BRB No. 96-1059

BERNARD KEIFER, SR.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HOLT CARGO SYSTEMS, INCORPORATED	)	DATE ISSUED:
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Robert D. Kaplan, Administrative Law Judge, United States Department of Labor.

David M. Linker (Freedman and Lorry, P.C.), Philadelphia, Pennsylvania, for claimant.

Stephen J. Harlen and Barbara D. Huntoon (Swartz, Campbell & Detweiler), Philadelphia, Pennsylvania, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (95-LHC-1143) of Administrative Law Judge Robert D. Kaplan 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, while working for employer as a tractor-trailer driver at employer's marine terminal, sustained a work-related injury on June 16, 1993, when a piece of steel pipe he was loading onto his trailer fell on his left ring finger. Claimant was temporarily totally disabled from June 16, 1993 until April 27, 1994, when he returned to his employment with employer. The parties stipulated that claimant sustained a 17.5 percent permanent partial disability with regard to his left ring finger. *See* 33 U.S.C. §908(c)(10). The parties further stipulated that claimant was injured on a covered situs pursuant to Section 3(a) of the Act. 33 U.S.C. §903(a)(1988). The only issue before the administrative law judge was whether

claimant satisfied the status element of jurisdiction set forth in Section 2(3) of the Act, 33 U.S.C. §902(3)(1988).

In his Decision and Order, the administrative law judge found that claimant's maritime work of transporting equipment used in loading and unloading vessels to and from the terminal was an insignificant portion of claimant's total work time, and thus concluded that claimant failed to establish the status requirement for coverage under the Act. Accordingly, the administrative law judge denied claimant's claim for permanent partial disability compensation.

On appeal, claimant contends that the administrative law judge erred in finding that his occasional transporting of equipment used in loading and unloading is insufficient to bring him within the Act's coverage. Employer responds, urging affirmance of the administrative law judge's Decision and Order.

While maritime employment is not limited to the occupations specifically enumerated in Section 2(3), claimant's employment must be an integral or essential part of the chain of events leading up to the loading, unloading, building or repairing of a vessel. *See generally Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989); *Sea-Land 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). A claimant is covered under the Act if he spends at least some of his time engaged in indisputably covered activities. *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 69, 6 BRBS 150 (1977). A claimant's time need not be spent primarily in longshoring operations if the time spent is more than episodic or momentary. *See Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981).

In the present case, claimant's duties as a tractor-trailer driver required him to transport cargo from the terminal to other piers or warehouses, pick up empty containers and return them to the terminal; in describing his work duties, claimant stated that he would "customarily" assist in the loading of his truck, "just to be nice," but did not specify how often he would render such assistance. *See* Tr. at 33. However, claimant testified, and employer agreed, that 95 percent of his job duties consisted of hauling cargo to and from terminals, *see* Tr. at 30, 57, activity not covered under the Act. *See Caputo*, 432 U.S. at 267, 6 BRBS at 161; *Dorris v. Director, OWCP*, 808 F.2d 1362, 19 BRBS 82 (CRT)(9th Cir. 1987). With regard to the remainder of claimant's work time, claimant testified that part of his job consisted of picking up equipment used in the loading and unloading process (usually forklifts) from the terminals, transporting them for repairs, and returning them to the terminals. Tr. at 26-27. Claimant testified that he might do this type of work 4 to 6 times

in a month, or he might do it only once in a month. Tr. at 27. He stated later that in the six months prior to his June 1993 injury, he performed this task "maybe 20 times." Tr. at 43.

In his Decision and Order, the administrative law judge interpreted the Supreme Court's decision in *Caputo* as requiring that an employee perform "essentially" longshore work to satisfy the status element of Section 2(3), inferring that "an employee who spends only a small portion of his time doing longshore work" would not be covered. Decision and Order at 4. Next, the administrative law judge determined that the time claimant spent transporting equipment used to load and unload vessels constituted covered maritime activity. *Id.* at 6; *see, e.g., Atlantic Container Service, Inc. v. Coleman*, 904 F.2d 611, 23 BRBS 101 (CRT)(11th Cir. 1990). However, finding that claimant spent "at most" 5 percent of his time performing this activity, the administrative law judge determined that this amounted to an insignificant portion of claimant's total work, and thus, concluded that claimant was not a covered maritime employee under Section 2(3) of the Act.

We hold that the administrative law judge applied the wrong legal standard in determining claimant's status under the Act. Contrary to the administrative law judge's determination, where a claimant is "directed to regularly perform *some* portion of what was indisputably longshore work," he is covered under the Act. *Boudloche*, 632 F.2d at 1348, 12 BRBS at 734 (emphasis in original); *see also Schwabenland v. Sanger Boats*, 683 F.2d 309, 16 BRBS 78 (CRT)(9th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981)(cases rejecting the Board's use of a "substantial portion" test). In *Boudloche,* the United States Court of Appeals for the Fifth Circuit found that an employee who was engaged in unloading ships 2 ½ to 5 percent of his overall work time was covered under the Act, stating "[o]ur decision does not undertake to define the point at which a worker's employment in maritime activity becomes so episodic it will not suffice to confer status. That point was clearly not reached here." *Boudloche*, 632 F.2d at 1348, 12 BRBS at 734. The United States Court of Appeals for the First Circuit defined the term "episodic" as an activity that is "discretionary or extraordinary" as opposed to that which is "a regular portion of the *overall* tasks to which [claimant] could have been assigned . . ." *Levins v. Benefits Review Board*, 724 F.2d 4, 8, 16 BRBS 24, 33 (CRT)(1st Cir. 1984)(emphasis in original). In the instant case, the administrative law judge found that claimant's work activities transporting equipment used in the loading and unloading process constituted maritime activity. The administrative law judge then found that claimant spent 5 percent of his time engaged in this activity. Furthermore, claimant's supervisor, Paul Rand, testified that claimant would be assigned the activity of transporting loading and unloading equipment. Tr. at 55-56. Thus, although claimant's work duties in this regard were infrequent, those duties were a regular part of claimant's assigned overall duties and cannot be said to have been discretionary or extraordinary. *See generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT)(5th Cir. 1994).

The administrative law judge's finding that claimant spent 5 percent of his time in covered activity is not challenged by employer on appeal. Under the precedent set in *Caputo*, claimant is entitled to coverage under the Act based on that finding, as it

establishes that claimant spent at least some of his time engaged in the loading and unloading process. *See McGoey v. Chiquita Brands International*, BRBS , BRB No. 96-593 (Jan. 28, 1997); *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993). Inasmuch as the administrative law judge improperly required that claimant's work must be substantially devoted to covered activity, we reverse his finding that claimant is not an employee covered under the Act. The administrative law judge's denial of benefits is thus vacated, and the case is remanded for the entry of a permanent partial disability award pursuant to the parties stipulations.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is reversed, and the case is remanded to the administrative law judge for the entry of an award of permanent partial disability benefits pursuant to Section 8(c)(10) of the Act, 33 U.S.C. §908(c)(10), reflecting a 17.5 percent impairment to the left ring finger.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge