BRB No. 97-287

ESTHER JONES (widow of CHARLIE JONES)	)	
Claimant-Petitioner	)	
v.	)	DATE ISSUED:______________
ALUMINUM COMPANY OF AMERICA	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Mitchell G. Lattof, Jr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Gregory C. Buffalow, Mobile, Alabama, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (95-LHC-2055) of Administrative Law Judge Richard K. Malamphy 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).

Decedent worked for employer from July 1972 until his illness and death in March 1980 caused by carcinoma of the left lung with metastasis to the brain. From July 1972 through November 12, 1978, decedent worked as a millwright welder, and thereafter he worked as a general mechanic. Cl. Exs. 13, 20. His duties as a millwright welder required him to perform cutting, welding, fusing and heating operations to install, maintain, repair and service machinery at employer's plant.[1] Emp. Ex. 12. As a general mechanic, a

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[1]Employer's facility converted bauxite into calcine alumina, otherwise known as aluminum oxide, which would later be used to produce aluminum. Tr. at 37. Shipments of bauxite were unloaded at the State Port Authority docks and placed on Conveyor A, which

category to which all the maintenance-type workers were changed in 1978, decedent was required to "construct, install, maintain, repair, and service all types of equipment, machinery, structures, ducting, and piping systems." Emp. Ex. 11. Claimant contends decedent was exposed at employer's facility to asbestos which contributed to his death. Claimant and her five children filed claims for death benefits. Cl. Exs. 2, 7.

The administrative law judge addressed only one issue in his decision. He concluded that decedent's job as a millwright welder and general mechanic did not satisfy the Section 2(3), 33 U.S.C. §902(3), status requirement. Specifically, he found that decedent's work maintaining Conveyor B did not meet the definition of maritime employment because it was not an integral part of loading or unloading a vessel. Decision and Order at 7. The administrative law judge stated that when the bauxite spilled from Conveyor A to Conveyor B it came into possession of the ultimate user for manufacturing purposes and, therefore, it was no longer in the unloading process.

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was owned and maintained by the state of Alabama. Bauxite destined for employer's facility dropped from Conveyor A to Conveyor B, which was owned and operated by employer and most of which was on employer's property. From Conveyor B, the bauxite would travel to Conveyor C where it would then travel to one of two storage buildings. Emp. Ex. 13; Tr. at 33-35. When employer needed the bauxite in the manufacturing process, workers would bulldoze it through trap doors in the floor of the storage buildings which led to underground conveyor belts. Tr. at 36; *see also Garmon v. Aluminum Company of America - Mobile Works*, 28 BRBS 46 (1994), *aff'd on recon.*, 29 BRBS 15 (1995).

Claimant appeals the administrative law judge's decision, arguing that decedent was engaged in maritime employment by virtue of his work on the conveyor belts and work to which he may have been assigned on the alumina loading dock and the liquid caustic dock.[2] Employer responds, urging affirmance of the administrative law judge's denial of benefits because claimant failed to establish decedent's maritime status.[3] For a claim to be covered by the Act, a claimant must establish that the injury occurred upon the navigable waters of the United States, including any dry dock, or that it occurred on a landward area covered by Section 3(a), and that the employee's work is maritime in nature and is not specifically excluded by the Act. 33 U.S.C. §§902(3), 3(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); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996). Thus, in order to demonstrate that coverage exists, a claimant must satisfy the "situs" and the "status" requirements of the Act.[4] *Id.*; *see also Crapanzano v. Rice Mohawk, U.S. Construction Co., Ltd.*, 30 BRBS 81 (1996).

Generally, an employee satisfies the "status" requirement if he is 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, 46, 23 BRBS 96 (CRT) (1989). To satisfy this requirement, he must "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 constitutes 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); *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990).

Decedent worked as a millwright welder and a general mechanic for employer. A

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[2]The plant's final product, alumina, was moved to the barges for maritime transportation via a conveyor belt called a "gravity conveyor" or an "airslide." The liquid caustic arrived at employer's facility on a barge and was off-loaded by way of a pump and pipeline. Tr. at 60-61, 107-108.

[3]Employer has filed a Statement for Oral Argument before the Board *en banc*. We deny employer's motion, as it was not filed in the proper form pursuant to Section 802.219(b) of the regulations. 20 C.F.R. §802.219(b). Moreover, we conclude that oral argument is unnecessary to resolve the issue in this case. 20 C.F.R. §802.219. Further, we decline to address the additional issues employer raises in its response brief because, as claimant asserts, they were not addressed by the administrative law judge. *See Brown v. I.T.T./Continental Baking Co.*, 921 F.2d 289, 24 BRBS 75 (CRT) (D.C. Cir. 1990).

[4]The parties agree that employer's facility constitutes a maritime situs under Section 3(a). Decision and Order at 2, 4.

millwright welder works in tandem with a millwright. Mr. House, a co-worker who was a millwright, testified that he and decedent repaired and maintained conveyor belts, specifically the bauxite conveyor system (Conveyors B and C), changing rollers, head pullers, and tail pullers, adjusting belts, and oiling and maintaining rollers. He stated they also changed motors and repaired pumps, working in the power house, the plant, near the digesters and boilers, and on machinery between the water and the plant. Cl. Ex. 22; Tr. at 82, 84-88. Other co-workers, Mr. Simon and Mr. Howard, confirmed decedent's work on the bauxite conveyor system, but neither knew whether decedent worked on the liquid caustic or alumina docks. Jt. Ex. 1 at 14, 24-25, 35; Jt. Ex. 2 at 20, 43-44, 46-48.

According to Mr. Hartwell, a former plant manager, repair work of the conveyor systems was a "regular part" of a millwright's, and later a general mechanic's, job. Specifically, he stated that although a millwright/general mechanic was responsible for maintaining and repairing the conveyor belts, and that a welder would accompany the millwright, this would involve approximately one percent or less of the millwright welder's work. Tr. at 72-75. With regard to the dock activity, Mr. Hartwell testified that the general mechanic's duties included observing the discharge of liquid caustic and maintaining the alumina conveyor but that this constituted less than two percent of a general mechanic's work. Tr. at 61-63, 75-76.

In this case, the administrative law judge acknowledged the three possible work areas where decedent's duties could confer coverage under Section 2(3): the bauxite conveyors, the alumina dock and the caustic dock. He then noted claimant's contention that decedent could have been and actually was assigned to work in all three areas. Decision and Order at 4. The administrative law judge determined that decedent could have spent approximately one percent of his time repairing Conveyor B, but that there is "no suggestion" that he ever worked on the alumina or caustic docks. He then concluded that decedent's duties as to Conveyor B were not integral to the unloading process but were analogous to the truck driver's duties as discussed by the Supreme Court in *Caputo*. *See* discussion, *infra*. Specifically, the administrative law judge found that when the bauxite spilled from Conveyor A to Conveyor B, it came into the possession of the ultimate user. Decision and Order at 7. Thus, he found that the transition from the "unloading" process to the "manufacturing" process occurred once the bauxite left Conveyor A.

Claimant alleges error in this finding, and asserts that this case is controlled by the Board's decision in *Garmon v. Aluminum Co. of America - Mobile Works*, 28 BRBS 46 (1994), *aff'd on recon.*, 29 BRBS 15 (1995). In *Garmon*, the claimant was a bulldozer operator for ALCOA who bulldozed bauxite into piles in the storage buildings and pushed the piles through the trap doors for transport on the underground conveyor system. The claimant also removed scrap iron from the above-ground conveyor belts leading to the storage buildings and replaced bauxite which had fallen from the same conveyor belts. *Garmon*, 28 BRBS at 47. The administrative law judge found, and the Board affirmed, that the claimant's bulldozing duties in the storage buildings were insufficient to confer coverage. However, the Board held there was testimony which, if credited, could establish that the claimant performed covered work "since ensuring that the conveyor belts leading from the ships to the storage facility continued operating entails part of the 'overall unloading process' . . . ." *Id.* at 49. Therefore, because the administrative law judge had not considered that aspect of the claimant's duties, the Board remanded the case for him to address whether the testimony established that the claimant performed work on the conveyor belts "which constituted part of the unloading process and which is covered under the Act." *Id.* at 50. On reconsideration, the Board reaffirmed its decision to remand the case for the administrative law judge to consider the claimant's conveyor belt duties. *Garmon*, 29 BRBS at 15.

In stating that maintenance and repair of the conveyor belts leading from the ships to the storage buildings constitute covered employment, the Board relied on the Supreme

Court's decision in *Schwalb*. In that case, the Supreme Court stated:

> Although we have not previously so held, we are quite sure that employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act. Such employees are engaged in activity that is an integral part of and essential to those overall processes. That is all that §902(3) requires.

Schwalb, 493 U.S. at 47, 23 BRBS at 99 (CRT); *Garmon*, 28 BRBS at 49-50. The Court stated that the determinative consideration is whether the ship loading/unloading process could continue without the claimant's function, and it noted that it is irrelevant whether the employee may have other duties unconnected to loading or unloading or whether his contribution to the loading process is not continuous. *Id.*; *see also Ford*, 444 U.S. at 82, 11 BRBS at 328; *Caputo*, 432 U.S. at 272-274, 6 BRBS at 165.

In *Caputo*, the Supreme Court held that employees who were hired as terminal labor from the hiring hall, when there was no work for their regular stevedoring crew, and who could be assigned to any number of tasks on the waterfront, are covered employees if they are "engaged in the final steps of moving cargo from maritime to land transportation: putting it in the consignee's truck." *Caputo*, 432 U.S. at 272-274, 6 BRBS at 165. Thus, claimant Caputo, who was loading trucks with discharged cargo sitting on the docks when he was injured, was covered by the Act. *See also Ford,* 444 U.S. at 82, 11 BRBS at 328 (coverage conferred on those involved in the intermediate steps of moving cargo between ship and land transportation). In addressing the language of the Act, the Court distinguished Caputo's job from that of a truck driver, who was merely responsible for picking up or delivering cargo "unloaded from or destined for maritime transportation." *Caputo*, 432 U.S. at 267, 6 BRBS at 161; *see also Dorris v. Director, OWCP*, 808 F.2d 1362, 19 BRBS 82 (CRT) (9th Cir. 1987).

The administrative law judge in the instant case likened decedent's work to that of the truck driver because the administrative law judge found that the bauxite had come into the possession of the ultimate consumer when it reached Conveyor B and therefore was no longer in the unloading process. Initially, we hold that the administrative law judge erred in establishing a boundary between Conveyor A and Conveyor B on the ground that the Port owns and maintains Conveyor A and employer owns and maintains Conveyor B. He found that bauxite which spilled from Conveyor A to Conveyor B "was now in the possession of the ultimate user" and was no longer in the unloading process. Decision and Order at 7. The Board has held that when raw materials are unloaded from a ship at a manufacturing plant and are refined or used in a manufacturing process, loading activities are complete upon the delivery of the goods to the plant. *Coyne v. Refined Sugars, Inc.*, 28 BRBS 372 (1994); *see also Prolerized New England Co. v. Benefits Review Board,* 627 F.2d 30, 12 BRBS 808 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981). Thus, in *Garmon*, the Board held that the unloading process was complete when the bauxite was received for storage because it is at this point that the product has reached the consumer and is not stored for further transhipment. *Garmon*, 28 BRBS at 49; *see generally Caputo*,

432 U.S. at 277-278, 6 BRBS 168-169 (rejecting "point of rest" theory). The Board stated, however, that ensuring the continued operation of the conveyor belts leading from the ships to the storage facility is part of the overall unloading process, *Garmon*, 28 BRBS at 49-50, *citing Schwalb*, 493 U.S. at 40, 23 BRBS at 96 (CRT), and it remanded the case for consideration of the evidence regarding whether the claimant maintained the conveyor belts.

Contrary to the administrative law judge's finding, the situation herein is not analogous to the truck driver analysis in *Caputo*. There, the Court stated that a driver whose job was to load and carry cargo which had been stored for further transshipment over land was not a covered employee. *Caputo*, 432 U.S. at 267, 6 BRBS at 161; *cf. Novelties Distribution Corp. v. Molee*, 710 F.2d 992, 15 BRBS 168 (CRT) (3d Cir. 1983), *cert. denied*, 465 U.S. 1012 (1984) (employee who helps deliver cargo from initial point of rest on docks to storage area is covered despite paper transfer of ownership at the point of rest); *Warren Brothers v. Nelson*, 635 F.2d 552 (6th Cir. 1980) (truck driver injured while transporting gravel unloaded from barges to storage pile was integral to unloading process). By contrast, the court found that employees such as claimant Caputo, who was loading the truck, are engaged in steps in the loading process and thus covered until the process is complete regardless of whether the cargo is containerized or whether it halts at a point of rest on the dock.

In this case, although the primary purpose of employer's facility was to process alumina, the work at issue involves maintenance of the conveyors which transported bauxite from the ships to employer's storage facility for later use in the manufacturing process. Thus, the conveyor system did not move stored cargo, but instead moved shipped cargo that was still in the unloading process.[5] *See Prolerized New England Co. v. Miller*, 691 F.2d 45, 15 BRBS 23 (CRT) (1st Cir. 1982) (worker who maintains conveyor belt and "stacker" which are integral to loading the product onto ships is covered). Given the holding of *Schwalb* that maintenance of loading equipment is covered, decedent's duties in this case are analogous to those of claimant Caputo, rather than to those of the truck driver who moved the goods on their landward journey. Accordingly, we hold that the administrative law judge erred in stating that the loading process ended once the bauxite left Conveyor A, and consistent with *Schwalb, Caputo* and *Garmon*, we hold that the loading process did not end until the raw material reached the storage facility.

We next address whether decedent spent a sufficient amount of his time engaged in

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[5]The testimony of record implies that movement of the bauxite on the conveyor system between the ships and the storage building was a continuous process. Jt. Ex. 2 at 41, 44; Tr. at 58. Thus, Conveyors A, B and C are all integral to the unloading of bauxite, as this material travels on all conveyors prior to reaching the storage facility.

maintenance of the conveyor belts, as employer contends that any time decedent spent in this activity is legally insufficient to confer coverage. *See generally King v. Tennessee Consolidated Coal Co.,* 6 BLR 1-87 (1983). While *Caputo* states that only "some" of an employee's time need be spent in covered activities to confer status, those activities must be more than merely episodic. 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). In *Boudloche,* 632 F.2d at 1346, 12 BRBS at 732, an employee who spent 2.5 to five percent of his work time unloading ships without assistance and "some" additional time with assistance was held covered by the Act under the "some of the time" test of *Caputo*. In *McGoey*, the Board held that an employee who spent three to five percent of his time supervising the unloading of ships "spent at least some of his time engaged in the unloading process." *McGoey*, 30 BRBS 239. Moreover, the claimant was covered because this activity, while infrequent, was nonetheless a non-discretionary, regular portion of his job. *Id.*; *see generally Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994). Similarly, in *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997), the Board held that the administrative law judge's finding that the claimant worked one to two percent of his time in either ship repair or cargo handling was sufficient to establish the claimant's maritime status. Specifically, the Board held that these duties "were a regular portion of the overall tasks to which claimant could be, and actually was, assigned" and were not too episodic to confer status simply because of their infrequency. *Lewis*, 31 BRBS at 40-41; *see generally Lennon*, 20 F.3d at 660-661, 28 BRBS at 24 (CRT).

Decedent's job description was broad, encompassing service on "all types of equipment," and the administrative law judge noted Mr. Hartwell's testimony that employees with decedent's job classification could spend about one percent of their work repairing and maintaining the conveyor belts. Although the maintenance of the conveyor belts was infrequent pursuant to the credited testimony of Mr. Hartwell, this work nevertheless confers coverage under the Act because it was a regular, non-discretionary part of the job. *See Schwalb*, 493 U.S. at 47, 23 BRBS at 99 (CRT). As the administrative law judge found that decedent could have been and actually was assigned to work on the bauxite conveyor about one percent of his time, Decision and Order at 7, we reverse his conclusion that such work was not covered employment.[6] *Lewis*, 31 BRBS at 40-41.

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[6]Because we conclude that decedent's work on employer's bauxite conveyor system constitutes covered employment, we need not address claimant's contentions regarding alleged work performed on the alumina or liquid caustic docks.

Accordingly, the administrative law judge's Decision and Order denying benefits is vacated. The case is remanded to the administrative law judge for consideration of the remaining issues raised by the parties.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. MCGRANERY
Administrative Appeals Judge