

DEBORAH M. KILBURN	)	
(Widow of TODD KILBURN)	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
COLONIAL SUGARS	)	DATE ISSUED:
	)	
and	)	
	)	
AETNA CASUALTY & SURETY	)	
COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Keith R. Credo, Metairie, Louisiana, for claimant.

Mark S. Taylor (Waller & Associates), Metairie, Louisiana, for employer/ carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (96-LHC-274) of Administrative Law Judge James W. Kerr, Jr., 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 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).

Decedent worked for employer, the operator of a sugar refinery, in a position variously described as general mechanic, centrifugal mechanic, and technician 2, during which time he was required to perform welding and "all mechanic duties as assigned." See, e.g., P-2; Tr. at 235. Employer's facility included the sugar refinery itself as well as

raw and refined sugar wharves located on the Mississippi River, warehouses, various conveyer belts that move the raw sugar from vessels on the river to the refinery, and palletizers for loading some of the sugar, once refined, onto barges, railroad cars or trucks. Employer's facility was divided by railroad tracks separating employer's refinery employees, who worked on the north side of the railroad tracks, from contract longshore workers who loaded and unloaded barges or other vessels on the south side, or river side, of the railroad tracks. See RX 2; Tr. at 42-68, 113-119, 165-174. Decedent's regular employment duties involved maintenance performed on the refinery's centrifugal machines, which were used to wash the raw sugar as part of the refining process and were located in the wash plant on the north side of the railroad tracks. See, e.g., Tr. at 65-66, 115-116.

On April 1, 1992, decedent died as a result of a heart attack sustained while at work. On the day of his death, decedent was changing screens inside the centrifugal machine; in order to change the screens, decedent was required to get inside the centrifuge machine. Shortly after finishing this job, decedent suffered a fatal heart attack while riding a bicycle to take the old screen to the trash. See P-6; Tr. at 203-206, 236-244. Claimant thereafter sought death benefits pursuant to Section 9 of the Act, 33 U.S.C. §909 (1994).

In his Decision and Order, the administrative law judge first determined that decedent failed to satisfy the Section 2(3), 33 U.S.C. §902(3), status requirement for coverage under the Act. Specifically, the administrative law judge found that the amount of time decedent spent in what could be deemed maritime employment amounted to an "inconsequential percentage" of decedent's employment as a centrifugal mechanic.<sup>1</sup> The administrative law judge further found that, even had the status requirement been met, a causal connection between decedent's death and his employment had not been established. Accordingly, the administrative law judge denied the claim for benefits.

On appeal, claimant contends with respect to the status issue that the administrative law judge applied an incorrect legal standard by requiring, in effect, that the maritime work performed by claimant be a "substantial portion" of his employment. Claimant additionally contests the administrative law judge's finding that decedent's death was not causally related to his employment, contending that the administrative law judge erred in analyzing the parties' respective burdens of proof under the Section 20(a), 33 U.S.C. §920(a), presumption and further erred by requiring claimant to prove that decedent's working conditions, including exertion and extreme heat, were a "major cause," rather than a "contributing factor," of decedent's coronary-related death. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

To be covered under the Act, a claimant must satisfy the "status" requirement of Section 2(3) of the Act, 33 U.S.C. §902(3), and the "situs" requirement of Section 3(a), 33

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<sup>1</sup>The administrative law judge did not reach the issue of whether decedent's death occurred on a covered situs. See 33 U.S.C. §903(a)(1994).

U.S.C. §903(a)(1994). See *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 160 (1977). Generally, an employee satisfies the "status" requirement if he is 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, 23 BRBS 96 (CRT)(1989). To satisfy this requirement, a claimant must "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 constitutes covered employment, those activities must be more than episodic, momentary or incidental to non-maritime work. *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th 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)(11th Cir. 1990).

Claimant contends on appeal that the administrative law judge erred in failing to find that decedent was engaged in maritime employment by virtue of his work repairing the unloading belts, fixing the loading crane, repairing the palletizer, or welding anywhere in the facility that he was needed.<sup>2</sup> We reject this contention and affirm the administrative law judge. In determining whether any of decedent's duties could be deemed maritime employment, the administrative law judge considered documentary evidence consisting of time cards for each day decedent worked during the year before his death, as well as hearing testimony explaining the nature of the work listed on the time cards. The administrative law judge acknowledged the existence of five possible work areas where decedent's employment duties could confer coverage under Section 2(3): the crane on the river, the pumps on the refined wharf, the motor on the river, the F belt, and the palletizer. The administrative law judge determined that decedent spent approximately thirteen hours in the year prior to his death performing work in these five areas that could be deemed maritime employment.<sup>3</sup> The administrative law judge found that these 13 hours were "at

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<sup>2</sup>Claimant does not contend that decedent's work maintaining the centrifuge, which he was performing immediately prior to his death, constitutes maritime employment. Thus, there is no contention here that claimant is covered because his death occurred while he was engaged in maritime work. See *Thibodaux v. Atlantic Richfield Co.*, 590 F.2d 841, 8 BRBS 787 (5th Cir. 1978), *cert. denied*, 442 U.S. 090 (1979)(claimant is covered if either injured while engaged in maritime employment or if his overall employment is maritime in nature).

<sup>3</sup>We note that claimant's statement on appeal that the administrative law judge found that claimant spent 45 hours in maritime employment is misleading. The administrative law judge found only 13 hours of work in the year preceding decedent's death that could be deemed maritime employment. He considered an additional 32 hours of work on belts and equipment repair listed on decedent's time cards, but determined that decedent was not expected to perform this type of work. The administrative law judge stated that even if those 32 hours were added to the 13 hours credited, the 45 hours of "allegedly maritime employment in an entire year of work ... amounts to an inconsequential percentage of decedent's main employment..." See Decision and Order at 11.

most a tangential connection with longshore work." See Decision and Order at 11. The administrative law judge stated that the facts of the instant case are distinguishable from those in *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981), in which an employee who drove a truck and spent 2.5 to 5 percent of his time on loading and unloading without assistance and "some" additional time assisting in loading or unloading was held to have status under the "some of the time" test of *Caputo*, 432 U.S. at 273, 6 BRBS at 165. Rather, the administrative law judge found the instant case to be similar to *Dorris v. Director, OWCP*, 808 F.2d 1362, 19 BRBS 82 (CRT) (9th Cir. 1987), wherein the United States Court of Appeals for the Ninth Circuit determined that a truck driver whose regular duties involved driving cargo loaded and unloaded by other workers between berths at different harbors was not covered by the Act. The court affirmed the administrative law judge's finding that any engagement in maritime activity by the employee was only on an episodic basis as it was supported by substantial evidence and, therefore, held *Boudloche* was distinguishable.

We hold that, under the specific facts of this case, the administrative law judge's determination that any performance of maritime duties by decedent was tangential or incidental to his non-maritime work and, thus, insufficient to confer status is rational, supported by substantial evidence, and in accordance with law. See *Boudloche*, 632 F.2d at 1346, 12 BRBS at 732; see also *Dorris*, 808 F.2d at 1362, 19 BRBS at 82 (CRT). The determination under *Caputo* as to whether an employee spends "some of his time in indisputably longshoring operations" is not a precise mathematical calculation. Rather, the key factor is the nature of the employee's regularly assigned duties as a whole; thus, activities performed infrequently but as a regular part of the employee's overall job may confer coverage. See *Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 23 (CRT) (1st Cir. 1984); *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997); *McGoey v. Chiquita Brands Int'l*, 30 BRBS 237 (1997). In the instant case, the administrative law judge rationally concluded, based on the record before him, that the evidence did not establish that decedent was regularly assigned to perform indisputably longshore activities.

In this regard, the administrative law judge credited the testimony of Al St. Pierre, who held the same position as decedent, that he had never worked on any equipment related to longshoring operations. Decision and Order at 11. Moreover, the administrative law judge rationally determined that decedent's time cards fail to show the regular performance of indisputably longshore work. Rather, the time cards and the testimony of decedent's co-worker support the finding that decedent's assignments involving the repair of longshore equipment were so rare that they were outside the normal course of decedent's job. Thus, the evidence supports the administrative law judge's conclusion that any longshore work was momentary or incidental, and not a regular portion of the overall tasks to which decedent could be, and actually was, assigned. See *Levins*, 724 F.2d at 4, 16 BRBS at 23 (CRT).<sup>4</sup>

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<sup>4</sup>Review of the facts of relevant cases finding coverage under the "some of the time standard" underscores the distinction here. In *Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 23 (CRT) (1st Cir. 1984), claimant was primarily a clerical worker, but performed work outside the office whenever ships under 300 tons were loaded or unloaded

We therefore affirm the administrative law judge's determination that decedent was not a maritime employee under Section 2(3) of the Act. In light of our affirmance of the administrative law judge's finding that decedent was not covered under the Act, we need not address claimant's contentions regarding the causal relationship between decedent's death and his employment.

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or whenever a discrepancy occurred between the number on a manifest and on a container. As these tasks were a regular portion of claimant's overall work, he was covered. Similarly, in *McGoey v. Chiquita Brands, Int'l.*, 30 BRBS 237 (1997), the employee's regular work included supervising unloading whenever his supervisor was absent on the day a container ship docked and whenever a break bulk ship arrived. The Board stated that coverage turns on whether maritime work, although it may be infrequently performed, is a non-discretionary, regular portion of claimant's work. Thus, maintenance mechanics are covered where their regular duties include maintenance of conveyors used in loading. See *Jones v. Aluminum Co. of North America*, 31 BRBS 130 (1997)(evidence established that conveyer repair was included in all mechanics' job descriptions and was a regular part of job although infrequently required). By contrast, in the present case, substantial evidence supports the conclusion that repair of loading equipment was not a non-discretionary, regular portion of decedent's work.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

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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NANCY S. DOLDER  
Administrative Appeals Judge