BRB No. 11-0600

EDDIE GARY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
THE BAYOU COMPANIES, L.L.C.	)	DATE ISSUED: 03/05/2012
	)	
and	)	
	)	
GRAY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER
	)	

Appeal of the Decision and Order of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Andrew W. Horstmyer and Kenneth W. Jacques, New Orleans, Louisiana, for claimant.

Eric J. Waltner (Allen & Gooch), Lafayette, Louisiana, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2010-LHC-1972) of Administrative Law Judge C. Richard Avery 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, rational, and 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 began working for employer in 1993 in the pipe coating plant of employer's facility in the Port of Iberia, Louisiana.[1] At some point he was transferred to the yard and became the yard foreman. Tr. at 48-49. Claimant injured his back on March 18, 2003, when he and a co-worker were loading pipes onto a truck, and the co-worker dropped his end of the load. Tr. at 33-34. The parties agree that employer has paid claimant temporary total disability benefits under Louisiana workers' compensation law since July 6, 2003, and that claimant's condition reached maximum medical improvement on March 18, 2009. Decision and Order at 2. Claimant filed a claim for benefits under the Longshore Act.

At the hearing, the parties agreed that employer's facility is a covered situs, 33 U.S.C. §903(a). Decision and Order at 5. Thus, the administrative law judge addressed only the status issue under Section 2(3) of the Act, 33 U.S.C. §902(3). The administrative law judge found that claimant's job as a yard foreman consisted of loading trucks, building pipe racks, and cleaning the yard. However, he found that when the barge crew was short-handed, claimant sometimes assisted in loading or unloading a barge. Decision and Order at 3. Because all the witnesses agreed that doing barge work was not part of claimant's regular duties, and because no witness could give a good estimate of how many times claimant worked on the barges or what percentage of his work was barge work, the administrative law judge found that claimant's barge work was sporadic and not covered by the Act. Accordingly, the administrative law judge denied benefits under the Act and found that all other disputed issues were moot. Decision and Order at 6-7. Claimant appeals the denial of benefits under the Act, and employer 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 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); *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996). Thus, in order to demonstrate that jurisdiction 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).

[1]Employer is in the business of welding and coating pipes that are used in the gas and oil pipelining industry for onshore and offshore projects.

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* 33 U.S.C. §902(3); *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 longshoring operations." *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.[2] *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981); *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990).

In this case, it is undisputed that claimant was a yard foreman and that his regular duties consisted of loading trucks, building pipe racks, and cleaning the yard.[3] On some occasions, he was called to do barge work when the barge crew was short-handed. Testimony from claimant's yard supervisor, Mr. Norris, indicated that claimant would sometimes be put on the day's schedule to help the barge crew when it was short-handed and at other times he would just be called over to help out. Emp. Ex. 23 at 40. Initially, Mr. Norris testified that claimant spent 50 percent of his time loading trucks, five percent cleaning the yard, 15 percent building pipe racks, and the rest (30 percent) working the barges. However, Mr. Norris later testified that he saw claimant working the barges only approximately ten times over the course of three years and that it had been a long time since he retired so his estimate may not be accurate. *Id.* at 14, 17, 22, 24, 29-30.

Claimant was unable to estimate how many times he worked on the barges over the course of his employment, but his best guess was 20 percent of the time. Tr. at 52, 108-109. He stated that the barges did not come in at the same rate every week, and he did not work on a barge every week. Claimant also testified that he sometimes "moved barges around" but this was "something extra" with the captain and was not a regular part of his job. Tr. at 107. A co-worker, Mr. Menard, stated that claimant was part of the truck crew, which was separate from the barge crew. He stated that claimant could have loaded barges if he were filling in for someone but that such a job was infrequent, and he did not know the number of times claimant worked on a barge. Tr. at 116-117. There are no reports or work logs in the record showing where claimant worked each day.

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[2]An "episodic" activity is one which is "discretionary or extraordinary" as opposed to one which is "a regular portion of the overall tasks to which a claimant may be assigned. . . ." *Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 24(CRT) (1st Cir. 1984); *see also McGoey v. Chiquita Brands Int'l*, 30 BRBS 237 (1997); *Stone*, 30 BRBS at 213.

[3]Claimant does not argue that his regular duties constitute maritime work.

Claimant contends the administrative law judge erred in finding that his work loading and unloading barges was "brief and fortuitous." He asserts that it is contradictory to so find when he was sometimes put on the "schedule" for such work.[4] We reject claimant's contention.

The administrative law judge found that claimant's work on the barges was not a part of his regular duties. The administrative law judge considered the testimony of Mr. Norris, regarding claimant's work on a barge, to be contradictory; nevertheless, he credited Mr. Norris's later statements that claimant worked on the barges approximately ten times over a three-year period. This coincides with Mr. Menard's statement that claimant's work on the barges was infrequent, as he was assigned to the truck crew which is separate from the barge crew. As no witness gave an accurate estimate of how many times claimant may have worked on the barges, but all agreed such work was not part of his regular duties and was something that was done only when the barge crew was short-handed, the administrative law judge rationally found that claimant's activities on the barges were "sporadic" and "were too brief and fortuitous to confer longshore jurisdiction." Decision and Order at 6; *see Kilburn v. Colonial Sugars*, 32 BRBS 3 (1998). As the administrative law judge's interpretation of the evidence is reasonable, and as his findings are supported by substantial evidence and are in accordance with law, we affirm the finding that claimant's work on barges was sporadic and, therefore, that claimant failed to establish that he spent at least "some" time in covered work. *Id.*; *Felt v. San Pedro Tomco*, 25 BRBS 362 (1992) (Stage, C.J., dissenting), *appeal dismissed sub nom. Felt v. Director, OWCP*, 11 F.3d 951, 27 BRBS 165(CRT) (9th Cir. 1993); *see generally Caputo*, 432 U.S. at 273, 6 BRBS at 165; *McGoey v. Chiquita Brands Int'l*, 30 BRBS 237 (1997). Therefore, we affirm the administrative law judge's denial of benefits under the Act.

[4]Claimant cites *Coastal Prod. Serv., Inc., v. Hudson*, 555 F.3d 426, 42 BRBS 68(CRT), *reh'g denied*, 567 F.3d 752 (5th Cir. 2009), and *Howard v. Rebel Well Service*, 632 F.2d 1348, 12 BRBS 734 (5th Cir. 1980), to support his argument that he was regularly assigned to the barges and should be covered. Claimant's analogy is misplaced. In *Howard*, the claimant was regularly engaged in ship repair, and in *Hudson*, the claimant was regularly engaged in loading oil onto a transport barge. Those were actual elements of the claimants' job descriptions. Thus, while the percentages of time spent by these two employees in covered work was limited, it constituted a regular part of their work duties. Therefore, they spent "some" time in covered work, and such work was not sporadic or fortuitous.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge