BRB Nos. 89-3111
90-2264

DAWN R. FERGUSON (Widow of ROY N. FERGUSON) and AMY JO FERGUSON, ROBERT LYLE FERGUSON, CLIFFORD DELANE FERGUSON (Minor Children of ROY N. FERGUSON) Claimant-Respondents v. SOUTHERN STATES COOPERATIVE and SOUTHERN STATES INSURANCE EXCHANGE Employer/Carrier-Petitioners CLIFFORD DELANE FERGUSON (Minor child of ROY N. FERGUSON) Claimant-Petitioner v. SOUTHERN STATES CORPORATION and	)	DATE ISSUED: BRB No. 89-3111

SOUTHERN STATES INSURANCE EXCHANGE	)	BRB No. 90-2264
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	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order, Supplemental Decision and Order - Granting Attorney Fees, and Order Denying Motions for Reconsideration of Theodor P. Von Brand, Administrative Law Judge, United States Department of Labor.

George M. Kelley, III (Cromwell, Sykes & Carnes, P.C.), Virginia Beach, Virginia, for claimants Dawn R. Ferguson, Amy Jo Ferguson and Robert Lyle Ferguson.

John H. Klein (Rutter & Montagna), Norfolk, Virginia, for claimant Clifford Delane Ferguson.

Daniel R. Lahne (Knight, Dudley, Dezern & Clarke), Norfolk, Virginia, for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order and claimant Clifford Delane Ferguson appeals the Supplemental Decision and Order - Granting Attorney Fees and Order Denying Motions for Reconsideration of the fee (87-LHC-1762) of Administrative Law Judge Theodor P. Von Brand 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). .[1] We must affirm the findings of fact and conclusions of law of the

[1]The Board consolidated for decision employer's appeal of the administrative law judge's Decision and Order, 89-3111, and claimant's appeal of the Supplemental Decision and Order - Granting Attorney Fees and Order Denying Motions for Reconsideration, BRB No. 90-2264, in an Order dated June 21, 1991.

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). An attorney's fee award is discretionary and may only be set aside only if shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding and Dry Dock Co.*, 12 BRBS 272 (1980).

On January 2, 1984, decedent was hired as a mechanic by employer at its fertilizer plant. On November 1, 1984, employer leased a warehouse on the waterfront for the sole purpose of receiving potash from self-unloading ships. Decedent was involved in every aspect of this venture from its inception from surveying the river depth in order to ascertain the feasibility of receiving the shipments, to making modifications to the warehouse to accommodate the booms of the incoming ships. In addition, decedent assisted the incoming ships in docking and directed the ship's crew as to where to position the ship's boom during the unloading process. Decedent also participated in the removal and construction of bulkheads to accommodate the incoming cargo, and was responsible for the maintenance of various machinery used in the shipping operation. On May 31, 1986, as decedent was leaving the warehouse roof where he had been cutting a hole to accommodate the boom of a jepson ship due to unload the next day, the roof gave way, causing him to fall to his death. Decedent was survived by his widow, Dawn R. Feguson, and their two minor children, Amy Jo and Robert Lyle Ferguson, and a minor child, Clifford Delane Ferguson, from a previous marriage, all of whom sought benefits under the Act pursuant to 33 U.S.C. §909.

After reviewing the evidence, the administrative law judge found that the record

establishes that the employer's warehouse's located immediately adjacent to navigable waters qualifies as a maritime situs, thus satisfying the Section 3(a), 33 U.S.C. §903(a). The administrative law judge then determined that because decedent had spent at least "some" of his time in longshoring operations, decedent's duties were essential to the maritime industry and furthered the concerns of a covered employer, he was an "employee" covered under Section 2(3) of the Act. 33 U.S.C. §902(3. The administrative law judge proceeded to award claimants death benefits under the Act subject to a 33 U.S.C. §903(e) credit for the weekly death benefits previously awarded to each under the Virginia Workers' Compensation Act.

Thereafter, claimant's attorney filed a Petition for Award of an Attorney's Fee requesting $2,842.50, representing 19 attorney hours at $125.00 per hour for work done before January 1, 1989, 3.25 attorney hours at $145.00 per hour for work done after January 1, 1989, and .25 paralegal hours at $45.00 per hour. In his Supplemental Decision and Order - Granting Attorney Fees, the administrative law judge reduced the $145 hourly rate requested after January 1, 1989 to $125.00 per hour, reduced the hours claimed from 22.25 to 19.75, but otherwise granted the fee requested awarding claimant's counsel a total fee of $2,448.75 representing 19.5 attorney hours at $125.00 per hour plus 1/4 of a hour for paralegal services at $45.00 per hour. The administrative law judge issued an Order Denying Motions for Reconsideration on September 6, 1990.

On appeal, employer contends that although decedent spent some time performing indisputably longshore activities, the time decedent spent performing these activities was too episodic and *de minimis* to confer status under the Longshore Act. In the alternative,

employer contends that even if decedent is covered under the Act, the administrative law judge erred in failing to allow it to credit the state compensation benefits paid to Clifford Ferguson, decedent's child from a previous marriage, who opted to receive benefits under the Virginia Act, against its compensation liability to decedent's widow and her two children under the Longshore Act under Section 3(e), 33 U.S.C. §903(e) . BRB No. 89-3111. Claimant cross-appeals the Supplemental Decision and Order - Granting Attorney's Fees, contesting both the administrative law judge's reduction in the hourly rate and the disallowance of one hour of travel time. BRB No. 90-2264.

Jurisdiction

After consideration of the arguments raised on appeal, the administrative law judge's Decision and Order, and the evidence of record, we affirm the administrative law judge's finding of jurisdiction under the Longshore Act as it is rational, supported by substantial evidence, and accords with applicable law. *See O'Keeffe*, *supra*. To be covered under the Act, a claimant must satisfy both the "status" requirement of Section 2(3) of the Act, 33 U.S.C. §902(3), and the "situs" requirement of Section 3(a) of the Act, 33 U.S.C. §903(a). *See P. C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 74, 11 BRBS 320, 322 (1979); *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 264, 6 BRBS 150, 159 (1977); *Harwood v. Partredereit AF*, 944 F.2d 1187, 1190 (4th Cir. 1991), *cert. denied*, 112 S.Ct. 1265 (1992).[2] The term "employee" is defined in Section 2(3) as "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring

[2]We note that the administrative law judge's determination regarding "situs" is not challenged by employer on appeal. We therefore affirm the administrative law judge's findings pertaining to Section 3(a) of the Act.

operations, and any harbor-worker, including a ship repairman, shipbuilder, and ship-breaker . . . ." 33 U.S.C. §902(3). Although the amendments to the Act requiring a showing of status are to be liberally construed, *Northeast*, 432 U.S. at 268, 6 BRBS at 161, "Congress did not seek to cover all those who breathe salt air." *Herb's Welding, Inc. v. Gray*, 470 U.S. 414, 423, 17 BRBS 78, 82 (CRT) (1985). Furthermore, while "maritime employment" is not limited to the occupations specifically mentioned in Section 2(3), claimant's employment must bear a relationship to the loading, unloading, building or repairing of a vessel. *See Chesapeake and Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96, 99 (CRT) (1989). Section 2(3) of the Act covers not only employees who are directly engaged in loading or construction of ships, but also employees who are "harbor-workers." The term harbor-worker includes at least those persons involved in the construction, repair, alteration, or maintenance of harbor facilities. *Hawkins v. Reid Associates*, 26 BRBS 8, 10 (1992); *Stewart v. Brown & Root, Inc. v. Joyner*, 7 BRBS 356, 365 (1978), *aff'd sub nom. Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980). Such employees are engaged in activity that is an integral part of and essential to the overall process of loading or unloading a ship. *See Schwalb*, 293 U.S. 40, 23 BRBS 96 (CRT).

The record in the present case reflects that decedent's job duties included removing and constructing bulkheads and cutting holes in the roof of employer's warehouse to accommodate the booms of the incoming ships. As decedent was directly involved in the construction and alteration of employer's harbor facility for the purpose of receiving self-unloading ships, he was a covered harbor worker. *See Hawkins*, 26 BRBS at 10. The record further reflects that although ships did not arrive at employer's maritime facility on a

regular basis, decedent would assist in docking every ship which did come in and would aid in directing the position of the unloading boom via walkie talkie, duties clearly integral to the unloading process. *Schwalb* 493 U.S. 40, 23 BRBS 96 (CRT). Moreover decedent's work in repairing the front end loaders used to load potash from the warehouse to the rail or truck and in repairing the bucket elevator used to move potash from one level of the warehouse to another also constitutes covered employment because it involved the maintenance of machinery essential to the unloading process. *Price v. Norfolk and Western Rail Co.*, 618 F.2d 1059 (4th Cir. 1990); *See also Hayes v. CSX Transportation, Inc.*, ___ F.2d ____, No. 92-1706 (4th Cir. Jan. 22, 1993).

Although, as employer avers, decedent's longshore activities made up only approximately two percent of his overall work duties, we reject employer's assertion that time decedent spent in performing these tasks was too episodic and irregular to confer status under the Act. A claimant is covered under the Act if he spends "at least some of his time engaged in indisputably covered activities. *See Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. at 273, 6 BRBS at 165 (CRT). A claimant's time need not be spent primarily in longshoring operations if the time spent is more than episodic or momentary. *See Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990). In the present case, whenever a ship would arrive decedent was expected to be there to assist in the unloading process as part of his regularly assigned duties. The United States Court of Appeals for the First Circuit affirmed a finding of coverage under similar facts in *Levins v. Benefits Review Board*, 724 F.2d 4, 16

BRBS 24 (CRT) (1st Cir. 1984).[3] Although only six ships actually unloaded in employer's warehouse facility between November 1984 and May 31, 1986, when decedent died, decedent was instrumental in the unloading of each of them. Moreover, although not dispositive of the status inquiry, we note that at the time of decedent's death he was actually performing a maritime function, *i.e.*, modifying employer's maritime facility to accommodate an incoming ship due to arrive the next day. Inasmuch as these indisputably maritime duties were a regular part of decedent's employment for employer, which were neither momentary nor episodic, we affirm the administrative law judge's finding of Longshore Act status. [4] *See Schwabenland v. Sanger Boats*, 683 F.2d 309, 16 BRBS 78 (CRT) (9th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *Boudloche v. Howard Trucking Co., Inc*., 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981);

[3]In *Levins*, although claimant was classified as a book clerk, the court affirmed the administrative law judge's determination that claimant was a covered employee where he was required to work as a runner whenever ships under 3000 tons were loaded or unloaded, and to go out to the container yard whenever there was a discrepancy between the manifest number and the number actually on a container.

[4]Employer also challenges the administrative law judge's statement in his Finding of Fact Number 15 that at the time decedent fell to his death, he was going to repair the front end loader which was used to move the potash. We need not address employer's argument in this regard, however, because it appears to be premised on employer's erroneous assumption that the fact that decedent may not have been engaged in maritime employment at the time of his death somehow alters the finding of status made by the administrative law judge in this case. An employee may not be excluded from coverage, however, merely because he is not engaged in maritime employment at the moment of his injury if, as here, he spent at least some of his time in indisputably covered activities. *See Boudloche v. Howard Trucking Co., Inc.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981); *Thornton v. Brown & Root, Inc.*, 23 BRBS 75 (1989). In any event, we note that at the time of decedent's death, he had been on the roof of the warehouse to cut a hole to accommodate the boom of a jepson due to arrive the next day, an activity which was essential to the unloading process.

Thornton v. Brown & Root, Inc., 23 BRBS 75 (1989). [5]

Section 3(e)

[5]On appeal, employer also contends that the administrative law judge erred in relying on the Board's decision in *Rock v. Sea-land Service, Inc.*, 21 BRBS 187 (1988), *rev'd Sea-Land Service, Inc. v. Rock*, 9053 F.2d 56, 25 BRBS 112 (CRT) (3d Cir. 1992), *cert. denied*, 112 S.Ct. 2286 (1992), and the case cited therein, *Sanders v. Alabama Shipbuilding and Dry Dock Co.*, 841 F.2d 1085, 21 BRBS 18 (CRT) (11th Cir. 1988) in concluding that claimant was a covered employee because decedent's job duties furthered the concern of a covered employer. Employer asserts that the status test as stated in *Rock* and *Sanders* is overly broad and conflicts with recent jurisdiction holding of the United States Supreme Court. In *Rock*, the Board found that claimant, a courtesy van driver, who transported passengers primarily within his employer's main terminal was covered under the Act because the services he performed were essential to the maritime industry and furthered the concerns of a maritime employer. Although the Board's decision in *Rock* was subsequently reversed in *Sea-Land Service Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112 (CRT) (3d Cir. 1992), *cert. denied*, 112 S.Ct. 2286 (1992), the administrative law judge's reliance on the Board's *Rock* decision, however, does not constitute reversible error inasmuch as his finding of coverage was not based solely on the fact that claimant's duties furthered employer's maritime concern. Rather, consistent with *Schwaulb*, 493 U.S. at 40, and *Caputo*, 432 U.S. at 273, the administrative law judge in addition determined that decedent was a covered employee because he performed work which was essential to the unloading process on a regular, albeit infrequent, basis.

Employer's assertion that the administrative law judge erred in failing to allow him to credit the state payments made to Clifford Ferguson under the Virginia Act against its federal liability to decedent's widow and her two children under the Longshore Act similarly must fail. Under Section 3(e), employer is entitled to a credit for "any amounts paid to an employee for the same injury, disability, or death for which benefits are claimed under the Longshore Act to avoid the possibility of double recovery. 33 U.S.C. §903(e). *See Lustig v. Todd Shipyards Corp.*, 20 BRBS 207, 211 (1988), *aff'd in part and rev'd in part sub nom. Lustig v. United States Department of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT) (9th Cir. 1989), In the present case at the time of the administrative law judge's Decision and Order, decedent's widow and his three children had been awarded and were receiving benefits under the Virginia Worker's Compensation Act (the Virginia Act). Pursuant to the Virginia Act, the four beneficiaries divide 66 2/3 percent of the decedent's average weekly wage equally subject to a statutory maximum of $311.00 per week. Accordingly, under the Virginia Act, the widow and the three children were each entitled to receive $77.75 per week.

In making the award of death benefits in the present case, the administrative law judge determined that pursuant to Section 9(b) of the Act, 33 U.S.C. §909(b), the widow was entitled to receive 50 percent of decedent's stipulated average weekly wage of $512.50. The administrative law judge further determined that in light of the Section 9(b) statutory maximum which limits the total amount payable under the Longshore Act to 66 2/3 percent of the employee's average weekly wage, decedent's dependent children were entitled to

split the remaining 16 2/3 percent of decedent's stipulated average weekly wage equally. Pursuant to this formula, the administrative law judge determined that widow's share under the Longshore Act was $256.25 and that each of the three children was entitled to $28.47 per week with a total weekly death benefit of $341.67. Consistent with Sun Ship, Inc. v. Commonwealth of Pennsylvania, 447 U.S. 715, 100 S.Ct. 2432, 12 BRBS 890 (1980) the administrative law judge also found that as Clifford, decedent's child by his former marriage, and the widow and her children represented two distinct family units, Clifford was at liberty to choose to continue to receive the more favorable compensation benefits available to him under the Virginia Act. Because the Supreme Court explicitly recognized in Sun Ship, that concurrent jurisdiction could result in more favorable awards than under the LHWCA, 447 U.S. at 724, and that the Longshore Act was intended to provide a minimum benefit rate, we reject employer's assertion that the fact that employer's overall liability under both the Virginia and Longshore Act exceeds the 66 and 2/3 percent maximum imposed by Section 9(b) constitutes reversible error. As Clifford's larger recovery will extinguish claimant's right to death benefits under the LHWCA, there is no danger of double recovery. See Ponder v. Peter Kiewit Sons' Co., 24 BRBS 46, 55 (1990). The widow and her children, however, are also entitled to receive the benefits due them under the Act subject to employer's offset for benefits previously paid to them under the Virginia Act. Because allowing employer to credit the state payments made to Clifford against its liability to the widow and her children under the LHWCA would in effect deprive them of a portion of the minimum benefit which the Longshore Act was intended to provide, the administrative law judge in the present case properly determined that employer was not entitled to offset its state liability to Clifford Ferguson against its Federal liability under the Longshore Act.

As the administrative law judge in the present case properly allowed employer to credit the state payments made to each of the claimants against its liability to each under the Longshore Act in accordance with Section 3(e), we affirm this determination.

Claimant's assertion on cross-appeal that the administrative law judge erred in disallowing one hour of the 4 hours requested on September 30, 1988 for travel from his office in Norfolk to the hearing in Hampton is also rejected. Fees for travel time may be awarded only where the travel is necessary, reasonable, and in excess of that normally considered to be a part of overhead. Swain v. Bath Iron Works Corp., 14 BRBS 657, 666 (1982); Harrod v. Newport News Shipbuilding & Dry Dock Co., 14 BRBS 592, 593 (1981). As the administrative law judge in the present case acted within his discretion in finding that counsel's travel from Norfolk to the hearing in Hampton was local in nature, and not in excess of that normally considered overhead for the Tidewater region, we affirm the administrative law judge's one hour reduction for time claimed for travel on the date of the hearing. *Neeley v. Newport News Shipbuilding and Dry Dock Co.*, 19 BRBS 138 (1986). *See generally Muscella*, 12 BRBS 272. [6] Claimant's assertion that the administrative law judge erred in reducing the hourly rate from $145 to $125 for the work performed after January 1, 1989 similarly must fail as claimant has not met its burden of showing the $125 hourly rate awarded is unreasonable. *See generally Watkins v. Ingalls Shipbuilding, Inc.*, BRBS , BRB Nos. 90-1034 and 90-2229 (February 9, 1993).[7]

[6]As claimant does not challenge the administrative law judge's denial of the remaining 1.751 hours, the reduction of these hours is affirmed.

[7]Although claimant argues that the local deputy commissioner awards fees of $145.00

per hour, and that Administrative Law Judge Robert L. Cox also awarded a fee based on a $145.00 hourly rate in Samuel M. Hill v. Newport News Shipbuilding, 88-LHC-423, the amount of an attorney's fee is within the discretion of the body awarding the fee. *See* 20 C.F.R. §702.132.

Accordingly, the Decision and Order, Supplemental Decision and Order - Granting Attorney Fees, and Order Denying Motions for Reconsideration of the administrative law judge are affirmed.

SO ORDERED.

BETTY J. STAGE, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge