BRB No. 12-0036

JOHN A. SANTORE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEW YORK CONTAINER TERMINAL	)	
	)	
and	)	
	)	
SIGNAL MUTUAL INDEMNITY ASSOCIATION, LIMITED	)	DATE ISSUED: 09/11/2012
	)	
Employer/Carrier-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Granting Employer's Motion for Summary Judgment of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Andrew R. Topazio (Marciano & Topazio), Hoboken, New Jersey, for claimant.

Paul L. Edenfield (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Order Granting Employer's Motion for Summary Judgment (2011-LHC-01174, 01175) of Administrative Law Judge Theresa C. Timlin 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. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant filed a claim under the Act seeking benefits for his bilateral carpal tunnel syndrome which, he alleged, arose as a result of his work for employer as a hiring agent.[1] In response, employer filed a Motion for Summary Judgment averring that claimant's work as a hiring agent was "clerical" in nature, and thus excluded from coverage pursuant to Section 2(3)(A) of the Act, 33 U.S.C. §902(3)(A). The administrative law judge found that while claimant's work as a hiring agent was integral to employer's loading and unloading operations,[2] he is excluded from coverage under Section 2(3)(A) because the work was exclusively clerical and office-oriented in nature. In this regard, the administrative law judge found that while claimant was sporadically required to leave his office, his functions outside the office remained "essentially clerical," because he attended meetings and confirmed the identity of workers who had been hired to the timekeeper or foreman at the hiring hall. The administrative law judge thus found that "even construing the facts in the light most favorable to claimant, as demonstrated in his affidavit," his infrequent trips out of the office did not expose him to hazardous conditions inherent to longshore work. Accordingly, the administrative law judge granted employer's motion for summary judgment.

On appeal, claimant challenges the administrative law judge's finding that he is an excluded clerical employee under Section 2(3)(A) and argues that the administrative law judge improperly granted summary judgment in employer's favor. Employer has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds in agreement with claimant's position and requests that the Board vacate the administrative law judge's order and remand the case for further proceedings.

[1]Claimant worked for employer exclusively in this capacity from 1996 until his retirement in April 2010.

[2]This finding is based on the fact that claimant's job involved selecting the men who ultimately performed unloading and loading jobs for employer. *See infra* at 4.

Under the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges (OALJ Rules),[3] any party may move, with or without supporting affidavits, for summary decision at least twenty days before the hearing. 29 C.F.R. §18.40(a). In determining if summary judgment is appropriate, the administrative law judge must look at the record in the light most favorable to the party opposing the motion, and must draw all inferences in favor of the party opposing the motion. *See O'Hara v. Weeks Marine*, 294 F.3d 55 (2d Cir. 2002). If the pleadings, affidavits, material obtained through discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact and that either party is entitled to judgment as a matter of law, the administrative law judge may enter summary decision. 29 C.F.R. §§18.40(d), 18.41(a).

Under Section 2(3) of the Act, a covered employee is "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). In 1984, Congress amended Section 2(3) to specifically exclude certain employees from coverage. The pertinent provision in this case, Section 2(3)(A), provides for the exclusion of "[i]ndividuals employed *exclusively to perform office clerical*, secretarial, security, or data processing *work*," if such persons are covered by state workers' compensation laws. 33 U.S.C. §902(3)(A) (emphasis added). In this regard, the Board has held that the term "office" modifies the term "clerical," such that "only clerical work performed exclusively in a business office is intended to be excluded." *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1, 3 (2003).

Prior decisions illustrate that the applicability of the Section 2(3)(A) clerical exception hinges on two key elements: 1) whether the work is performed "exclusively" in an office setting; and 2) whether the work requires the exercise of judgment and expertise that goes beyond that typical of clerical work. *See Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005); *Stalinski v. Electric Boat Corp.*, 38 BRBS 85 (2005); *Boone*, 37 BRBS 1; *Ladd v. Tampa Shipyards, Inc.*, 32 BRBS 228 (1998); *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996); *Jannuzzelli v. Maersk Container Serv. Co.*, 25 BRBS 66 (1991) (Clarke, J., dissenting); *see also Morganti v. Lockheed Martin Corp.*, 37 BRBS 126 (2003), *aff'd*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006).

[3]The OALJ Rules apply to this issue, as they are not inconsistent with a rule of special application as provided by statute or regulation. 29 C.F.R. §18.1; *see Adams v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 78 (1989).

Claimant, as a hiring agent, was responsible for fulfilling employer's labor needs on a daily basis to ensure that it had a sufficient number of workers to conduct its loading and unloading process. Much of claimant's job involved computer work and data-entry at employer's company office, although it also included assignments outside of the building. Claimant's affidavit states that he, as part of his job duties, left the office and went to the union hall approximately three times per month to select new employees; he went onto the pier to point out the new hires to the timekeeper or foreman approximately three times per month following his union hall visits; and he ventured to a trailer on the bulkhead behind the crane, located approximately 30 feet from the water, to meet with company managers four times per month.

Applying the legal principles to the facts in this case, we agree with claimant and the Director that there is sufficient evidence to establish the existence of a material and genuine issue of fact as to whether the entirety of claimant's work removed him from the clerical exclusion of Section 2(3)(A). First, the administrative law judge did not adequately address whether claimant's work required the exercise of independent judgment and expertise beyond that of a typical clerical worker. *Wheeler*, 39 BRBS 49; *see also Lockheed Martin Corp. v. Morganti*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006). Claimant's duties as "the man responsible for giving [the company superintendent] what he wants" in terms of the correct number of workers on the terminal for each day's work by selecting, CX 1, Dep. at 6, and then hiring, men from a roster according to need, may involve the exercise of judgment, as well as an expertise, beyond that of a typical clerical worker. *Wheeler*, 39 BRBS 49; *see also Morganti*, 412 F.3d 407, 39 BRBS 37(CRT).

Second, while the administrative law judge found that claimant's work outside the company office was both sporadic and "essentially clerical" and thus, is subject to the clerical exclusion, claimant's affidavit raises an issue of fact as to whether that outside work was indeed "essentially clerical" and/or sporadic. Claimant had to go onto the pier at least three times per month and he also attended meetings another four times a month in a trailer located 30 feet from navigable water. This evidence raises a material question of fact regarding whether claimant performed exclusively clerical work in a business office, i.e., was he confined physically and by function to the administrative areas of employer's operations? *Boone*, 37 BRBS at 3; *Morganti*, 37 BRBS at 133. Similarly, claimant's evidence raises a question of material fact regarding the amount of time claimant spent performing work outside of employer's office on or around the pier. *See Jannuzzelli*, 25 BRBS 66. In addition, the administrative law judge did not identify how attending meetings is "clerical" in nature.

In *Jannuzzelli*, the Board held that an employee was not excluded by Section 2(3)(A), even though he worked primarily in an office on payroll and cost-allocation matters, because at least some of his time was spent at the dock checking in longshoremen, making sure the work crews were sufficiently staffed, and hiring more workers, if necessary, to unload the vessels. As these duties were integral to the unloading of ships, required claimant to work at the docks, and were performed almost every day, the claimant was not engaged exclusively in office clerical work and Section 2(3)(A) did not apply. *Id.* at 69. In this case, claimant's affidavit clarifies that, while not an everyday occurrence, his trips to the pier and to the trailer alongside navigable water were part of his regular routine rather than episodic forays outside his usual office environment. *See Stalinski*, 38 BRBS 85.

Moreover, as claimant and the Director contend, this case is distinguishable from those cited by the administrative law judge in support of her exclusion finding as the work of the claimants in those cases: did not require leaving the office at all, *see Sette v. Maher Terminals, Inc.*, 27 BRBS 224 (1993) (claimant, who worked as a delivery clerk processing papers necessary to release cargo to outbound truck drivers, exclusively performed his work in an office setting); required truly sporadic trips out of the office as opposed to regular ones, *see Stalinski*, 38 BRBS 85 (claimant's trips outside of employer's office, where she worked as a clerk in the quality assurance department, were incidental to her clerical work and simply too sporadic, i.e., approximately 3 trips to a vessel over the course of 12 years, to warrant coverage under the Act); involved work on the pier that was not integrally related to the loading and unloading of ships, *see Ladd*, 32 BRBS 228 (the administrative law judge's application of the clerical exclusion was based, primarily, on the fact that claimant, a production clerk, did not facilitate the building or repairing of ships or loading or unloading of cargo by shifting men around or by hiring workers to ensure that the proper manpower was in place to do those jobs).

Consequently, the administrative law judge's grant of summary decision in employer's favor is vacated. We remand the case to the administrative law judge for findings of fact consistent with applicable law and for resolution of any other issues raised by the parties. On remand, the administrative law judge should address whether claimant's work is subject to the clerical exclusion of Section 2(3)(A). If the evidence presented by the parties with respect to employer's motion for summary decision is insufficient for a resolution of the Section 2(3)(A) issue, the administrative law judge must hold an evidentiary hearing on this issue and/or on any other issues raised by the parties. 33 U.S.C. §§919(d), 923; 20 C.F.R. §702.331 *et seq.*

Accordingly, the administrative law judge's Order Granting Employer's Motion for Summary Judgment is vacated, and the case is remanded for further consideration in accordance with this opinion.[4]

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge

[4]If, on remand, the administrative law judge finds that claimant's job with employer was covered by the Act, she must address and resolve any remaining issues between the parties in this claim.