

BRB No. 13-0353

DON JACOBS)	
)	
Claimant-Respondent)	
)	
v.)	
)	
G & J LAND AND MARINE FOOD)	
DISTRIBUTORS)	
)	DATE ISSUED: <u>Apr. 3, 2014</u>
and)	
)	
COMMERCE AND INDUSTRY)	
INSURANCE COMPANY)	
)	
Employer/Carrier-)	
Petitioners)	DECISION and ORDER

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

Andrew W. Horstmyer, New Orleans, Louisiana, for claimant.

Jeffrey I. Mandel (Juge, Napolitano, Guilbeau, Ruli & Frieman), Metairie, Louisiana, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order (2012-LHC-00243) of Administrative Law Judge Patrick M. Rosenow 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).

At all relevant times, claimant worked for employer as a truck driver. As a truck driver, claimant was responsible for transporting groceries from employer's inland warehouse to staging areas within a port.¹ On June 2, 2007, claimant sustained a back injury at work while moving an ice chest from his truck to a grocery box which would be loaded on a supply boat for transport to an offshore rig. The administrative law judge found, *inter alia*, that claimant satisfied the status requirement of the Act, 33 U.S.C. §902(3), and he awarded claimant disability benefits.² Employer challenges only the administrative law judge's finding that claimant satisfied the status element, and claimant responds, urging affirmance.

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). As the parties agree that claimant's injury occurred on a covered situs, the remaining coverage inquiry must be addressed in two parts: 1) is claimant's job specifically excluded by Section 2(3)?; and 2) did claimant perform maritime work?

Employer initially asserts claimant is specifically excluded from coverage by the Section 2(3)(D), 33 U.S.C. §902(3)(D), vendor exclusion. Section 2(3)(D) 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 –

(D) individuals who

(i) are employed by suppliers, transporters, or vendors,

¹ Employer is a food distributor whose customers cater for offshore boats and rigs and land-based rigs and rig suppliers. Employer is in the business of supplying, transporting, and vending groceries. It makes deliveries to docks of groceries to be delivered offshore; it does not make offshore deliveries.

² The parties stipulated claimant satisfied the situs requirement as he was injured on a dock. 33 U.S.C. §903(a).

(ii) are temporarily doing business on the premises of an employer described in paragraph 4, and

(iii) *are not engaged in work normally performed by employees of that employer under this chapter;*

if the claimant is subject to coverage under a state workers' compensation law. 33 U.S.C. §902(3)(D) (emphasis added). The administrative law judge found the parties do not dispute that the first two elements of the Section 2(3)(D) exclusion are satisfied in this case as employer is a vendor and claimant was temporarily doing business at the facility of a maritime employer. 33 U.S.C. §902(3)(D)(i), (ii); 33 U.S.C. §902(4).³ He then found that both claimant and the dock employees unloaded claimant's truck, and he therefore concluded that claimant established the status element. Decision and Order at 14-15. As the finding that claimant engaged in work normally performed by the dock crew is supported by substantial evidence, the third element of Section 2(3)(D) was not met. Thus, the administrative law judge properly found that coverage is not specifically excluded by the Act. 33 U.S.C. §902(3)(D); *see Daul v. Petroleum Communications, Inc.*, 196 F.3d 611, 33 BRBS 193(CRT) (5th Cir. 1999). Therefore, we reject employer's contention that the vendor exclusion applies to preclude coverage in this case.

Employer next contends the administrative law judge erred in finding that claimant was engaged in maritime employment, as it asserts claimant's employment was related solely to land transportation. 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; *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981). An employee works in

³ Section 2(4) of the Act defines "employer" as one "any of whose employees are employed in maritime employment...." 33 U.S.C. §902(4). However, employees need not be engaged exclusively in maritime employment in order to be covered under Section 2(3). *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Thus, a worker could be engaged "in work normally performed by employees of that employer" within the meaning of Section 2(3)(D) even if that work is not covered employment. Contrary to employer's assertion, under Section 2(3)(D) the relevant inquiry is not whether longshore workers performed the non-maritime duties of claimant's job, but whether claimant engaged in work normally performed by the longshore employer's employees.

covered employment if he is “engaged in intermediate steps of moving cargo between ship and land transportation.” *Ford*, 444 U.S. at 83, 11 BRBS at 328.

Claimant’s job was to truck groceries from employer’s inland warehouse to staging areas within a port. Depending of the type of vehicle claimant was driving and the availability of forklifts and cranes on the dock, claimant would push a pallet to the back of the truck and manually offload the groceries to containers on the dock, or dock workers would offload the groceries with a forklift or crane; if a crane was used, claimant would couple straps from the pallets to the crane. Very infrequently, claimant would operate the forklifts during a nighttime delivery; also very infrequently, nighttime deliveries required that claimant go aboard a supply boat to communicate with the captain. The administrative law judge found that claimant’s work was covered employment because a regular but rare part of his job was hooking straps from the grocery pallet to the crane, the pallet was then put into a temporary staging area or, in some cases, directly onto a supply boat. The administrative law judge also relied on evidence that claimant’s job duties required him on rare occasions to board vessels to speak with the captains, and, similarly rarely, to drive the forklift. Decision and Order at 14-15.

We reverse the administrative law judge’s finding that claimant was engaged in maritime employment. There is no dispute that claimant did not load or unload ships. Further, claimant’s work delivering groceries from an inland supplier to a maritime site was not an intermediate step in maritime transportation. Rather, it was the last step in land transportation. In *Caputo*, the Supreme Court explained that coverage under the Act is limited to those whose work facilitates the loading and unloading 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 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); see *Zube v. Sun Refining & Marketing Co.*, 31 BRBS 50 (1997), *aff’d mem.*, 159 F.3d 1354 (3d Cir. 1998) (table); see also *McKenzie v. Crowley America Transport, Inc.*, 36 BRBS 41 (2002); *Martinez v. Distribution Auto Serv.*, 19 BRBS 12 (1985); *Dorris v. California Cartage*,

17 BRBS 218 (1985), *aff'd sub nom. Dorris v. Director, OWCP*, 808 F.2d 1362, 19 BRBS 82(CRT) (9th Cir. 1987).

In *McKenzie*, 36 BRBS 41, the claimant was a truck driver who transported containers between a port terminal and the rail head outside the port or other port facilities. The claimant did not board ships, load or unload cargo, or transport cargo within the port facility. The Board affirmed the administrative law judge's finding that the claimant was not engaged in covered employment, as he did not move cargo as part of the loading or unloading process. Rather, he moved containers on the start of their overland journey to destinations outside the port. The cargo was not simply at its "point of rest," but was ready to leave maritime commerce and enter land transportation. The Board discussed how the *McKenzie* case was distinguishable from *Ford*, 444 U.S. 69, 11 BRBS 320, and similar to *Dorris*, 808 F.2d 1362, 19 BRBS 82(CRT), distinctions which are equally applicable in the present case. "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."⁴ *McKenzie*, 36 BRBS at 45. As claimant McKenzie picked up containers shipside or from a storage yard for direct overland transportation, his work was not an intermediate step in the loading process. *Id.*

In this case, claimant's deliveries to maritime facilities make him a non-covered truck driver "whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation." *Caputo*, 432 U.S. at 266-67, 6 BRBS at 160-61; *McKenzie*, 36 BRBS 41. Claimant's work manually unloading groceries or fastening crane straps to the pallets were the last step in land transportation; the groceries were not yet at their point of rest at the maritime facility. *Dorris*, 808 F.2d 1362, 19 BRBS 82(CRT). Claimant's infrequent communications with ship captains regarding a delivery were incidental to his primary non-maritime responsibility of trucking groceries to the site. *Zube*, 31 BRBS 50.⁵ Thus, we hold that claimant's

⁴ In *Ford*, claimant Bryant was found to be engaged in the first step of maritime commerce while unloading cotton from a dray wagon into a pier warehouse where it had been stored until loaded on a vessel. The dray wagon Bryant was offloading was used to move cotton within the port after it had been delivered to the port by an inland shipper.

⁵ The claimant in *Zube* was a tanker-truck driver employed by a refining company to transport petroleum from a storage tank located at a terminal facility to various service stations. His duties included driving to the storage tank facility, pumping petroleum into his truck, and delivering the product to service stations. The Board affirmed the administrative law judge's findings that the movement of product was not an intermediate step in the movement of cargo to/from ships and that the claimant was not covered by the Act. *Zube*, 31 BRBS at 54.

delivery of groceries by truck from an inland warehouse to maritime sites, and his unloading of those groceries, are not covered activities under Section 2(3). *Caputo*, 432 U.S. at 276-279, 6 BRBS at 166-169; *Dorris*, 808 F.2d 1362, 19 BRBS 82(CRT) (holding that a truck driver transporting cargo to a berth at a harbor does not engage in longshore work when the goods are loaded on ships by other workers); *Zube*, 31 BRBS 50. Therefore, we reverse the administrative law judge's finding that claimant was engaged in maritime employment and is covered by the Act. 33 U.S.C. §902(3); *Caputo*, 432 U.S. at 276-279, 6 BRBS at 166-169; *Dorris*, 808 F.2d 1362, 19 BRBS 82(CRT); *Zube*, 31 BRBS 50. Consequently, we reverse the administrative law judge's award of benefits.

Accordingly, the administrative law judge's Decision and Order awarding benefits is reversed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge