

W.T.)
)
 Claimant-Petitioner)
)
 v.)
)
 GULF CONCRETE, LLC/) DATE ISSUED: 09/26/2007
 BAYOU CONCRETE COMPANY,)
 INCORPORATED)
)
 and)
)
 ZURICH NORTH AMERICAN)
)
 Employer/Carrier-Respondent) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Mitchell T. Lattof, Sr. (Lattof & Lattof, P.C.), Mobile, Alabama, for claimant.

Richard W. Franklin and Benjamin Y. Ford (Armbrecht Jackson LLP), Mobile, Alabama, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2006-LHC-0088) of Administrative Law Judge Clement J. Kennington 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).

Claimant worked as a truck driver for employer from November 1, 1999, to February 2005, delivering concrete from its plants to various locations, including a number of waterfront sites. In particular, claimant stated that during his time with employer, he made approximately twenty or more concrete deliveries to Alabama State Docks, Atlantic Marine, Battleship Bender and Pinto Island, as well as an additional twenty or more deliveries to Ingalls Shipyard. Upon leaving his work for employer, claimant held several other positions as a truck driver and was, at the time of the hearing, employed by Asphalt Services as a dump truck driver.

An audiogram administered on April 26, 2005, revealed that claimant had a binaural hearing loss of 7.5 percent, prompting him to file a claim for benefits under the Act. Employer contested the claim on the ground that claimant's work as a truck driver was insufficient to meet the status and situs tests under the Act. 33 U.S.C. §§902(3), 903(a). Alternatively, employer argued that claimant failed to prove his hearing loss was a result of his work for employer.

In his decision, the administrative law judge concluded that claimant did not establish situs under Section 3(a), 33 U.S.C. §903(a), or status under Section 2(3), 33 U.S.C. §902(3). The administrative law judge further found that even if claimant had established coverage under the Act, he was judicially estopped from pursuing his claim because of a prior inconsistent position in his bankruptcy suit regarding the existence of his pending compensation claims. Accordingly, benefits were denied.

On appeal, claimant challenges the administrative law judge's findings that his employment with employer was not covered under the Act, as well as the administrative law judge's alternative finding that claimant is judicially estopped from pursuing his claim under the Act. Employer responds, urging affirmance of the denial of benefits.

Claimant initially argues that the administrative law judge erred in finding that he did not establish that he was engaged in maritime employment pursuant to Section 2(3) of the Act, 33 U.S.C. §902(3). Claimant maintains that he was directly responsible for pouring concrete from his mixer truck to a pump that would then move the concrete via a hose to ships or to dockside construction sites where it was needed. As such, claimant specifically contends that his work activities were an integral part of the construction, repair and/or alteration of dockside piers or facilities, and thus, are covered under the Act.

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 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), 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). Thus, in order to demonstrate that coverage under the Act 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).

Section 2(3) of the Act provides:

The term “employee” means 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

33 U.S.C. §902(3). Generally, a claimant satisfies the “status” requirement if he is an employee engaged in work that is integral to the loading, unloading, constructing, or repairing of vessels. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). Moreover, Section 2(3) covers those workers injured while maintaining or repairing buildings and machinery essential to the shipbuilding and the loading/unloading processes, *Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT); *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981); *Price v. Norfolk & Western Ry. Co.*, 618 F.2d 1059 (4th Cir. 1980); and those workers injured during the construction of “inherently maritime” structures, such as piers and dry docks, *Pittman Mechanical Contractors, Inc. v. Director, OWCP [Simonds]*, 35 F.3d 122, 28 BRBS 89(CRT) (4th Cir. 1994); *Hullingshorst Industries, Inc. v. Carroll*, 650 F.2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982); *Brown & Root, Inc. v. Joyner*, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), *cert. denied*, 446 U.S. 981 (1980); *Hawkins v. Reid Associates*, 26 BRBS 8 (1992).

We affirm the administrative law judge’s finding that claimant’s work responsibilities, during the times he delivered concrete to waterfront sites,¹ are insufficient to meet the status requirement. Contrary to claimant’s assertion, his work activities were not an integral part of the construction, maintenance or repair of “inherently maritime” structures, as he did not personally perform any tasks which may be deemed essential to those covered endeavors. See e.g., *Graziano*, 663 F.2d 340, 14 BRBS 52 (maintenance of structure housing shipbuilding machinery is essential, as is repair of machines themselves); *Price*, 618 F.2d 1059 (maintenance worker injured

¹ The record establishes that claimant made a total of approximately 40 trips to waterfront locations, incorporating anywhere from ten minutes to two hours per visit, over the course of his five and one-half years as a concrete driver for employer. HT at 36, 100.

painting a structure essential to loading operations); *Alabama Dry Dock & Shipbuilding Co. v. Kininess*, 554 F.2d 176, 6 BRBS 229 (5th Cir. 1977) (sandblasting of a crane to remove rust is covered due to necessity for use of crane in shipbuilding); *Kerby v. Southeastern Public Service Authority*, 31 BRBS 6 (1997), *aff'd mem.*, 135 F.3d 770 (4th Cir.), *cert. denied*, 525 U.S. 816 (1998) (claimants whose duties involved the maintenance and operation of a power plant which supplied electricity to shipyard were covered). In this regard, claimant has not established that he was involved in the building, maintaining, or repairing of any maritime facilities. Rather, his work involved merely delivering a construction supply, concrete, to sites where it was used by other individuals in furtherance of their respective projects.

In this regard, claimant's work in delivering construction supplies to a maritime work site is akin to that of truck drivers who transport stored cargo for further transshipment.² In *Caputo*, the Supreme Court explained that coverage under the Act is limited to those whose work facilitates the loading, unloading, repair or construction of vessels:

The closest Congress came to defining the key terms [in Section 902(3)] is the "typical example" of shoreward coverage provided in the Committee Reports. The example clearly indicates an intent to cover those workers involved in the essential elements of unloading a vessel - taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area. The example also makes it clear that persons who are on the situs but are not engaged in the overall process of loading and unloading vessels are not covered. *Thus, employees such as truck drivers, whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation are not covered.*

Caputo, 432 U.S. at 266-67, 6 BRBS at 160-61 (emphasis added). Thus, it has been held that truck drivers whose responsibility is to pick up and/or deliver stored cargo from or destined for marine transportation are engaged exclusively in land transportation and thus are not covered under the Act. *See Zube*, 31 BRBS 50; *see also McKenzie v. Crowley America Transport, Inc.*, 36 BRBS 41 (2002); *Martinez v. Distribution Auto Serv.*, 19

² We need not address claimant's argument regarding the administrative law judge's finding that claimant's work in pouring concrete was not part of a continuous process integral to loading, unloading, or repairing ships, as we hold that his employment as a truck driver in this case is not, by its very nature, maritime employment. *See Caputo*, 432 U.S. at 266-67, 6 BRBS at 160-61; *Zube v. Sun Refining & Marketing Co.*, 31 BRBS 50 (1997), *aff'd mem.*, No. 97-3382 (3^d Cir. July 31, 1998).

BRBS 12 (1985); *Dorris v. California Cartage*, 17 BRBS 218 (1985), *aff'd Dorris v. Director, OWCP*, 808 F.2d 1362, 19 BRBS 82(CRT) (9th Cir. 1987).

Claimant's deliveries to shipyards and maritime facilities place him in the same category as a truck driver "whose responsibility on the waterfront is essentially to pick up or deliver cargo unloaded from or destined for maritime transportation." *Caputo*, 432 U.S. at 266-67, 6 BRBS at 160-61. While claimant's delivery of concrete was not "destined for maritime transportation," but instead used on maritime construction projects, his work at those waterfront locations, *i.e.*, the pouring of concrete from his truck to the pumps or pump trucks, was, like that of claimant *Zube*, 31 BRBS 50,³ incidental to his primary responsibility of delivering concrete to the site. Thus, claimant's delivery of construction supplies to a maritime site is not a covered activity. *Caputo*, 432 U.S. at 276-279, 6 BRBS at 166-169; *Dorris*, 808 F.2d 1362, 19 BRBS 82(CRT); *Zube*, 31 BRBS 50. We therefore affirm the administrative law judge's finding that claimant did not establish that he was engaged in maritime employment and thus, is not covered under the Act. 33 U.S.C. §902(3); *Caputo*, 432 U.S. at 276-279, 6 BRBS at 166-169; *Dorris*, 808 F.2d 1362, 19 BRBS 82(CRT); *Zube*, 31 BRBS 50. Consequently, the administrative law judge's denial of benefits is affirmed.⁴

³ *Zube* was a tanker-truck driver employed by a refining company to transport petroleum from a storage tank located at a terminal facility to various service stations. His duties included driving to the storage tank facility, pumping petroleum into his truck, and delivering the product to service stations. *Id.*

⁴ Given this disposition, we need not address claimant's remaining contentions.

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge