BRB No. 97-0693

YVONNE D. PUGH	)	
	)	
Claimant-Petitioner	)	DATE ISSUED: _____
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
	)	
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

Robert E. Walsh and Matthew H. Kraft (Rutter & Montagna, L.L.P.), Norfolk, Virginia, for claimant.

Benjamin M. Mason (Mason & Mason), Newport News, Virginia, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (96-LHC-97 and 96-LHC-98) of Administrative Law Judge Fletcher E. Campbell, Jr., 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).

On March 31, 1993, claimant developed a problem with her right hand while operating a printing press during the course of her employment as a reproduction clerk at employer's shipbuilding facility. Claimant's job duties at that time required her to work exclusively in an office in Building 86, which was located on the waterfront on employer's premises. In that capacity, claimant spent approximately 85 percent of her time operating a printing press to print invitations, cards, crane information, safety booklets, sports schedules for the apprentice schools, newsletters, and in-house flyers. The remainder of the time, she would operate various other machinery used to copy blueprints and changes

to blueprints. In addition, she was responsible for burning plates to be put on the press, matting work, and loading ink into the press. Furthermore, approximately two days a month, she would work on the copier. Tr. at 21-27. In performing her work duties at this facility, claimant was not required to wear a hard hat, safety shoes, or protective eyewear.

As a result of her work-related hand injury, claimant underwent several surgical procedures, after which Dr. Vonu placed her on numerous restrictions. In October 1994, as a result of these restrictions, claimant was moved to Building 5, employer's sheet metal shop, where she worked in the drawing vault -- a room where the microfiche for blueprints is stored. In this job she received requests to produce certain copies, pulled the microfiche, and printed it on a large sheet. While working in this area, claimant was responsible for enlarging various drawings in connection with repair and shipbuilding work being done at employer's facility. During this time, on almost a daily basis, claimant was required to walk down to different waterfront offices or to the Navy Department next door to obtain drawings which were not located in her particular building. Tr. at 32, 68. When claimant left Building 5 to go to other offices she was required to wear a hard hat, steel-toed shoes, goggles, and hearing protection.

On or about December 21, 1994, claimant was released from all job restrictions. Immediately following her release, claimant alleged that she sustained a second injury to her right wrist while unloading some drawings from a van. Tr. at 44. The shipyard then closed for the Christmas holidays. In January 1995, claimant returned to her prior job in Building 86, but was placed on restrictions. On April 24, 1995, she was laid off, and she thereafter remained unemployed until June 25, 1995, when she found alternate employment with the International Longshoreman's Association. Employer voluntarily paid claimant temporary total disability compensation from August 10, 1994 through August 15, 1994, from October 26, 1994 through November 2, 1994, and from March 1, 1995 through March 9, 1995. In addition, employer paid claimant permanent partial disability compensation based on Dr. Vonu's five percent permanent impairment rating, although these benefits were subsequently voided and categorized as paid under the Virginia Workers' Compensation Act. Tr. at 9-12. Claimant sought additional temporary total disability benefits from April 25, 1995, through June 24, 1995, as well as continuing medical treatment by Dr. Vonu.

Finding the Board's reasoning in *Williams v. Newport News Shipbuilding & Dry Dock Co.,* 28 BRBS 42 (1994), *vacated mem.,* 47 F.3d 1166, 29 BRBS 75 (CRT) (4th Cir. 1995)(table), persuasive, the administrative law judge concluded that because claimant was at all relevant times a reproduction clerk whose work involved copying blueprints and other documents in an office environment, she was excluded from the Act's coverage under the clerical exclusion of Section 2(3)(A), 33 U.S.C. §902(3)(A)(1994). Claimant appeals that determination. Employer responds, urging affirmance. For the reasons that follow, we affirm the administrative law judge's decision.

Claimant first contends that the administrative law judge erred in finding her to be an excluded clerical employee under Section 2(3)(A), inasmuch as the record reflects that at

the time of her March 30, 1993, injury, the majority of her job involved mounting and printing documents used directly in ongoing ship repair and shipbuilding at the yard. Claimant further asserts that, although the administrative law judge also erred by failing to independently analyze whether claimant satisfied the status requirements based on the work she was performing at the time of her second December 21, 1994, injury, the same holds true with regard to this injury. Claimant argues that as she was responsible for enlarging various drawings utilized in the repairing and building of ships, and was required to wear a hard hat and carry bundles of drawings which she was required to retrieve from various other areas in the shipyard, she does not fall within the clerical exclusion of Section 2(3)(A) because the work she performed is neither exclusively clerical nor exclusively performed in an office setting.[1]

For a claim to be covered by the Act, a claimant must establish that her injury occurred within a covered area under Section 3(a) and that she is a maritime employee under Section 2(3). 33 U.S.C. §§903(a), 902(3)(1994); *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 exists, a claimant must satisfy the "situs" and "status" requirements of the Act. *Id.; see also Riggio v. Maher Terminals, Inc.,* 31 BRBS 58 (1997).

Generally, a claimant satisfies the "status" requirement if she is an employee 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, she must spend "at least some of [her] time"' in indisputedly maritime activities. *Caputo,* 432 U.S. at 273, 6 BRBS at 165. Although an employee is covered if some portion of her activities constitute covered employment, those activities must be more than episodic, momentary, or incidental to non-maritime work. *Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 24 (CRT) (1st Cir. 1984); *Boudloche v. Howard Trucking Co.*, 632 F.2d 1345, 12 BRBS 732 (5th Cir. 1980), *cert. denied,* 452 U.S. 915 (1981); *Ripley v. Century Concrete Services*, 23 BRBS 336 (1990). In 1984, Congress amended Section 2(3) to specifically exclude certain employees from coverage. Section 2(3)(A) provides:

[1]Claimant cites several decisions issued by various administrative law judges in support of her arguments. Such decisions, however, are not binding precedent on the Board.

> (3) 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, but such term does not include --
>
> (A) individuals employed *exclusively to perform office, clerical,* secretarial, security or data processing work;
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> * * *
>
> if such [individuals] are subject to coverage under a State Workers’ compensation law.

33 U.S.C. §902(3)(A) (1994)(emphasis added). The relevant legislative history reflects that the amendments to Section 2(3) are intended to exclude certain employees whose "activities and occupations either lack a substantial nexus to maritime navigation and commerce or do not expose employees to the types of hazards normally associated with longshoring, shipbuilding, and harbor work." Cong. Rec. S11622-23 (September 20, 1984)(statement of Senator Hatch); *Powell v. International Transportation Services*, 18 BRBS 82, 84 n.5 (1986). Thus, the Board has held that while a claimant's duties may be covered under the general definition of maritime employment in Section 2(3), a claimant may nonetheless be excluded from coverage by the specific exceptions to coverage in Section 2(3)(A)-(H).[2] *Bergquist v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 131 (1989).

[2]The exclusion of clerical workers is not a new concept added in 1984. In *Caputo*, addressing the 1972 Amendments, the Supreme Court stated that "purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo" are not covered under the Act, 432 U.S. at 273, 6 BRBS at 165, relying on the legislative history of the 1972 Amendments.

Contrary to claimant's assertions in this case, the administrative law judge's decision that claimant is not covered by the Act is supported by substantial evidence and in accordance with law. The facts in the present case are virtually identical to those in *Williams,* upon which the administrative law judge relied. In *Williams,* the Board held that claimant, a reproduction clerk employed by the same employer performing the same duties as the claimant in the present case, was an excluded clerical employee despite the fact that her work may have been an integral part of the shipyard's mission of shipbuilding and repair.[3] Claimant attempts to distinguish this case from *Williams* based on the fact that she was required to leave her office to retrieve documents located in other buildings at employer's facility and thus did not perform her duties exclusively in a business office. A similar argument was rejected by the Board in *Stone v. Ingalls Shipbuilding, Inc.,* 30 BRBS 209 (1996). In the present case, moreover, the administrative law judge explicitly discussed this distinction and rejected it, characterizing claimant's performance of these duties as momentary and episodic.[4] While the administrative law judge's characterization of claimant's trips outside her office as "momentary and episodic" is not consistent with the record, as claimant testified that these trips were part of her regular duties and performed on a daily basis, any error he may have made in this regard is harmless inasmuch as he also found that when claimant left her office it was only for reasons incidental to her clerical duties. An employee performing exclusively clerical work who occasionally leaves the office in performing such work, such as retrieving documents as claimant did here, is nonetheless excluded under Section 2(3)(A). *Stone,* 30 BRBS at 213 (1996). Thus, for the reasons previously stated in our decisions in *Williams* and *Stone*, we reject claimant's arguments and affirm the administrative law judge's determination that claimant is excluded from coverage under Section 2(3)(A).

Accordingly, the Decision and Order of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief

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[3]In *Williams,* the Board held that under the facts presented, claimant was excluded by Section 2(3)(A) as a matter of law, reversing the administrative law judge's decision that she was covered because her work reproducing documents was integral to shipbuilding. On appeal, the United States Court of Appeals for the Fourth Circuit agreed with the Board that the issue was whether claimant's duties were exclusively clerical and performed exclusively in a business office, but vacated the Board's decision because the administrative law judge did not make the necessary factual findings. In the present case, however, the administrative law judge did make the relevant factual findings.

[4]As it is undisputed that at the time of her first injury claimant's duties were performed exclusively in an office, in recognizing that the present claimant differed from the claimant in *Williams* in that she would have to leave the office occasionally, the administrative law judge was obviously referring to claimant's duties at the time of her second injury. Thus, claimant's argument that the administrative law judge erred by failing to make an independent determination of status based on her duties at the time of the second December 1994 injury is rejected.

Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge