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| ROBERT McKENZIE |) | |
| |) | |
| Claimant-Petitioner |) | |
| |) | |
| v. |) | |
| |) | |
| CROWLEY AMERICAN |) | DATE ISSUED: <u>April 3, 2002</u> |
| TRANSPORT, INCORPORATED |) | |
| |) | |
| and |) | |
| |) | |
| CRAWFORD & COMPANY |) | |
| |) | |
| Employer/Carrier- |) | |
| Respondents |) | DECISION and ORDER |

Appeal of the Decision and Order of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Howard L. Silverstein and Marc R. Silverstein (Silverstein & Silverstein), Miami, Florida, for claimant.

Laurence F. Valle and Frank J. Stoli (Valle & Craig), Miami, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (99-LHC-2613) of Administrative Law Judge Thomas M. Burke 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).

Claimant sustained a brain injury as a result of a physical trauma to the head while

working as a truck driver on March 24, 1999, for employer at the Crowley Maritime Yard in Port Everglades, Florida (Port).¹ Claimant testified that his job duties as a truck driver for American Marine Transport (AMT) at the time of his accident consisted of transporting containers and/or trailers between the Crowley Maritime Yard at the Port and the United States Customs facility, also located within the Port but not within the Crowley Maritime Yard, and/or the Florida East Coast Railroad yard (FEC) which is located outside of the Port.² He also stated that about 5-10 percent of the time he would transport containers to areas away from the Port, such as to Miami, Florida. Claimant stated that usually his deliveries would originate or end at a holding yard in the Crowley Maritime Yard, although occasionally he would be required to make deliveries and/or pick-ups alongside the dock, termed “hot loads.” He stated that at no time did he ever board any ships, as the containers at dockside were loaded onto and unloaded from ships by “mule drivers.” Mr. Burelli, employed as the manager of intermodal transportation and trucking operations for Crowley American Transport (CAT) and AMT, concurred with claimant’s description of his work. Specifically, he stated that AMT drivers did not board ships, did not load or unload cargo, and did not get involved with the delivery of containers or trailers until clearance is effected and customer delivery arrangements had been made. In addition, he observed that there are

¹The record establishes that claimant worked for American Marine Transport (AMT), which is a subsidiary of Crowley American Transport (CAT), and, in turn, of Crowley Maritime Corporation. Unless otherwise noted, for purposes of this decision, the term employer is meant to encompass AMT and Crowley Maritime Corporation.

²The parties stipulated that the FEC is 1.9 miles from the Crowley Maritime Yard. Claimant states that the parties could not agree on the distance from Port Everglades to the FEC, but asserts that it was two-tenths of a mile based on photographic evidence. Cl. Exs. 21, 32, 37.

clear distinctions between CAT drivers and AMT drivers. Most notably, he stated that CAT “mule drivers” transport cargo inside the port facility, while cargo moved into or out of the port facility is transported by AMT “city drivers.”³

Claimant filed a claim against employer which was controverted solely on the grounds that the claim did not fall within the coverage of the Longshore Act. In his decision, the administrative law judge determined that claimant met the situs requirement of Section 3(a), 33 U.S.C. §903(a), but did not meet the status requirement of Section 2(3), 33 U.S.C. §902(3), as claimant’s primary job duties, which involved the transportation of cargo between a holding yard at the Port and a rail yard outside the Port, are not covered activities. Accordingly, the administrative law judge denied benefits.

On appeal, claimant challenges the administrative law judge’s finding that he did not establish status under the Act. Employer responds, urging affirmance.

Claimant argues that the administrative erred in finding that status was not established in the instant case, asserting that the evidence demonstrates that he is a covered employee as contemplated by the Act. Specifically, claimant contends that his job duties of transporting containers discharged from vessels between the Crowley yard and the FEC yard or other Port facilities is clearly related to the stevedoring function rather than, as the administrative law judge found, the land transportation function. Claimant also avers that the administrative law judge improperly applied a “point of rest” test which has been consistently rejected by the courts. Claimant asserts that contrary to the administrative law judge’s finding, the maritime process in the instant case was not complete until the cargo reached the consignee or entered further transshipment beyond the FEC, Customs, and the surrounding Port areas. Moreover, claimant argues that the administrative law judge misstated claimant’s job duties since the evidence revealed that claimant spent 90 percent of his time working at the Port and that a majority of that time was spent traveling a short distance to the rail facility which was immediately adjacent to the Port.

³Mr. Burelli further distinguished these two entities in the following manner: CAT drivers are confined to the terminal limits and, in contrast to AMT drivers do not require a Class I, or commercial driver’s license; CAT is registered as a stevedore with Port Everglades while AMT is licensed by the Federal Highway Administration (FHA).

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 under Section 2(3) 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). 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 *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). To satisfy this requirement, he need only "spend at least some of [his] time" in indisputably maritime activities. *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. See, e.g., *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990).⁴

While 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 United States Supreme Court has addressed this issue on a number of occasions. Pertinent to the present case, in *Caputo*, 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 truck drivers, whose

⁴In *Coleman*, the United States Court of Appeals for the Eleventh Circuit added that "given the advent of containerization, making the chassis road worthy is the last step necessary to complete the unloading process such that the cargo is ready to leave its maritime existence and enter into the land based stream of commerce by being pulled out of the Port Authority area behind a tractor/trailer." *Coleman*, 904 F.2d at 618, 23 BRBS at 108(CRT).

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 (emphasis added).⁵ Nevertheless, the Court, in holding claimant covered under the Act, reasoned that the 1972 Amendments emphasized broader coverage and a decision to move that coverage shoreward brought about by the trend towards containerization. In this regard, the Court rejected the “point of rest theory,” which advocated coverage of only those employees who moved cargo from the vessel to its initial point of rest on the pier or in the terminal area and vice versa. *Caputo*, 432 U.S. at 276-279, 6 BRBS at 166-169.⁶

Thereafter, in *Ford*, 444 U.S. 66, 11 BRBS 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 that both claimants were covered because they were engaged in intermediate steps in moving cargo between ship and land

⁵The 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 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.

⁶The 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.

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*.⁷ *Ford*, 444 U.S. at 82, 11 BRBS at 328; *see also Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT).

In contrast, in *Dorris v. Director, OWCP*, 808 F.2d 1362, 19 BRBS 82(CRT) (9th Cir. 1987), *aff'g Dorris v. California Cartage*, 17 BRBS 218 (1985), 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. Similarly, 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 covered under the Act. *See Zube v. Sun Refining & Marketing Co.*, 31 BRBS 50 (1997), *aff'd mem.*, No. 97-3382 (3^d Cir. July 31, 1998)(claimant's duties as a tanker-truck driver for overland delivery to area service stations is not maritime employment); *Martinez v. Distribution Auto Services*, 19 BRBS 12 (1985)(claimant, a truck driver whose sole responsibility was to pick up and transport a container of sealed cargo from a storage area to his employer's facility, is not covered under the Act).

Conversely, coverage under the Act has been found in instances where claimant's work as a truck driver was confined to the port area. *See Triguero v. Consolidated Rail Corp.*, 932 F.2d 95 (2^d Cir. 1991) (cargo transported from dockside storage facility to port's rail facility); *Warren Bros. v. Nelson*, 635 F.2d 552, 12 BRBS 714 (6th Cir. 1980) (gravel

⁷In particular, the Court observed that "persons moving cargo directly from ship to land transportation are engaged in maritime employment.... A worker responsible for some portion of that activity is as much an integral part of the process of loading or unloading a ship as a person who participates in the entire process." *Ford*, 444 U.S. at 82-83, 11 BRBS at 328.

transported from dockside hopper to manufacturer's facility within port area); *Waugh v. Matt's Enterprises, Inc.*, 33 BRBS 9 (1999) (scrap metal hauled from barges to scrap field); *Uresti v. Port Container Industries, Inc.*, 33 BRBS 215 (Brown, J. dissenting on other grounds), *aff'd on recon.*, 34 BRBS 127 (2000)(Brown, J., dissenting on other grounds)(hauling cargo from ship side to the storage facility is part of the overall process of unloading). In *Novelties Distribution Corp. v. Molee*, 710 F.2d 992, 15 BRBS 168(CRT) (3^d Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984), as in *Triguero, Nelson, Waugh, and Uresti*, the claimant transported maritime cargo within the port area from dockside to storage facilities. The court held that claimant's work involved an intermediate step in the loading process and was covered, notwithstanding that he worked for a subsidiary of Maher Terminals to whom ownership of the goods was transferred upon its arrival at the docks. *See also Ford*, 444 U.S. 69, 11 BRBS 320; *Waugh*, 33 BRBS 9. The court found the nature of claimant's work determinative rather than the legal relationship between the company and its consignees, rejecting the contention that claimant was not covered as he was an agent of the consignee.

In addressing the status requirement in the instant case, the administrative law judge observed that claimant was employed as a truck driver or "city driver" based out of a Port Everglades facility whose primary duties involved the transportation of cargo between a holding yard at the Port and a rail yard outside of the Port. Specifically, the administrative law judge determined that claimant's duties, which included receiving or removing containers and/or trailers after they had been made road worthy and released for delivery, and transporting these containers and/or trailers to locations outside of the Port facility, were a part of the land-based stream of commerce. Relying on *Dorris*, 808 F.2d 1362, 19 BRBS 82(CRT), the administrative law judge concluded that claimant is not a maritime worker and thus did not satisfy the status requirement of the Act.

This case turns on determining the point at which cargo moves from the stream of maritime commerce and longshoring operations to the land-based portion of its ultimate destination. As claimant is a truck driver transporting containers between a terminal at the Port and the rail head outside the Port or other Port facilities, the administrative law judge found he was involved in landward transportation and that the loading process had ended. Claimant posits that the longshoring process continues up to the point that the container is placed onto or removed from a rail car, as only then is its transition from maritime transportation to land transportation complete. Claimant thus seeks a holding that trucks engaged in the land-based movement of cargo outside of employer's terminal to locations in the Port and to the rail head nearby are performing longshoring work. Under this theory, only after goods leave the general Port area, usually by rail under the facts presented here, do they leave the stream of maritime commerce and embark on their landward shipment. We do not agree that the case law defining "maritime employment" is so broad as to include the trucking duties performed by claimant herein.

Initially, we reject claimant's assertion that the administrative law judge erroneously applied the rejected "point of rest" theory in finding that the further landward movement of containers from employer's storage yard was not a step in the longshoring process. Contrary to claimant's assertion, in this case the containers, once placed in the storage yard, were not simply at a "point of rest" but were ready to leave maritime commerce and transfer to land transportation. The uncontradicted testimony of Mr. Burelli establishes that AMT drivers like claimant did not get involved with the delivery of containers until clearance was effected and customer delivery arrangements had been made. All of the witnesses, *i.e.*, Mr. Burelli, claimant, and fellow AMT drivers Lavan McKnight and William Wilder, testified that AMT drivers do not move unloaded cargo to an intermediate storage yard. Thus, all of the steps in the longshoring operation were complete upon a container's arrival at the storage yard, its final destination in the terminal. From there, it was loaded onto claimant's truck for overland transportation. *See, e.g., Coleman*, 904 F.2d 611, 23 BRBS 101(CRT).

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 the goods 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 a vehicle transporting the goods overland.⁸ This critical distinction is equally applicable to the case at hand. Claimant herein was not, like claimants Ford and Bryant, involved in the initial steps of placing cargo onto, or removing it from, a vehicle of land transportation. Specifically, he did not engage in the type of duties that longshoremen perform in transferring goods between ship and land transportation. This work, as stated by Mr. Burelli, was performed by CAT drivers as opposed to AMT drivers like claimant. Rather, claimant's duties involved the movement of cargo from employer's holding yard and/or on rare occasions directly from the dock, to destinations outside of the Port. 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 transportation of cargo.⁹ Accordingly, as all of claimant's duties involved the landward

⁸The 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, in *Dorris*, neither the Board nor the Ninth Circuit was swayed by the fact that claimant Dorris's regular job entailed driving directly onto the pier to receive the cargo for its land-based journey.

⁹The administrative law judge's finding that claimant is, in essence, a land-based truck driver is further supported by evidence that he was required to hold a Commercial I Driver's

transportation of cargo, claimant's duties are akin to those of claimant Dorris. Claimant's contention that his duties are essentially indistinguishable from those of claimant Bryant is therefore rejected.

In addition, the instant case is distinguishable from *Triguero*, 932 F.2d 95, upon which claimant heavily relies in support of his assertion that he is covered. Specifically, Triguero's work duties mirrored those described by Mr. Burelli for CAT drivers, *i.e.*, Triguero drove a yard hustler to shuttle containers between a temporary storage yard and portside. In addition, the Second Circuit noted as significant that, in contrast to claimant's situation, Triguero's hustler was not a registered vehicle for travel over the public roads, and he classified himself as a longshoreman and was a member of the International Longshoremen's Association. Similarly, the decisions in *Nelson*, 635 F.2d 552, 12 BRBS 714, *Waugh*, 33 BRBS 9, and *Uresti*, 33 BRBS 215, also are distinguishable, as claimant herein drove his rig outside of the confines of employer's facility and his work duties did not involve, in any capacity, assisting in the loading or unloading of ships. In particular, claimant Waugh's duties included assisting in the unloading of barges, and claimants Waugh, Uresti and Nelson each performed duties which involved the movement of cargo to what constituted an intermediary storage site within the port.

License, that AMT is licensed by the FHA, and since claimant made various runs involving locations other than the FEC yard, such as to Colorado Beef in Miami, or Consolidated Freight in Pompano Beach, Florida, Jones Chemicals, AFC Food, Raffa Associates, and to Speciality Produce all located in Ft. Lauderdale, Florida. *See* HT at 81-97.

In this case, claimant drove a truck not to move cargo as part of a loading process, but to start it on its overland journey. Whether picking up containers directly at shipside or from the storage yard, claimant trucked it overland away from the Port area or he delivered it from a landward site to the Port.¹⁰ Claimant's reliance on the fact that *Ford* and other cases, *e.g.*, *Triguero* and *Lewis v. Sunnen Crane Services, Inc.*, 31 BRBS 34 (1997), involved claimants who loaded cargo onto rail cars is misplaced, as the nature of the facilities in those cases supported coverage up to the rail head. However, the fact that the cargo here also continues its journey by rail cannot convert this claimant's driving work into an intermediate step in the unloading process. In this case, claimant drove a truck toward or away from the Port, and thus performed the first step in the overland delivery of goods unloaded from ships and the last step in the transportation of goods to be loaded. The facts of this case therefore establish that claimant was involved in the land-based stream of commerce and that he was not involved in maritime activities. Pursuant to the precedents set forth by the Supreme Court, and in light of the Ninth Circuit's holding in *Dorris*, claimant's employment duties are not intermediate steps in the movement of cargo from ship to shore. *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT); *Ford*, 444 U.S. 69, 11 BRBS 320; *Caputo*, 432 U.S. 249, 6 BRBS 150; *Dorris*, 808 F.2d 1362, 19 BRBS 82(CRT); *Zube*, 31 BRBS 50; *Martinez*, 19 BRBS 12. Therefore, the administrative law judge's conclusion that claimant is not covered by the Act is affirmed.

¹⁰Thus, claimant's occasional movement of "hot loads" is not, as he suggests, a covered activity unrelated to land transportation. *Dorris*, 808 F.2d 1362, 19 BRBS 82(CRT). Similarly, claimant's assertion that his runs to the Customs facility in the Port are sufficient to confer longshore coverage in this case is without merit. While claimant's transport of containers to Customs or other Port areas could arguably be an intermediate step in the movement of cargo from ship to land transportation, if claimant's work was confined to that area, the evidence herein establishes that on the occasions that claimant drove to Customs, he continued on to his destination at the FEC yard. HT at 63. The fact that claimant may have made stops inside the Port does not alter the fact that he was an overland truck driver.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge