

FRANK SETTE)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
MAHER TERMINALS,)	DATE ISSUED:
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order and Denial of Petition for Reconsideration of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Philip J. Rooney (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

William M. Broderick, New York, New York, for self-insured employer.

Before: SMITH, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order and Denial of Petition for Reconsideration (90-LHC-521) of Administrative Law Judge Ralph A. Romano denying benefits 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.* We must affirm the findings of fact and conclusions of law of the administrative law judge if they 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 January 5, 1988, claimant was injured in the course of his employment as a delivery clerk at employer's marine facility. His job duties require that he work in an office on employer's premises, where he processes the paperwork necessary to authorize the delivery of outbound cargo to truck drivers.¹ After the driver receives the delivery papers from claimant, the paperwork is

¹The record contains conflicting evidence whether claimant's duties are exclusively performed in an office. Employer presented testimony that claimant is not authorized to leave the delivery office. Tr. at 104, 107. Claimant testified that he occasionally was required to confer with the checker where the cargo is located to address a delivery snafu. Tr. at 59-71.

shown to the checker where the outbound cargo is located. Upon exiting employer's facility, the driver again produces the delivery papers to a security guard at the gate. Employer voluntarily paid compensation and provided medical benefits pursuant to the workers' compensation laws of New Jersey. Thereafter, claimant filed a claim for benefits under the Act. Claimant and employer stipulated that he sustained a work-related injury on January 5, 1988, which caused temporary total disability from January 6 to February 13, 1988. The parties also stipulated that, if coverage under the Act is established, claimant is entitled to an award of benefits for a two percent right leg impairment and a one and one-half percent right arm impairment. *See* 33 U.S.C. §908(c)(1), (2), (19). The parties further agreed that employer is entitled to a credit for temporary total disability benefits paid under New Jersey law should claimant obtain an award under the Act for his temporary total and permanent partial disabilities. *See* 33 U.S.C. §903(e)(1988).

The administrative law judge concluded that claimant did not establish that he is an employee covered under the Act, and the claim for benefits was therefore denied. He reasoned that claimant's position as a delivery clerk was excluded from coverage under the Act pursuant to Section 2(3)(A), 33 U.S.C. §902(3)(A)(1988), which states, *inter alia*, that the term "employee" for purposes of establishing coverage does not include individuals employed exclusively to perform office clerical work. The administrative law judge found that claimant's job duties as a delivery clerk were performed in an office. Under these facts, the administrative law judge found controlling the holding of the United States Court of Appeals for the Third Circuit in *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476, 5 BRBS 393 (3d Cir. 1977), that a delivery clerk who works in an office is not entitled to coverage under Section 2(3) because he is a clerical worker. The administrative law judge determined that the facts in *Farrell* are indistinguishable from those in the instant case, and he therefore concluded that claimant is not covered under the Act. Claimant's motion for reconsideration was summarily denied. On appeal, claimant argues that the administrative law judge erred by finding *Farrell* controlling and by denying coverage pursuant to amended Section 2(3)(A). Employer responds, urging affirmance.

Initially, we hold that the administrative law judge properly relied on *Farrell* to exclude claimant from coverage pursuant to Section 2(3)(A), as this case arises within the jurisdiction of the Third Circuit and the cases are factually indistinguishable. Section 2(3) of the Act, in pertinent part, states:

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....

33 U.S.C. §902(3)(A)(1988). In *Farrell*, the claimant, an ILA member, was working as a delivery clerk in an office adjoining navigable water. His function was to handle paperwork necessary for cargo to be delivered to truckers for removal from the terminal. A trucker would hand the paperwork to the claimant who would determine whether the cargo was properly released. The administrative law judge found that claimant was covered by Section 2(3), reasoning that the clerk's function was essential to the removal of cargo from the terminal. The Board affirmed the administrative law judge's determination. *Farrell v. Maher Terminals, Inc.*, 3 BRBS 42 (1975).

On appeal, the court reversed the Board's decision, holding that claimant's primary duties were those of a clerical worker, and thus he was not covered by the Act. The court stated that if *Farrell* were covered "then it is difficult to conceive of any clerical position in maritime employment that would not be covered." 548 F.2d at 478, 5 BRBS at 396. The court emphasized that *Farrell* worked in an office and was not required to participate in the loading or unloading of cargo. *Id.* In holding that the claimant in *Farrell* was not covered under the Act, the court rejected the Board's interpretation of the 1972 Amendments that Congress intended to exclude only those office clerical employees whose jobs do not require participation in the loading and unloading of cargo. *Farrell*, 548 F.2d at 477-478, 5 BRBS at 395-396. The court held that the legislative history expressed congressional intent that a claimant, whose primary duties were those of a clerk and not a checker, was not entitled to coverage under Section 2(3) of the 1972 Act.

Claimant contends, however, that Supreme Court cases decided subsequent to *Farrell* undermine its rationale. Claimant contends that the *Farrell* court's focus on whether the primary duties of the employee were clerical has been replaced by a functional test focusing on the nexus between a job duty and the loading or unloading of cargo. In the instant case, claimant's job duties could be considered integral or essential to the loading and unloading of cargo, which is the primary criterion for determining coverage under recent Supreme Court decisions. *See Chesapeake and Ohio Ry. Co. v. Schwalb*, 110 S.Ct. 381, 385, 23 BRBS 96, 99 (CRT)(1989). The testimony of claimant and employer's vice president for operations, Joseph Cuerto, establishes that a delivery clerk at employer's marine facility generates and processes the necessary papers for the deliverance of outbound cargo to truck drivers. Tr. at 21-24, 46-49, 99-101, 134. Cargo cannot be released for

transport landward from employer's facility without the accompanying paperwork. Tr. at 134. A truck driver assigned to pick up cargo at employer's facility is required to produce the paperwork received from the delivery clerk to the checker where the cargo is located, and again upon leaving employer's facility. Tr. at 21-24, 46-49. While claimant does not physically handle the cargo, the Supreme Court in *Schwalb* held that Section 2(3) imposes no such requirement. *Schwalb*, 110 S.Ct. at 385, 23 BRBS at 99 (CRT).

Moreover, claimant notes that the court's interpretation in *Farrell* of the relevant legislative history to the 1972 amendments focused on the office situs of claimant's employment, rather than on whether claimant's duties were integral to the loading and unloading of cargo. *Farrell*, 548 F.2d at 478, 5 BRBS at 396. In *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69, 11 BRBS 320 (1979), the Supreme Court rejected a situs-based definition of "maritime employment," in favor of a functional test focusing on the relationship between claimant's work activities and longshoring operations. The Court reasoned that Section 3(a), 33 U.S.C. §903(a), limits the geographic coverage of the Act, while Section 2(3) solely defines the Act's occupational requirements. *P.C. Pfeiffer*, 444 U.S. at 334-335, 11 BRBS at 325. In addition, claimant relies on *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 266 n.27, 6 BRBS 150, 161 n.27 (1977), which was also decided subsequent to *Farrell*. In *Caputo* the Supreme Court noted 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.² Claimant contends he is engaged in the unloading process, for without his participation, cargo cannot be removed from the facility; as his job is necessary for the movement of cargo, he asserts that he is not such a purely clerical employee. Finally, claimant notes that the Court repeatedly has held that the maritime employment definition under Section 2(3) should be expansively construed. *Schwalb*, 110 S.Ct. at 385, 23 BRBS at 99 (CRT); *see also Caputo*, 432 U.S. at 268, 6 BRBS at 161.

While the Board has found merit to arguments regarding the validity of the analysis in *Farrell* in light of later Supreme Court law in cases where an employee performed clerical and other functions related to longshore operations, *see, e.g., Jannuzzelli v. Maersk Container Service Co.*, 25 BRBS 67 (1991), claimant's arguments must be rejected in this case. No Supreme Court case explicitly rejects the holding in *Farrell*, nor does any hold that an employee performing exclusively office clerical work is covered by the Act. Most significantly, the Third Circuit recently restated with favor its holding in *Farrell* that an office clerical worker is not within the coverage of the Act because a clerk's job duties do not include handling cargo. *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 64-65, 25 BRBS 112, 118-119 (CRT)(3d Cir. 1992), *rev'g* 21 BRBS 187 (1988).³ In *Rock*, the

²Insofar as the Third Circuit's statement in *Farrell* that the controlling criterion in determining coverage is the nature of the claimant's primary duties, claimant is correct that *Farrell* has been explicitly rejected by the Supreme Court. In *Caputo*, the Supreme Court held that an employee is covered if he spends "at least some of [his] time in indisputably longshoring operations." *Caputo*, 432 U.S. at 273, 6 BRBS at 165. This case does not, however, involve a situation where claimant spent some of his time at work other than the clerical duties at issue in this case.

³In *Rock*, the circuit court did note that the Supreme Court has rejected the "time of the accident"

court reversed the Board's holding that a courtesy van driver is covered under Section 2(3), and it stated that the most recent Supreme Court holding on the scope of Section 2(3), *Schwalb*, 110 S.Ct. at 381, 23 BRBS at 96 (CRT), does not "mark a shift in the [the court's] understanding" of the boundaries for establishing coverage under Section 2(3). *Rock*, 953 F.2d at 65, 25 BRBS at 119 (CRT). In discussing the facts of its prior decisions, including *Farrell*, the Third Circuit stated:

All of our previously-noted cases indicate that we require some nexus between the employee's activities and either cargo-handling or shipbuilding. . .The employees in [prior Third Circuit] cases have either *directly* handled cargo or have been so far removed from the entire process of loading and unloading that they cannot provide a clear model in this case

Id. (emphasis added). Accordingly, *Rock* affirms the validity of the holding in *Farrell* excluding from coverage office-bound delivery clerks.

The administrative law judge and the Board must defer to the law of the circuit court in which a case arises. *See generally Lepore v. Petro Concrete Structures, Inc.*, 23 BRBS 403, 405 (1990); *see also Aurelio v. Louisiana Stevedores, Inc.*, 22 BRBS 418, 422 (1989), *aff'd mem.*, No. 90-4135 (5th Cir. March 5, 1991). It is clear that *Farrell* is controlling precedent in the Third Circuit. In this case, moreover, the administrative law judge found that claimant, who works in an office, processes the paperwork necessary for the release of cargo to outbound truck drivers. The facts are indistinguishable from those in *Farrell*. We therefore hold that the administrative law judge properly relied upon *Farrell* in the instant case.

Claimant also challenges the administrative law judge's reliance on the 1984 Amendments' exclusion of office clerical workers. The Act as amended in 1984 is applicable to the instant case, as claimant was injured on January 5, 1988. *See Bergquist v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 131, 133 n.1 (1989). The 1984 Amendments explicitly exclude from coverage those workers who otherwise would be covered, including those employed exclusively as office clerical workers. *See* 33 U.S.C. §902(3)(A)(1988). Claimant asserts that this language was intended to exclude from coverage those office clerical workers whose work is not necessary to longshoring operations but who perform clerical functions necessary to any business operation, such as data processing. In citing *Farrell* in *Rock*, however, the court noted the Section 2(3)(A) exclusion of office clerical workers, which suggests that the court viewed *Farrell* as consistent with the exclusion. *Rock*, 953 F.2d at 64 n.12, 25 BRBS at 118 n.12 (CRT). The relevant legislative history to the amended Section 2(3) does not establish conclusively whether longshore clerks processing documents integral to the loading and unloading process are excluded from coverage under Section

approach for determining coverage, which the court relied on in part to deny coverage in *Farrell*. *Rock*, 953 F.2d at 64 n. 13, 25 BRBS at 118-119 n.13 (CRT); *see also Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 272-274, 6 BRBS 150, 165-169 (1977).

2(3)(A) based on the fact that they work exclusively in an office.⁴ Compare House Rept. No. 98-570, 98th Cong. 2d Sess., reprinted in 1984 U.S.C.C.A.N. 2763-2737 with Conf. Rept. No. 98-1027, 98th Cong. 2d Sess., reprinted in 1984 U.S.C.C.A.N. 2736, 2772-73. However, the exclusion of "office" clerical workers is consistent with the emphasis placed on claimant's work in an office in *Farrell*. Given the precedent set by the United States Court of Appeals for the Third Circuit in *Farrell*, as restated in *Rock*, and the language of Section 2(3)(A), we decline to disturb the administrative law judge's finding that claimant is excluded from coverage pursuant to Section 2(3)(A). We therefore affirm the administrative law judge's findings that claimant is not covered by the Act.

Accordingly, the administrative law judge's Decision and Order and Denial of Petition for Reconsideration denying benefits are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

⁴The Board has affirmed a finding of coverage under the Act as amended in 1984 for a clerk-checker who handles documentation presented by truckers delivering cargo and who works in an office. *Caldwell v. Universal Maritime Service Corp.*, 22 BRBS 398 (1989). The claimant in *Caldwell* was subject to reassignment as a checker and his work hours were tied to the movement of cargo. The administrative law judge in the instant case discussed *Caldwell* and found the distinguishing factors were absent; claimant was not subject to reassignment and he worked fixed hours.