BRB No. 97-1602

JOSEPH FIDALGO	)	
	)	
Claimant-Petitioner	)	DATE ISSUED:
	)	
v.	)	
	)	
NORTHEAST AUTO MARINE	)	
	)	
and	)	
	)	
NEW JERSEY MANUFACTURERS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

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

Christopher J. Field (Weber, Goldstein, Greenberg & Gallagher), Jersey City, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (97-LHC-39) of Administrative Law Judge Ainsworth H. Brown 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 which 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 was injured on November 14, 1995, when the car he was driving in the

course of his employment was struck on the side by another car, resulting in injuries to claimant's neck, shoulders, upper back, elbow and right ankle. Claimant sought permanent partial disability benefits under the Act.

In his Decision and Order, the administrative law judge reviewed claimant's duties relating to automobiles that were brought into the port by ship and unloaded onto employer's dock, and found that claimant's duties of charging the cars' air conditioners with freon, vacuuming the cars' air conditioning system, and moving the cars to a quality inspector do not constitute maritime employment. Therefore, the administrative law judge found that claimant was not a covered employee under the Act, 33 U.S.C. §902(3), and he denied benefits.

On appeal, claimant contends that the administrative law judge erred in denying coverage, asserting that he was involved in the intermediate steps of moving cargo for further transshipment. Employer responds, urging affirmance of the administrative law judge's decision.

While maritime employment is not limited to the occupations specifically enumerated in Section 2(3) of the Act, 33 U.S.C. §902(3), claimant's employment must be an integral or essential part of the chain of events leading up to the loading, unloading, building, dismantling or repairing of a vessel. *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977); *see generally Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989); *SeaLand Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112 (CRT)(3d Cir. 1992); *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). Coverage extends to workers who, although not actually loading and unloading vessels, are involved in the intermediate steps of moving cargo between ship and land transportation. *P.C. Pfeiffer Co., Inc. v. Ford*, [*Ford*] 444 U.S. 69, 11 BRBS 320 (1979).

The facts in *Ford* indicate the extent of coverage where a claimant is engaged in intermediate steps in longshore activities. Claimant Ford was injured on a dock while securing military vehicles, unloaded earlier, to railroad cars for further transshipment. Claimant Bryant, in a consolidated case, was injured while unloading a bale of cotton from a dray wagon onto a pier warehouse for subsequent loading. Both claimants were held covered because they were engaged in intermediate steps in moving cargo between ship and land transportation. The Supreme Court reasoned that if the goods had been taken directly from the ship to the train, or from the truck directly to a ship, the claimants' 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*. *Ford*, 444 U.S. at 82, 11 BRBS at 328.

The leading post-*Ford* case involving steps in the loading process in the Third Circuit,

within whose jurisdiction this case arises, is *Novelties Distribution Corp. v. Molee,* 710 F.2d 992, 15 BRBS 168 (CRT)(3d Cir. 1983), *cert. denied,* 465 U.S. 1012 (1984). In *Molee,* employees of Maher Terminals unloaded lumber from ships, and placed it alongside the dock. The claimant, an employee of Novelties, a warehouse and distribution company, supervised the removal of the lumber from the dock to the warehouse. The court held that the claimant was engaged in covered employment as the lumber had not yet passed into land transportation but was still in the terminal area. The fact that the claimant was an employee of the land-based company is not determinative of coverage if the claimant's duties are integral to the movement of cargo between land and sea transportation. *See also Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997).

In *Odness v. Import Dealers Service Corp.*, 26 BRBS 165 (1992), the claimant worked for an employer that received shipments of vehicles at the port of Los Angeles for further distribution to auto dealers. The cars were unloaded and temporarily stored at the pier, then brought by truck to employer's facility where they were washed, detailed, and checked over. After preparation, the cars were loaded onto rail cars or trucks for shipment to distributors. The claimant spent 90 percent of his time maintaining the car wash facility, but contended that the work he performed in surveying vehicles for damage, moving them from the terminal and preparing the cars prior to loading for shipment to dealers, as well as maintenance of equipment used in these activities, was covered work as it involved intermediate steps in unloading the vehicles and readying them for further transshipment.

The Board held that although coverage is extended to employees involved in the intermediate steps of moving cargo between ship and land transportation, citing *Ford,* the claimant was not covered as his work related to the land transportation and sale of the vehicles and was not an integral part of the unloading process. *Odness*, 26 BRBS at 171. The Board noted that while washing cars was essential to their further shipment and sale, it does nothing to further the unloading process, which was completed prior to the time that the vehicles were transported to employer's facility. Thus, the Board held that claimant's car washing duties involved the preparation of the vehicles for sale after unloading is completed and this work was not part of a longshoring operation.[1] *Id.* With regard to the claimant's remaining activities, the Board held that the visual damage survey and marking the cars for final destination did not facilitate, affect or contribute to the unloading process. *Odness*, 26 BRBS at 170. Moreover, driving tractors from the port to employer's facility was not a

[1]Similarly, the claimant in *Zube v. Sun Refining & Marketing Co.*, 31 BRBS 50 (1997), was denied coverage when the Board rejected claimant's contention that the storage tanks from which he obtained his product for land transport were not simply a "point of rest" but marked the product's exit from maritime commerce and its transfer into land transportation, since delivery to the owner who placed it into overland transportation was complete at that point.

covered activity because it involved picking up stored cargo for further transshipment, citing *Dorris v. Director, OWCP*, 808 F.2d 1362, 19 BRBS 82 (CRT)(9th Cir. 1987)(claimant was not engaged in maritime employment where his regular duties consisted of driving a truck transporting containers to and from the terminal).[2]

In the present case, employer's facilities are directly at the port. Mr. Vogt, executive vice-president of Northwest Auto Marine Terminal (employer) testified that: employer is a port processor facility, which provides support services to import and export manufacturers of automobiles; cars are unloaded by employees of stevedoring companies and a damage survey is done; the custody of the automobiles or cargo changes to employer after the marine damage survey; the stevedores involved with unloading or loading the ships are contracted for by either the manufacturer of the cargo or the steamship line, not employer; and that upon completion of the damage survey, employer's insurance is liable for the state of the automobiles. H. Tr. at 53-61. Employer's employees then move the cars around the facility according to what needs to be done to the car, and the cars are equipped, and repaired if damaged. After the vehicles are prepared and ready to be delivered to a dealer, the manufacturer notifies employer what each vehicle's destination is, and it is placed in a load line for a trucking company to pick up. H. Tr. at 62. Mr. Vogt testified that an employee with claimant's job would drive a car into the warehouse where another employee would "fix" the car. When the job finished, claimant would drive the car out of the warehouse on the other side to complete his duties in preparing the car, and then it would be moved by someone else to the load line or a parking area.

Claimant testified that the vehicles are driven off the ship by employees of the stevedoring companies and placed in the yard of employer. H. Tr. at 32. An employee of employer will scan the cars to determine whether it needs air conditioning, a radio, an arm rest, etc. The cars are then rearranged by what they need to have done to them. Claimant's duties included removing the cars from the lot designated as needing air conditioning and placing it in line to enter the service bay with the required equipment (air conditioner, radio, etc.), putting it on a ramp and disconnecting the battery. H. Tr. at 20-21. Then, he would go back to the first car in line to exit the service bay and fill the air conditioner with freon, check

[2]The claimant also testified he moved cars at the port four times a year. The Board held that while such work is arguably maritime in nature, in *Odness* it was too episodic, and moreover, the administrative law judge discredited claimant's testimony on this count. *Odness*, 26 BRBS at 171.

for leaks, and take it to the quality control inspector. H. Tr. at 21. After the inspector approved the car, claimant would return the car outside to the yard, where it would be picked up and placed in the shipping yard (broken up into individual parking spots for the different dealers) by other employees. H. Tr. at 22-23.

As claimant correctly notes, the fact that he works for the land-based company and not the stevedoring company is not determinative of the coverage issue. *Molee,* 710 F.2d at 992, 15 BRBS at 168 (CRT). Nonetheless, we hold that the administrative law judge properly found that claimant was not engaged in maritime employment. Like the claimant in *Odness*, claimant's duties in the instant case involve the preparation of the vehicles for sale. In fact, claimant testified that "I only do air conditioning." H. Tr. at 22. Unlike the claimants in *Ford* and *Molee*, claimant's duties are not integral to the movement of cargo between sea and land in the terminal area. Rather, as demonstrated by claimant's testimony and that of Mr.Vogt, claimant's duties solely involve the preparation of the cars for shipment to dealers for sale. Therefore, this case in indistinguishable from *Odness* and claimant's duties do not constitute intermediate steps integral to the moving of cargo.[3] *Odness,* 26 BRBS at 165. Thus, we affirm the administrative law judge's denial of benefits.[4]

[3]Claimant also was occasionally responsible for driving BMW's to the dealer for the same type of preparation work done that was at the terminal and then driving the car back to employer's facility for washing or to be stored for pick-up. We reject claimant's contention that this duty, as well as his duties driving the vehicles from around the terminal area, both during his regular work day and during overtime at nights and on weekends, constitutes maritime employment as this argument overlooks the fact that the purpose of claimant's work is to prepare vehicles for sale. *See* H. Tr. at 46-47; *see generally Dorris,* 808 F.2d at 1362, 19 BRBS at 82 (CRT).

[4]Consequently, we reject claimant's attorney's request for a fee for work performed before the Board.

Accordingly, the Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge