BRB No. 06-0299

CARL W. ALLEN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
AGRIFOS, L.P.	)	DATE ISSUED: 10/31/2006
	)	
and	)	
	)	
ZURICH AMERICAN INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Dennis L. Brown and Mike N. Cokins, Houston, Texas, for claimant.

Lance S. Ostendorf, Colin D. Sherman, and Adam G. Young (Ostendorf, Tate, Barnett & Wells, L.L.P.), New Orleans, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2004-LHC-1475) of Administrative Law Judge Clement J. Kennington 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).

Claimant was hired by Mobil Mining and Manufacturing in 1992 and worked as a laborer. In 1998, Mobil Mining and Manufacturing was acquired by Agrifos, LP (employer).[1] Claimant had become an outside operator in the acid unit, and he also volunteered on the HAZMAT Team. On January 19, 2001, his day off from his regular duties, claimant was in the HAZMAT training room with his team practicing donning and doffing fire gear, including a 40-pound individual air pack. Although claimant completed the training that day, he became immobile that evening due to back pain and was taken to the hospital. After a course of conservative treatment, claimant underwent a laminectomy. After reaching maximum medical improvement and being released to light-duty work in 2002, claimant attempted to return to work with employer; however, employer had no positions within claimant's restrictions, and it terminated his employment. Claimant entered a Department of Labor vocational rehabilitation program and began an on-the-job training program with a fiberglass repair company where he continues to work. Claimant filed a claim for benefits under the Act.

The administrative law judge accepted the parties' stipulations that employer paid claimant temporary total disability benefits from January 20, 2001, through April 1, 2002, permanent total disability benefits from April 2, 2002, through July 25, 2003, and permanent partial disability benefits thereafter, as well as all medical benefits. Employer also stipulated that its facility is a covered situs. 33 U.S.C. §903(a); Decision and Order at 3. However, employer disputed that claimant meets the status requirements of the Act. 33 U.S.C. §902(3). The administrative law judge rejected employer's argument that claimant's involvement with loading and unloading was minimal as well as its argument that the unloaded acid was not "cargo." The administrative law judge found that claimant's work for employer involved unloading cargo and that he met the Act's status requirement. Decision and Order at 13-14. Employer appeals the award of benefits, and claimant responds, urging affirmance.

Admission of Evidence

Employer first contends the administrative law judge erred in relying on inadmissible evidence to support his conclusion that claimant met the status requirement. Specifically, employer argues that the transcript from a hearing under the Act involving another of employer's outside operators is hearsay, does not satisfy any exception to the

[1]The facility, the "Pasadena Plant," is adjacent to the Houston Ship Channel.

hearsay rule, and should not have been admitted into evidence or relied upon by the administrative law judge.[2] We reject employer's argument.

> Section 23(a) of the Act, 33 U.S.C. §923(a), provides in pertinent part:
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> > In making an investigation or inquiry or conducting a hearing the [administrative law judge] shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties.

See also 33 U.S.C. §919(d); 20 C.F.R. §702.339. The Supreme Court held that hearsay is permitted in administrative cases if it is reliable, *Richardson v. Perales*, 402 U.S. 389 (1971); *see also Camarillo v. National Steel & Shipbuilding Co.*, 10 BRBS 54 (1979), and, contrary to employer's argument, an agency finding may be based on hearsay alone. *Richardson*, 402 U.S. at 402.[3] Moreover, the administrative law judge is to "inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and documents which are relevant and material to such matters." 20 C.F.R. §702.338; *see McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005); *Picinich v. Seattle Stevedore Co.*, 19 BRBS 63 (1986).

Claimant introduced a portion of the transcript from *Gilcrease v. Agrifos, LP*, 2003-LHC-144 (2004), to support his own description of the duties of an outside operator. Employer objected, but the administrative law judge admitted the transcript into evidence over those objections. Cl. Ex. 21; Tr. at 7-12. Mr. Gilcrease testified at his

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[2]Employer argues that live testimony is preferred and that claimant has the burden of proving that Mr. Gilcrease, the former co-worker, was unavailable for claimant's hearing, but that he has not done so. Employer asserts that claimant has shown only that Mr. Gilcrease is retired and lives 100 miles away from the hearing site, but that this is insufficient to show unavailability as Mr. Gilcrease made that trip for his own hearing 11 months before this hearing. Further, employer argues that it was improper for the administrative law judge to address the fact that employer cross-examined Mr. Gilcrease at his own hearing when it has not first been shown that Mr. Gilcrease was unavailable to testify in these proceedings. Emp. Brief at 12-13.

[3]In *Richardson*, the Supreme Court held that hearsay evidence, even in the presence of opposing evidence, may constitute substantial evidence to support a finding. *Richardson*, 402 U.S. at 402.

own hearing that he worked as an outside operator in the acid plant, and he described many of his duties, including his responsibilities when unloading acid from vessels. Cl. Ex. 21 at 5-7, 11-20. The administrative law judge found this testimony credible and supportive of claimant's testimony. He stated:

> In this case I was impressed with Claimant's sincerity and demeanor and testimony together with Gilcrease's testimony about unloading operations. Together they describe an unloading operation which encompassed not only valve turning but tank and line monitoring during transfers. Employer (sic) witnesses on the other hand discounted all activity involved with tank and line monitoring which I find represented an unrealistic[,] narrow picture of the unloading process. Acid could not be unloaded until Claimant and other outside operators not only opened and closed necessary valves but monitored tank levels and lines during the unloading process. As such they played an essential and integral role in unloading operations.

Decision and Order at 12. Mr. Gilcrease held the same position as claimant, and the administrative law judge admitted the *Gilcrease* transcript into evidence. As the administrative law judge is not bound by formal rules of evidence and the evidence was relevant to the issue before him, his decision to admit the *Gilcrease* transcript is rational, and we affirm it. *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1999); *Casey v. Georgetown University Medical Center*, 31 BRBS 147 (1997).[4]

Status

Employer asserts that claimant does not satisfy the Act's status requirement. It asserts that his position was not one that is enumerated in the Act and that it is not integral or essential to the process of loading or unloading acid cargo. Specifically, employer argues that claimant's involvement in maritime work is minimal and, therefore, that this case involves the issue of having to define at what point an employee's maritime activity becomes so momentary or episodic that it will not confer status, an issue left open by *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir.

[4]While a judge may not take judicial notice of findings of fact in one cause of action to supply facts in another cause, *Wyatt v. Terhune*, 315 F.3d 1108 (9th Cir. 2003); *M/V American Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483 (9th Cir. 1983); *Paridy v. Caterpillar Tractor Co.*, 48 F.2d 166 (7th Cir. 1931), the transcript does not contain findings of fact; it contains statements the administrative law judge may admit and credit or accept, as is within his discretion. *See McAllister*, 39 BRBS at 39; *Casey*, 31 BRBS 147.

1980), *cert. denied*, 452 U.S. 915 (1981).[5] Employer also argues that that claimant's position is "two steps removed" from the vessel unloading process and cannot be considered "maritime."

For a claim to be covered by the Act, a claimant must establish that the injury occurred upon the navigable waters of the United States, including any dry dock, or that it occurred on a landward area covered by Section 3(a), and that the employee's work is maritime in nature and is not specifically excluded by the Act. 33 U.S.C. §§902(3), 3(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). Thus, in order to demonstrate that coverage under the Act exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id.*; *see also Crapanzano v. Rice Mohawk, U.S. Constr. Co., Ltd.*, 30 BRBS 81 (1996). In this case, employer concedes situs, and the only issue is whether claimant is a maritime employee.

Section 2(3) of the Act provides:

> The term 'employee' means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker. . . .

33 U.S.C. §902(3). 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. *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 [covered] operations." *Caputo*, 432 U.S. at 273, 6 BRBS at 165; *Boudloche*, 632 F.2d 1346, 12 BRBS 732. Although an employee is covered if some portion of his activities constitutes covered employment, those activities must be more than momentary or incidental to non-maritime work. *Id.*; *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990).[6]

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[5]In *Boudloche*, the court held that the claimant spent "some" of his time in longshoring work and that time was not so minimal as to require it to define the point at which work could be so minimal as to not confer status. *Boudloche*, 632 F.2d at 1348, 12 BRBS at 734.

[6]Under the law of the United States Court of Appeals for the Fifth Circuit, within whose jurisdiction this case arises, a claimant may also satisfy the status requirement by fulfilling the "moment of injury" test. *Universal Fabricators, Inc. v. Smith*, 878 F.2d

Claimant testified that his work as an outside operator in the acid plant involved monitoring and controlling the steam pipes, the sulfur pit and furnace, the soft water tanks/water clarification system, the thio reactor, and acid transfers. Emp. Ex. 17 at 47-49; Tr. at 95-96. Within the category of "acid transfers," claimant testified that, if a ship or barge were docking, he would have to adjust the valves so that acid could be discharged from the vessel and pumped to the proper tanks.[7] Claimant was required to set the valves and monitor the flow to check for leaks and prevent overflows. If a storage tank became full, he would re-set the valves to divert the acid into another tank. Communication between claimant at the tanks and the dockworkers at the vessel was via two-way radio. Although the dockworkers could indicate their readiness, no transfer could commence until claimant, as the outside operator, gave approval. Tr. at 43-46, 57-58. At times, claimant would need to climb to the catwalks at the tops of the tanks to measure how fast a tank is filling. Tr. at 64-65. Once during the year preceding his injury claimant participated in loading acid from tanks to vessels, and it required claimant to perform similar duties. Tr. at 77-78, 157.

Mr. Gilcrease's testimony corroborated claimant's testimony. Mr. Gilcrease stated that he was responsible for monitoring the sulfur pit, monitoring and treating the water system, and setting valves to isolate tanks for the flow of acid. In particular, when a

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843, 22 BRBS 104(CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); *Thibodaux v. Atlantic Richfield Co.*, 580 F.2d 841, 8 BRBS 787 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979); *Scott v. Tug Mate, Inc.*, 22 BRBS 164 (1989); *Clophus v. Amoco Production Co.*, 21 BRBS 261 (1988). The Fifth Circuit uses the "moment of injury" test not to narrow but to broaden coverage under the Act. *See McGoey v. Chiquita Brands International*, 30 BRBS 237 (1997); *Thornton v. Brown & Root, Inc.*, 23 BRBS 75 (1989). Employer mentions that claimant's injury occurred during the course of his training as a voluntary HAZMAT Team member. To the extent employer is attempting to argue that this is a basis for denying coverage to claimant, we reject the argument. The fact that a claimant is injured during the course of performing non-maritime work is insufficient in and of itself to deny coverage. *See Caputo*, 432 U.S. at 273, 6 BRBS at 165 (a claimant cannot be excluded because of activities performed at the time of injury as the "status" test is occupational in nature); *Hudson v. Coastal Production Services, Inc.*, 40 BRBS 19 (2006); *Jones v. Aluminum Co. of America*, 31 BRBS 130 (1997). Moreover, claimant's teams' coverage for emergencies included the docks of employer's facility as well as a zone extending along the Houston Ship Channel. Tr. at 42-44, 189-190.

[7]The lines are common lines and can be used for flow in many directions: unloading, loading, and transferring to various locations on the facility or to the contractor's facility. Cl. Ex. 21 at 23, 27, 46-47.

barge or vessel docked with acid to unload, he was responsible for setting the valves to isolate the tanks to which that acid would flow. Cl. Ex. 21 at 5-7. He stated that he must be in contact with the dock workers, he must open or close the appropriate valves to assure that the acid flows to the proper tanks, and he must monitor the tanks and the lines to check for leaks and prevent overflows. Mr. Gilcrease testified that the unloading process could not commence without his approval, and it had to cease immediately if he noticed a problem. Cl. Ex. 21 at 11-20. During the unloading process, he may have had to climb to the tops of tanks on the catwalk to take measurements, but he was also required to continue his rounds, attending to his other duties. *Id.* at 29, 42, 48-52, 55, 58. On the rare occasion that it occurred, he would also set the valves to allow acid to flow from the tanks to a vessel. *Id.* at 23, 27. Mr. Gilcrease estimated that 20-30 percent of his time was spent unloading ships and barges. *Id.* at 29.

Employer presented testimony from a supervisor and two managers. They agreed that claimant's duties were related to monitoring the outside plant operations, primarily the sulfur pit and steam management. Tr. at 109-110, 143-144, 208-209. Pursuant to his review of offloading records, called "pumper sheets," and claimant's timesheets, Mr. Gomez, the production operations manager, testified that claimant spent only 0.5 percent of his time performing duties related to unloading vessels.[8] Tr. at 163-167; Emp. Ex. 10, 24. However, the administrative law judge noted that the pumper sheets were incomplete, and he found that employer "discounted" claimant's activities, giving "an unrealistic [and] narrow picture" of claimant's unloading process duties. Decision and Order at 12. Despite their descriptions of claimant's work, the witnesses acknowledged that the dock workers could not commence unloading until claimant, as the outside operator, gave them the go-ahead and that claimant's duties were integral to the unloading process. Tr. at 129, 174, 212. Claimant's testimony, in conjunction with Mr. Gilcrease's, as well as the admissions from employer's witnesses, convinced the administrative law judge that claimant played an integral role in the unloading operations. Decision and Order at 12.

It is well settled that loading oil onto a vessel via pipelines constitutes covered work. *See Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935, *reh'g denied*, 910 F.2d 1179 (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991); *Hudson v. Coastal Production*

[8]According to employer, the dock workers were in charge of the unloading, and it would take very little time for claimant to set the valves. Once the acid was flowing into the proper tank, claimant could return to his primary duties. Employer states that the "overwhelming majority" of claimant's duties as an outside operator have nothing to do with loading or unloading vessels. Emp. Brief at 8. The "substantial portion" standard, however, has been rejected. *Boudloche*, 632 F.2d 1346, 12 BRBS 732; *see Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001).

Services, Inc., 40 BRBS 19 (2006); *Schilhab v. Intercontinental Terminals, Inc.*, 35 BRBS 118 (2001); *see also Pittman Mechanical Contractors, Inc. v. Director, OWCP*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994). Unloading vessels is an inherently maritime activity. *Ford*, 444 U.S. 69, 11 BRBS 320; *Caputo*, 432 U.S. 249, 6 BRBS 150. Employer argues that claimant was not "unloading" the vessel because when the acid reached claimant, it was no longer "cargo;" therefore, he could only *store* it.[9] The administrative law judge properly rejected this argument. Decision and Order at 14. Acid does not lose its status as "cargo" or leave the stream of maritime commerce merely because it has crossed into the pipelines on the shore. *See Caputo*, 432 U.S. at 277-278, 6 BRBS 166-169 (rejecting the "point of rest" theory under which unloading was considered to have ended at the first landward point of rest). The unloading process does not end until the cargo reaches the final step, *i.e.*, the point at which it is ready for landward transshipment or commercial use. Intermediate steps in loading and unloading are covered. *Ford*, 444 U.S. 69, 11 BRBS 320; *Jones v. Aluminum Co. of America*, 31 BRBS 130 (1997); *compare with Zube v. Sun Refining & Marketing Co.*, 31 BRBS 50 (1997), *aff'd mem. sub nom. Zube v. Director, OWCP*, No. 97-3382 (3d Cir. July 31, 1998) (tanker-truck driver who loaded petroleum products from storage facility onto truck for over-land transportation not covered). Transfer of cargo via pipeline is similar to transfer via conveyor belt as there is a continuous flow of the cargo to or from the vessel.[10] *Hudson*, 40 BRBS at 26; *Gavranovic v. Mobil Mining & Manufacturing*, 33 BRBS 1 (1999). In that claimant's job required him to control the flow of the acid from the vessel to the storage tanks, and the loading process did not end until the vessel's acid flowed into the storage tanks, *Ford*, 444 U.S. 69, 11 BRBS 320; *Caputo*, 432 U.S. 249, 6 BRBS 150; *Uresti v. Port Container Industries, Inc.*, 33 BRBS 215 (Brown, J., dissenting on other grounds), *aff'd on recon.*, 34 BRBS 127 (Brown, J., dissenting on other grounds) (2000); *Le v. Sioux City & New Orleans Terminal Corp.*, 18 BRBS 175 (1986), claimant's job is not "two steps removed" from the unloading process. The acid remains in the stream of maritime commerce while it is being unloaded and until the entire process is completed.

[9]Cargo may be liquid. *See, e.g., Hudson*, 40 BRBS 19 (crude oil); *Schilhab*, 35 BRBS 118 (ally alcohol, glacial methacrylic acid, butane, etc.); *see also Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27 (2000) ("cargo" can be any freight carried by a transport vessel).

[10]The Board has determined that when situs is at issue this continuity precludes a finding that there are separate and distinct areas for loading/unloading and manufacturing and production. *Hudson*, 40 BRBS 19; *Jones*, 31 BRBS 130; *see also Dickerson v. Mississippi Phosphates Corp.*, 37 BRBS 58, 62 (2003).

Employer also argues that claimant's work unloading acid from barges and vessels was so minimal as to be momentary and episodic and, therefore, is not covered. The administrative law judge found that, during the year preceding his injury, claimant's summary of his hours worked while a barge or vessel was being unloaded totaled 294 hours. Decision and Order at 7. He also found that Mr. Marquez, claimant's supervisor, "down played" the amount of time needed to monitor the transfer of acid to the storage tanks, Decision and Order at 9, and that Mr. Gomez described claimant's role in the unloading process as "minor." *Id.* However, he noted that some time and pumper sheets were missing, and Mr. Gomez admitted that, in his calculations to determine how much of claimant's time was spent in the unloading process, he did not credit time monitoring the lines.[11] *Id.* at 10. Overall, the administrative law judge rejected employer's "discounted" and "unrealistic" picture of claimant's duties during the unloading process and credited claimant's "more accurate" description of what the unloading procedures entail. Based on claimant's summary of hours worked unloading vessels, Cl. Ex. 26, compared with his total hours worked, the administrative law judge found that claimant spent over 11 percent of his time in unloading activities, and he rejected employer's calculations and assertions that it was far fewer hours. Decision and Order at 12-13. As claimant need only spend "some of his time" in longshoring operations, *Caputo*, 432 U.S. 249, 6 BRBS 150; *McGoey v. Chiquita Brands International*, 30 BRBS 237 (1997), and as the key is not the mathematical percentage calculated but is the nature of the work to which claimant may be assigned, *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997), the administrative law judge found that claimant's work is not momentary or episodic, and it meets the status requirement. Decision and Order at 13-14. As it is clear that claimant's regular, non-discretionary, duties required him to control and monitor the flow of acid from the vessels to the tanks, and that this process could not begin without his approval, we reject employer's assertion that claimant's work in the unloading process is momentary or episodic. *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT); *Caputo*, 432 U.S. 249, 6 BRBS 150; *Boudloche*, 632 F.2d 1346, 12 BRBS 732. Therefore, we affirm the administrative law judge's finding that claimant has met the status requirement and his consequent award of benefits, as it is rational, supported by substantial evidence, and in accordance with law. *Caputo*, 432 U.S. 249, 6 BRBS 150; *Hudson*, 40 BRBS at 26.

[11]Mr. Gomez calculated that claimant was present 91 hours when ships or barges were discharging acid and that he worked a total of 2,655 hours during the year preceding his injury (3.5 percent of his time). However, Mr. Gomez reduced the time to one hour per vessel, and with some other manipulations came up with 0.5 percent of claimant's time spent in the unloading process. Decision and Order at 10; Tr. at 162-168.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge