

BRB Nos. 07-0363
and 07-0363A

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| R.G. |) | |
| |) | |
| Claimant-Petitioner |) | |
| Cross-Respondent |) | |
| |) | |
| v. |) | |
| |) | |
| CORNELL & COMPANY, |) | DATE ISSUED: 12/17/2007 |
| INCORPORATED |) | |
| |) | |
| Self-Insured |) | |
| Employer-Respondent |) | |
| Cross-Petitioner |) | DECISION and ORDER |

Appeals of the Decision and Order Denying Benefits of John M. Vittone, Chief Administrative Law Judge, United States Department of Labor.

Alan C. Rassner (Rassner, Rassner & Olman), New York, New York, for claimant.

Francis M. Womack (Field Womack & Kawczynski, LLC), South Amboy, New Jersey, for self-insured employer.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Denying Benefits (2006-LHC-00203) of Chief Administrative Law Judge John M. Vittone 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, a preparation foreman for a structural steel supplier, was injured on May 4, 2005, in the course of his employment. Employer was supplying steel for a portion of a bridge under construction over navigable waters. The steel was delivered by truck to the water's edge where it was loaded onto a barge. The barge was then taken out to the site where the steel was being erected in connection with the construction of the bridge. Claimant was working on land when he stepped on a metal ring, which caused him to trip and fall.¹ Claimant sought benefits under the Act. Employer has paid claimant benefits under the New Jersey workers' compensation law.

In his Decision and Order, the administrative law judge found that claimant's duties as the preparation foreman did not involve the loading or unloading of any vessel. Moreover, the administrative law judge found that any work claimant performed on a barge was sporadic, momentary, and episodic. Therefore, the administrative law judge concluded that claimant was not engaged in maritime employment, 33 U.S.C. §902(3), and he denied the claim for benefits under the Act.

On appeal, claimant contends that the administrative law judge erred in finding that he was not a covered employee as his duties were an integral part of preparing the steel for loading onto barges. Employer responds, urging affirmance of the administrative law judge's finding that claimant did not meet the Act's status element.² Claimant has filed a reply brief.

For a claim to be covered by the Act, claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or on a landward area covered by Section 3(a) and that his work is maritime in nature and is not specifically excluded by the Act. 33 U.S.C. §§902(3), 903(a);³ *Director, OWCP v. Perini*

¹ Claimant alleged at one point that his injury occurred on the barge. The administrative law judge found that this allegation was unfounded, and claimant does not press this issue on appeal.

² Employer filed a cross-appeal of the administrative law judge's Decision and Order, which was assigned the Board's docket number, BRB No. 07-0363A. Subsequently, in its response brief dated September 23, 2007, employer requested withdrawal of its cross-appeal. We grant, with prejudice, employer's motion to withdraw its appeal. 20 C.F.R. §802.401(a).

³ The administrative law judge found that claimant's injury occurred in a landward area covered by Section 3(a) of the Act, and this finding is unchallenged on appeal.

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); *Crapanzano v. Rice Mohawk, U.S. Constr. Co., Ltd.*, 30 BRBS 81 (1996); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996). Thus, in order to demonstrate that coverage exists, claimant must satisfy the “situs” and the “status” requirements of the Act. *Id.* 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. *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981).

Claimant contends the administrative law judge erred in finding that his work was not integral to the loading process. Claimant asserts that he was involved with preparing and checking the steel cargo for loading onto a barge, and thus was engaged in maritime employment. The administrative law judge rejected claimant’s testimony concerning his job duties. Decision and Order at 7. Instead, he credited the testimony of the project foreman, Mr. Stenn. Mr. Stenn testified that when the steel arrived at the river by trailer truck, claimant prepared the steel girders for placement on the bridge, including bolting splice plates and installing the safety cables. Tr. at 33. Mr. Stenn stated that it was more efficient to do this work on land, rather than after the girders were erected over the water. *Id.* After this work was performed, the loading gang took the girders from the truck and moved them onto the barge for transport to the bridge site. Mr. Stenn testified that claimant was not involved with the loading of the steel onto the barges or with preparing it to be loaded. *Id.* at 34. In addition, Mr. Stenn testified that claimant was not responsible for checking the steel to make sure that it was properly prepared, as this was the responsibility of the loading crew. *Id.* at 38-39. Mr. Stenn acknowledged that, on two or three occasions, claimant completed his preparation work on a moored barge when time constraints so dictated. *Id.* at 34-35.

The administrative law judge found that claimant’s work was not part of the loading process, which involved a separate crew. Moreover, the administrative law judge acknowledged Mr. Stenn’s testimony that claimant performed his work on a barge on a few occasions, but found this work “sporadic, momentary, and episodic,” and thus insufficient to confer status. Decision and Order at 7.

We reject claimant’s contentions of error. Questions of credibility are for the administrative law judge as the trier-of-fact, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v.*

Hughes, 289 F.2d 403 (2^d Cir. 1961), and the administrative law judge rationally credited Mr. Stenn's testimony rather than claimant's testimony that he spent two to three hours a day loading steel onto the barges. *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). Moreover, contrary to claimant's contention, the administrative law judge did not commit legal error in finding that claimant's preparation work is not covered employment. That claimant's work was the last step prior to the girders being loaded onto the barge does not require a finding that claimant's work was integral to the loading process. Rather, Mr. Stenn's testimony establishes that the work was related to aiding the process of erecting the girders and that it was more efficient to perform this work on land, rather than after the girders were erected. A separate crew was responsible for loading the steel. Claimant's preparation work was part of the bridge construction project, which is not covered work. *Johnsen v. Orfanos Contractors, Inc.*, 25 BRBS 329 (1992); *see also Kehl v. Martin Paving Co.*, 34 BRBS 121 (2000); *cf. LeMelle v. B.F. Diamond Constr. Co.*, 674 F.2d 296, 14 BRBS 609 (4th Cir. 1982), *cert. denied*, 459 U.S. 1177 (1983) (construction worker injured over navigable waters while building a bridge designed in part to aid navigation was engaged in maritime employment).

In addition, the administrative law judge did not err in finding that the few times claimant performed his work on the barge do not confer coverage. The administrative law judge rationally characterized this work as "episodic" as it was not a regularly assigned part of claimant's job duties. *Kilburn v. Colonial Sugars*, 32 BRBS 3 (1998). Moreover, the work performed on the barge was the same as that performed on land, and thus, it was not "indisputably" maritime work, but was incidental to claimant's non-maritime work of preparing the bridge girders. *See Silva v. Hydro-Dredge Corp.*, 23 BRBS 123 (1989). We affirm the administrative law judge's finding that claimant was not a covered employee as it is rational, supported by substantial evidence and in accordance with law. *See generally Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112(CRT) (3^d Cir. 1992). Therefore, we affirm the denial of benefits.

Accordingly, employer's appeal, BRB No. 07-0363A, is dismissed. The Decision and Order of the administrative law judge denying benefits is affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge