 39(CRT). While *Papai* had been hired by this employer a number of times during the 2.5 years preceding his injury, his engagements were discrete and separate from the one in question, and although he may have worked as a seaman in the past for this or other employers, his work was not on a fleet of vessels under common ownership or control. Thus, rejecting the use of a multiple employer test, the Court held that *Papai*’s work as a seaman prior to his injury did not establish coverage under the Jones Act for this injury.

The decision of the United States Court of Appeals for the Ninth Circuit in *McGray Construction Co. v. Director, OWCP*, 181 F.3d 1008, 33 BRBS 81(CRT) (9<sup>th</sup> Cir. 1999), similarly does not support employer’s position in this case. In *McGray Construction*, claimant Hurston was working as a pile driver/pier construction worker on a non-maritime project for employer when he was injured. Although he had a history of being hired out of a union hall and working on maritime projects for other employers, the Ninth Circuit stated that such history does not make Hurston a maritime employee where he is hired specifically for a non-maritime job. The court reasoned that Hurston was “engaged” by his employer for a particular non-maritime job as a pile driver/construction worker, and “engaged,” as used by the Act, means “engaged on this job.” The non-maritime duties were his sole duties on this project for this employer, and consequently, Hurston was not “walking in and out of coverage” during this employment as if he were hired by an employer to perform both maritime and non-maritime tasks. Consequently, the Ninth Circuit rejected a multiple employer test, citing *Papai* and holding claimant Hurston could not obtain longshore coverage merely because of his long history of working in maritime jobs for various employers where the job for which he was hired by the employer, and on which he was injured, was exclusively non-maritime. *McGray Construction*, 181 F.3d at 1014-1016, 33 BRBS at 86-87(CRT). The court in no way limited the nature of the work inquiry to a particular day, but limited it to the nature of the work to be performed for a particular employer. It is undisputed here that employer assigned claimant both checker and clerical work.

In summary, we agree with claimant that the administrative law judge erred in creating a “same day of injury” status test. Such a test is not supported by law and too nearly resembles the defunct “moment of injury” theory. The administrative law judge’s test ignores the occupational focus on claimant’s overall employment. As he was assigned to work as a checker by employer as a part of his regular duties for employer, claimant is covered by Section 2(3).

Accordingly, the administrative law judge’s Decision and Order on Remand is reversed. The case is remanded to the administrative law judge for consideration of any remaining issues.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge