No. 97-1874

In the Supreme Court of the United States

OCTOBER TERM, 1997

HOLT CARGO SYSTEMS, INC., PETITIONER

v.

BERNARD KEIFER, SR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a truck driver who spends approximately five percent of his time performing tasks essential to the loading and unloading of vessels is engaged in maritime employment and is therefore a covered "employee" under Section 2(3) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 902(3).

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OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 142 F.3d 428 (Table). The decision and order of the Benefits Review Board (Pet. App. 3a-8a) is unreported. The decision and order of the administrative law judge (Pet. App. 9a-18a) is reported at 30 Ben. Rev. Bd. Serv. (MB) 294 (ALJ).

JURISDICTION

The court of appeals entered its judgment on February 23, 1998. The petition for a writ of certiorari was filed on May 21, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Longshore and Harbor Workers' Compensation Act (LHWCA or Act), 33 U.S.C. 901 *et seq.*, provides compensation to covered employees for work-related injuries that result in disability, and to survivors if the injury causes death. Compensation under the Act is available only if the injury occurs on a maritime "situs," *i.e.*, on navigable waters and certain adjoining land areas. 33 U.S.C. 903(a). The worker must also satisfy a "status" requirement—*i.e.*, he must be an "employee," defined by the Act as a person engaged in "maritime employment." 33 U.S.C. 902(3); see *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 265 (1977). The LHWCA does not define the term "maritime employment." It states, however, that an "employee" "includ[es] 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); see also 33 U.S.C. 902(3)(A)-(H) (specific exclusions from "employee" definition).

2. Respondent Bernard Keifer was employed as a truck driver by petitioner Holt Cargo Systems. Pet. App. 11a. During the course of his employment, on June 16, 1993, respondent Keifer was injured at petitioner's marine terminal when a piece of steel pipe he was helping to load onto his trailer fell on his finger. *Id.* at 4a, 12a. While in petitioner's employ, respondent Keifer spent 95% of his time transporting cargo from petitioner's terminals to other piers and warehouses and picking up empty containers and returning them to the terminals. *Id.* at 5a-6a, 11a-12a. He also transported equipment used in the ship loading and unloading process around the terminals to

and from repair areas. *Id.* at 6a, 12a; see also Pet. 4. Respondent Keifer testified at the hearing in this case that he transported such equipment as often as four to six times a month, or as rarely as once a month, and he estimated that during the six months preceding his injury he had performed such work approximately 20 times. Pet. App. 6a, 17a. In addition, "at least some of the time, [petitioner's] supervisors directed [c]laimant to * * * [drive equipment on and off the trailer] or were aware that he was doing it." *Id.* at 17a. On other occasions, he voluntarily "assisted other employees in loading the trailer." *Id.* at 16a.

3. Respondent Keifer sought benefits under the LHWCA for disability arising out of the injury to his finger. The parties stipulated that Keifer was injured on a covered situs, see p. 2, *supra*; that he had suffered a period of temporary disability because of his injury; and that he had sustained a permanent disability in the form of a 17.5% loss of the use of his finger. Pet. App. 10a-11a. The claim was referred for hearing before an administrative law judge (ALJ). The sole issue in dispute was whether Keifer was an "employee" within the meaning of 33 U.S.C. 902(3). Pet. App. 11a.

The ALJ held that Keifer was not a covered employee and accordingly denied his claim for benefits. Pet. App. 9a-18a. The ALJ stated that "as the question is whether [c]laimant, **overall**, was a longshore employee or a non-longshore employee, the nature of the duties he was performing at the specific time he was injured is all but irrelevant." *Id.* at 15a-16a. The ALJ therefore declined to consider Keifer's contention that he "was actively participating in the loading of the cargo from the vessel at the time his injuries

were sustained." *Id.* at 15a. The ALJ concluded that Keifer's primary work activity of hauling cargo to and from the terminal, which occupied 95% of his work time, was not covered activity. *Id.* at 16a. The ALJ rejected Keifer's argument that his maritime "status" was established by his duties transporting equipment, used in the loading and unloading of cargo, around the terminal to and from a repair shop. The ALJ agreed with Keifer that such activity was covered longshore work. *Id.* at 17a (citing *Chesapeake & O. Ry.* v. *Schwalb*, 493 U.S. 40 (1989)). He concluded, however, that because those activities constituted "at the very most" five percent of Keifer's work, they were "not an essential part of his job duties and [were] proportionally too minor to allow him to be considered an employee under Section 2(3) of the Act." Pet. App. 17a, 18a.

4. The Benefits Review Board (Board) reversed. Pet. App. 3a-8a. It stated that "[a] claimant's time need not be spent primarily in longshoring operations if the time spent is more than episodic or momentary." *Id.* at 5a. The Board noted that petitioner had not challenged the ALJ's finding that Keifer spent five percent of his time in activity essential to the loading and unloading process. *Id.* at 8a. It held that Keifer had thereby established his entitlement to benefits under the LHWCA, and it remanded for entry of an award of permanent partial disability benefits. *Ibid.*[1]

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[1] We note that a sentence from the Board's opinion is not fully reproduced in the appendix to the petition for a writ of certiorari. The italicized words are omitted from the final sentence at Pet. App. 7a, which should read: "Thus, although claimant's *work duties in this regard were infrequent, those duties were a regular part of claimant's* assigned overall duties

5. Petitioner sought review in the court of appeals. The court of appeals issued a judgment order, without opinion, affirming the Board's decision. Pet. App. 1a-2a.

ARGUMENT

The Benefits Review Board applied the correct legal standard in resolving this case. The court of appeals' unpublished ruling affirming the Board's decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. The court of appeals affirmed by judgment order the Benefits Review Board's ruling that an employee satisfies the LHWCA's status requirement if he is regularly engaged in maritime employment for some portion of his work time. The Board correctly recognized that a worker may come within the LHWCA's definition of "employee" even though his duties are not primarily maritime in nature, so long as his maritime activities are more than "momentary" or "episodic." Pet. App. 5a. That approach finds direct support in *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249 (1977), in which this Court observed that "when Congress said it wanted to cover 'longshoremen,' it had in mind persons whose employment is such that *they spend at least some of their time in indisputably longshoring operations*." *Id.* at 273 (emphasis added).[2] See also *Chesapeake & O. Ry.* v.

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and cannot be said to have been discretionary or extraordinary." (emphasis added).

[2] The full quotation in *Northeast Marine Terminal* states that "when Congress said it wanted to cover 'longshoremen,' it had in mind persons whose employment is such that they spend at least some of their time in indisputably longshoring opera-

Schwalb, 493 U.S. 40, 46 (1989) ("the LHWCA, as amended, *cover[s] all those on the situs involved* in the essential or integral elements of the loading or unloading process") (emphasis added).

The LHWCA broadly defines "employee" to include "any person engaged in maritime employment," 33 U.S.C. 902(3), a definition that calls for an "expansive view" of LHWCA coverage. *Northeast Marine Terminal*, 432 U.S. at 265, 268. The decision in this case is consistent with the statutory text and promotes Congress's purpose of covering those workers on an LHWCA situs who perform some portion of the process of moving cargo from a ship to land transportation. See *P. C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69, 82-84 (1979). Accordingly, those courts of appeals that have considered the question have ruled, based on *Northeast Marine Terminal*, that a claimant satisfies the LHWCA's status test if he is regularly engaged for some portion of his time in maritime employment. See *Boudloche* v. *Howard Trucking Co.*, 632 F.2d 1346, 1347-1348 (5th Cir. 1980) (truck

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tions and who, without the 1972 Amendments, would be covered only for part of their activity." 432 U.S. at 273. Because only injuries on navigable waters were covered by the LHWCA before the 1972 amendments, that statement might be read to suggest that Congress's expansion of coverage in 1972 was designed to bring within the Act's reach only those workers who perform some of their duties on navigable waters. That view, however, was rejected in *P. C. Pfeiffer Co.* v. *Ford*, 444 U.S. 69 (1979), which held that the Act's coverage is not limited to workers who "could have been assigned" to work over navigable waters. *Id.* at 77-78. Thus, a worker meets the LHWCA status requirement if he spends some of his time in longshoring operations, even if that time is spent solely on the land areas adjoining navigable waters falling within the LHWCA situs definition.

driver who spent 2.5 to 5% of his time loading or unloading vessels at unequipped piers, and some additional time assisting in loading and unloading at equipped piers, is covered), cert. denied, 452 U.S. 915 (1981); *Schwabenland* v. *Sanger Boats*, 683 F.2d 309, 311-312 (9th Cir. 1982), cert. denied, 459 U.S. 1170 (1983); *Graziano* v. *General Dynamics Corp.*, 663 F.2d 340, 343-344 (1st Cir. 1981).

Contrary to petitioner's suggestion (Pet. 6-8), the legislative history of the 1972 amendments to the LHWCA does not cast doubt on the legal standard employed by the Board in this case. The Committee Reports accompanying those amendments indicate that the Act should not be construed to cover workers who are injured on a covered situs but who are "not engaged in the overall process of loading and unloading vessels." *Northeast Marine Terminal*, 432 U.S. at 267; see also *id.* at 266 n.27 ("employees whose responsibility is *only* to pick up stored cargo for further trans-shipment would not be covered") (emphasis added). The Reports do not suggest that a worker must be primarily engaged in maritime activities in order to come within the Act's coverage.

Although the ALJ's findings are ambiguous on this point, see Pet. App. 17a-18a & n.3, the Board understood the ALJ to have found that respondent Keifer spent five percent of his time in covered activity, *id.* at 7a. Petitioner appears to accept that view of the evidence. See Pet. 3 ("95% of Keifer's time in the employment of Petitioner was involved in non maritime land based transportation of cargo"), 4-5. We agree with the Board that a worker who is regularly assigned maritime duties that take up five percent of his time is an "employee" within the meaning of the Act, and that such a level of regular activity cannot be

deemed "episodic," "momentary," or de minimis for purposes of the LHWCA status inquiry.[3]

2. The decision below does not conflict with any decision of another court of appeals. As we explain above, see pp. 6-7, *supra*, those courts of appeals that have addressed the quantum of maritime duties that workers must perform in order to meet the LHWCA status test have adopted the "some of their time" formulation employed by the Benefits Review Board in this case.

Contrary to petitioner's assertion (Pet. 11), the court of appeals' disposition of this case does not conflict with the decision of the Ninth Circuit in

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[3] The maritime status of a worker can be based either upon his activity at the moment of injury or upon his maritime occupation as a whole. See generally *Northeast Marine Terminal*, 432 U.S. at 271 (resolving a claimant's status based on activities at time of injury), 272-274 (reserving question of whether another claimant's activity at time of injury was covered activity, and resolving the claimant's status based on his potential overall tasks); *Chesapeake & O. Ry.*, 493 U.S. at 43, 47 (finding coverage of employee on basis of activity at time of injury), 49 (Blackmun, J., concurring) (noting that claimants need not have been engaged at time of injury in covered activity; crucial factor is activity to which they "may be assigned"). Although the petition appears to assume that respondent Keifer was engaged in non-maritime activities at the time of his injury, see Pet. i, 10, Keifer has taken the contrary position, see Pet. App. 15a, and the ALJ declined to resolve that dispute, see *id.* at 15a-16a. In our view, the ALJ erred in treating as irrelevant the nature of the activities in which Keifer was engaged at the time of his injury. That error did not affect the ultimate disposition of the case, however, in light of the Board's conclusion that Keifer was covered on the basis of his overall duties, which include regular maritime activity.

Dorris v. *Director, OWCP*, 808 F.2d 1362 (1987).[4] The court in *Dorris* observed that "[t]he status requirement is satisfied where a person spends 'at least some of [his] time in indisputably longshoring operations.'" *Id.* at 1364 (quoting *Northeast Marine Terminal*, 432 U.S. at 273). Its holding that Dorris failed to satisfy the Act's status requirement was based on the ALJ's factual finding that "if Dorris engaged in any longshoring type of work it was only on an episodic basis." *Ibid.*

The court in *Dorris* did not suggest that a worker must be primarily engaged in maritime duties in order to qualify for LHWCA benefits. To the contrary, it recognized that the Fifth Circuit in *Boudlouche* had found the status requirement to be

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[4] Petitioner also argues (Pet. 11) that the decision below conflicts with the Third Circuit's own decision in *Sea-Land Service, Inc.* v. *Rock*, 953 F.2d 56 (1992). Even if that contention were correct, an intra-circuit conflict would not warrant this Court's review. "It is primarily the task of a Court of Appeals to reconcile its internal difficulties." *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, no conflict exists. The court in *Sea-Land* held that the claimant's driving of a courtesy van for visitors, executives, and crew members at a marine terminal was insufficiently related to loading and unloading of vessels to be considered maritime employment. 953 F.2d at 60-67. The court also ruled that the claimant's occasional transport of longshoremen, who were normally transported by a separate bus and whose transport was not included in the claimant's job description, was "infrequent activity undertaken by the employee" that did not provide a basis for coverage. *Id.* at 67; see also *id.* at 61 ("neither the Court nor Congress intended to expand coverage to those wholly uninvolved with ship-building or loading or unloading cargo"). Nothing in *Sea-Land* suggests that coverage under the LHWCA is limited to workers who are primarily assigned to maritime duties.

satisfied where a worker spent 2.5 to 5% of his time in maritime activities. 808 F.2d at 1365. The *Dorris* court did not express disagreement with the Fifth Circuit's resolution of that case; it simply explained that Dorris, unlike Boudlouche, "was neither expected to nor assigned to perform longshoring work." *Ibid.* Nothing in *Dorris* is inconsistent with the Third Circuit's determination that respondent Keifer, whose regularly assigned duties included maritime activity that occupied approximately 5% of his time, was an "employee" within the meaning of the LHWCA.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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