BRB No. 97-0498

DONALD R. BOUTTE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TWIN BROTHERS MARINE	)	DATE ISSUED:
	)	
and	)	
	)	
FIDELITY & CASUALTY COMPANY OF NEW YORK / CNA INSURANCE COMPANIES	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order, Decision on Motion for Reconsideration and Supplemental Decision and Order - Awarding Attorney Fees of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Lawrence N. Curtis (Curtis & Lambert), Lafayette, Louisiana, for claimant.

V. William Farrington, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order, Decision on Motion for Reconsideration and Supplemental Decision and Order - Awarding Attorney Fees (94-LHC-3390) 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 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).

The facts involved in this case are not in dispute. Claimant worked as a fabrication yard welder for employer, which is in the business of fabricating various structures for offshore drilling platforms. After the construction of platform structures was completed, they were loaded onto barges for transport to offshore locations. As part of his job as a welder, claimant participated in this load-out process by welding brackets to the fabricated structures after they were loaded onto barges in order to secure their safe voyage to the offshore drilling platforms. Claimant performed this barge-related activity approximately 2 to 3 days every month. On August 22, 1992, claimant suffered a work-related back injury while loading pipeline valves onto a trailer at employer's warehouse.

The only issue before the administrative law judge was whether claimant satisfied the status element under Section 2(3) of the Act, 33 U.S.C. §902(3)(1994).[1] Relying on *Thorton v. Brown & Root, Inc.*, 16 BRBS 311 (1984), *on remand*, 707 F.2d 149, 15 BRBS 163 (CRT)(5th Cir. 1983), *cert. denied*, 464 U.S. 1052 (1984), the administrative law judge found that claimant's employment was covered under Section 2(3) of the Act, as part of his job consisted of assisting in the loading process. In a Decision on Motion for Reconsideration, the administrative law judge, citing to the decisions of the United States Court of Appeals for the Fifth Circuit in *Munguia v. Chevron U.S.A. Inc*, 999 F.2d 808, 27 BRBS 103 (CRT)(5th Cir. 1993), and *Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104 (CRT)(5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990), affirmed his finding of status.

Thereafter, claimant's counsel filed a petition for an attorney's fee for work performed before the administrative law judge. Employer filed objections to the fee petition. On August 18, 1997, the administrative law judge issued a Supplemental Decision and Order - Awarding Attorney Fees, wherein the administrative law judge awarded claimant's counsel an attorney's fee of $6,837.50 to be paid by employer.

On appeal, employer challenges the administrative law judge's determination that claimant satisfied the Act's "status" requirement. Specifically, employer contends that the vast majority of claimant's work was non-maritime, that he was engaged in non-maritime work at the time of his injury, and that 10 percent of claimant's time spent welding braces in order to secure fabricated equipment to barges merely furthered the non-maritime purpose of transporting offshore oil field equipment to their ultimate destination. Claimant responds, urging affirmance of the administrative law judge's decisions. In a supplemental appeal,

[1]Prior to the hearing, the administrative law judge accepted employer's motion to adjudicate the issue of coverage under the Act separately from other issues. Employer's sole contention at the April 23, 1996 hearing was that claimant's employment with employer lacked maritime status under the Act. Tr. at 7-8.

employer argues that if the Board reverses the administrative law judge's finding of status, the administrative law judge's award of an attorney's fee would have to be reversed due to an unsuccessful prosecution of the claim. Claimant has not responded to this appeal.

Section 2(3) defines an "employee" for purposes of coverage under the Act as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . . ." *See* 33 U.S.C. §902(3)(1994). While maritime employment is not limited to the occupations specifically enumerated in Section 2(3), claimant's employment must bear a relationship 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). Moreover, an employee is engaged in maritime employment as long as some portion of his job activities constitutes covered employment. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 275-276, 6 BRBS 150, 166 (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). Moreover, under *Caputo*, a claimant need not be engaged in maritime employment at the time of injury to be covered under the Act, as the Act focuses on occupation rather than on duties at the time of injury. *See, e.g., Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989).

In determining that claimant satisfied the status requirement for coverage under the Act, the administrative law judge found that claimant's regular employment duties with employer included participating in the load-out process whereby platforms were placed in barges for shipment to their ultimate destination. Employer asserts that claimant's activity in the load-out procedure furthered the non-maritime related purpose of transporting offshore oil field equipment and, thus, does not constitute maritime employment. We disagree. In a case similar to the one at bar, the Board held that an employee's work loading oil well platforms onto barges constitutes indisputably longshore work, and thus was sufficient to confer coverage under Section 2(3).[2] *Thornton v. Brown & Root, Inc.*, 23

[2]In so holding, the Board distinguished the holding of the United States Supreme Court in *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 17 BRBS 78 (CRT)(1985), wherein the Court held that an employee who welded and maintained fixed offshore platforms in state territorial waters was not covered under the Act. Similarly, in *Munguia*, 999 F.2d at 808, 27 BRBS at 103 (CRT), the Fifth Circuit held that an employee who maintained fixed platform

BRBS 75 (1989). Accordingly, we hold that claimant's activity of welding brackets onto fabricated structures in order to secure them to barges does constitute maritime employment as it is integral to the process of loading those barges. *See Universal Fabricators, Inc. v. Smith*, 878 F.2d 843, 22 BRBS 104 (CRT)(5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990).

In challenging the administrative law judge's conclusion that claimant satisfied the status requirement of the Act, employer next contends that claimant did not routinely or regularly participate in the load-out process as a welder. However, claimant testified that approximately 2 to 3 days every month, he was required to assist in the loading of fabricated oil field structures onto barges. Tr. at 43-44. Indeed, employer concedes that claimant spent 10 percent of his work time engaged in the load-out process. *See* Employer's Brief at 6. Thus, all parties are in agreement that "some portion" of claimant's job activities included the loading of structures onto barges. *See Caputo,* 432 U.S. at 275-276, 6 BRBS at 166; *Boudloche*, 632 F.2d at 1346, 12 BRBS at 732. Accordingly, as some portion of claimant's job activities constituted maritime employment, we affirm the administrative law judge's determination that claimant's involvement in the loading of fabricated drilling structures onto barges was sufficient to confer coverage under Section 2(3) of the Act, as that finding is supported by substantial evidence and is in accordance with law. *See also Schabenland 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); *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997); *McGoey v. Chiquita Brands International,* 30 BRBS 237 (1997). Inasmuch as we affirm the administrative law judge's determination that claimant satisfied the status requirement under Section 2(3) of the Act, we affirm the administrative law judge's award of an attorney's fee, payable by employer. *See* 33 U.S.C. §928(a).

Accordingly, the Decision and Order, Decision on Motion for Reconsideration, and Supplemental Decision and Order - Awarding Attorney Fees of the administrative law judge are affirmed.

SO ORDERED.

ROY P. SMITH

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wells and oil storage tanks was not covered under the Act, despite the fact that he loaded his tools and equipment onto a boat and then unloaded them when he arrived at the various platforms. In the instant case, however, claimant assisted in the loading of structures onto barges, which then conveyed this cargo to its ultimate destination.

Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge