

BRB No. 98-0156

OLIVER LADD, JR.)
)
 Claimant-Petitioner) DATE ISSUED: Sept. 28, 1998
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 v.)
)
 TAMPA SHIPYARDS,)
 INCORPORATED)
)
 and)
)
 NATIONAL UNION FIRE INSURANCE)
 COMPANY)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Thomas Albin (Embry & Neusner), Groton, Connecticut, for claimant.

Timothy D. Wolf (Fowler, White, Gillen, Boggs, Villareal and Banker, P.A.), Tampa, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (95-LHC-1656) of Administrative Law Judge Pamela Lakes Wood 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant worked as a production clerk for employer from September 1980

until March 1993. His primary duties with employer consisted of preparing production reports, delivering correspondence, answering telephones, typing and filing. In addition, claimant was required to make manpower distribution reports which involved receiving reports from other clerks in various departments and reporting this information to employer's main office.

Claimant performed the majority of his duties in a house trailer which served as his office. The trailer was located in a noisy, high-traffic area about 50 to 60 feet from one of employer's dry docks, and in close proximity to a number of employer's ship repair shops. Claimant testified that about 80 percent of the time his work duties were performed in his office, and that the other 20 percent was spent making trips throughout the yard to gather and deliver correspondence and summon people to meetings. Hearing Transcript (HT) at 12. Additionally, claimant stated that over the course of his employment he would occasionally walk to the various areas of the shipyard to confirm manpower reports received from department clerks, and to show new clerks around employer's facility. Claimant also testified that while he worked for employer, he was never involved with the actual building or repairing of ships, nor did he ever directly assist in the loading or unloading of cargo from any ship. Employer's Exhibit (EX) 1; HT at 17.

An audiogram administered on April 19, 1993, revealed that claimant had a binaural hearing loss of 6.3 percent, prompting him to file a claim for benefits under the Act. Employer contested the claim on the ground that claimant's duties as a production clerk are insufficient to meet the status test pursuant to Section 2(3) of the Act, 33 U.S.C. §902(3).

In her decision, the administrative law judge determined that claimant is excluded from coverage under Section 2(3)(A) of the Act, 33 U.S.C. §902(3)(A). Specifically, the administrative law judge found that none of claimant's duties as a production clerk were essential or integral to the building or repairing of ships, and that claimant was employed exclusively to perform office clerical work. Accordingly, the claim for hearing loss benefits was denied.

On appeal, claimant challenges the administrative law judge's finding that he has is not covered under Section 2(3) of the Act. Employer responds, urging affirmance.

Claimant argues that the administrative law judge erred in concluding that his duties were not an integral part of the shipbuilding process and that he was

employed exclusively to perform office clerical work since about 20 percent of his time was spent outside of his office regularly visiting all areas of the shipyard. Claimant maintains that his job duties subjected him to the acoustic trauma of the shops where he visited, and that as this is a typical hazard of the shipbuilding industry, he has met the status test in this case.

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 his injury occurred on a landward area covered by Section 3(a) and that his 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); *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996). Thus, in order to demonstrate that coverage exists, a claimant must satisfy the *situs* and the *status* requirements of the Act.¹ *Id.*; see also *Crapanzano v. Rice Mohawk, U.S. Const. Co., Ltd.*, 30 BRBS 81 (1996).

Generally, a claimant satisfies the status requirement if he is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels.² See *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT) (1989). To satisfy this requirement, he need only "spend at least some of [his] time" in indisputably maritime activities. *Caputo*, 432 U.S. at 273, 6 BRBS at 165. Although an employee is covered if some portion of his activities constitute covered employment, those activities must be more than episodic, momentary or incidental to non-maritime work. *Stone*, 30 BRBS at 209; *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990). A key factor in determining status is the nature of the work to which claimant could be assigned. See generally *Lewis v. Sunnen Crane Service, Inc.*, 31 BRBS 34 (1997).

¹The administrative law judge found that claimant meets the *situs* requirement as set out in Section 3(a) of the Act, 33 U.S.C. §903(a). Decision and Order at 4. This finding is not challenged on appeal.

²Thus, contrary to claimant's contention, mere exposure to the typical hazards of the shipbuilding industry is, alone, insufficient to meet the status test.

In 1984, Congress amended Section 2(3) to specifically exclude certain employees from coverage. Section 2(3)(A) 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, but such term does not include--

(A) individuals 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) (1994) (emphasis added). The legislative history explains that the excluded activities and occupations either lack a substantial nexus to maritime navigation and commerce or do not expose those employees to the hazards normally associated with longshoring, shipbuilding and harbor work. H.R. Rep. No. 570, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 2735. The Board has held that while a claimant's duties may arguably fall within the broad language of Section 2(3) as an employee engaged in maritime employment, such a claimant may nonetheless be explicitly excluded from coverage by the specific exceptions to coverage. See *Daul v. Petroleum Communications, Inc.*, 32 BRBS 47 (1998); *King v. City of Titusville*, 31 BRBS 187 (1997); *Stone*, 30 BRBS at 209. Moreover, work which is pertinent, and even integral, to the longshoring process still may be excluded if the work is exclusively clerical and office-oriented. *Stone*, 30 BRBS at 213; *Sette v. Maher Terminals, Inc.*, 27 BRBS 224 (1993).

In rendering her findings on this issue, the administrative law judge considered claimant's contention that the Board's decision in *Jannuzzelli v. Maersk Container Service Co.*, 25 BRBS 66 (1991), mandates a finding of status in the instant case. The administrative law judge first observed that in *Jannuzzelli*, the Board held that an employee was covered by the Act, even though his duties were primarily clerical, when at least some of his time was spent at the dock checking in longshoremen, checking to see if the work crews were sufficiently staffed, and in hiring more workers if there were not sufficient employees to unload the vessels, as these duties were integral to the unloading of ships. She then compared the job duties of the position in *Jannuzzelli* to those performed by claimant in the instant case. The administrative law judge determined that like *Jannuzzelli*, claimant reported on the number of employees who were working different shifts in different departments and that he occasionally went out to the shipyard to check these numbers for accuracy.

She also found similar the fact that claimant spent approximately 20 percent of the time outside of his office delivering correspondence and summoning people to meetings in the main office.

The administrative law judge, however, rationally determined that claimant's employment in the instant case is significantly distinguishable from the covered employment in *Jannuzzelli*. The administrative law judge found that claimant in the case at hand 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. Rather, she observed that claimant was merely checking the accuracy of the numbers that he was reporting and forwarding those numbers to the main office, tasks which the administrative law judge found were exclusively clerical and did not involve any decision-making. In addition, the administrative law judge found that claimant's work involved processing data on paper, and not handling shipbuilding materials or cargo or allocating manpower for shipbuilding and repair or loading and unloading. See, e.g., *Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 24 (CRT) (1st Cir. 1984). Thus, the administrative law judge determined that while claimant's duties were sometimes performed outside of his office, he was still merely performing the clerical duties which he had been hired to perform.³ See *Stone*, 30 BRBS at 213. The administrative law judge therefore concluded that claimant was employed exclusively to perform office clerical work, and that his trips outside his office were merely incidental to performing his clerical duties.

In this regard, the Board's decision in *Stone* is analogous to the instant case. As in the present case, the claimant in *Stone* worked in a trailer office in the shipyard where most of her time was spent ordering and tracking material, and researching budgets and dates of completion. *Stone*, 30 BRBS at 211. Claimant also prepared spread sheets for work-station packages, gathering and compiling the appropriate information for presentation to the foremen, and approximately two days a week,

³The instant case is similarly distinguished from the Board's decision in *Riggio v. Maher Terminals, Inc.*, 31 BRBS 58 (1997), wherein the Board held that if a claimant indeed occasionally works as a checker, he is not ||exclusively= a clerical employee and is not excluded from coverage by Section 2(3)(A) because he spends ||at least some time in indisputably= maritime employment. In this case there is no evidence that claimant's duties, at any time, ever went beyond the ||exclusively= clerical work he was expected to perform.

claimant would assist the secretary in the wet dock building, filing documents, moving boxes, unpacking coveralls, answering the phone, punching holes in reports, taking head counts, and basically doing whatever needed to be done. *Id.* Claimant's job duties required her, on occasion, to travel about the shipyard to assist the secretary in the wet dock building and/or meet with management's secretary or the foremen on the ships to correct reporting discrepancies. *Id.* The administrative law judge found that the vast majority of claimant's work was done in an office and that her sporadic visits to ships were only incidental to her office work. In light of this, the administrative law judge concluded that claimant did not have the required maritime status and was a clerical employee excluded from coverage under Section 2(3)(A) of the Act. *Id.* at 211-212. Holding that employees whose jobs may be integral to the shipbuilding or loading and unloading process but whose positions are exclusively clerical and office-oriented are removed from coverage, the Board affirmed the administrative law judge's conclusion that claimant did not satisfy the status requirement and thus was not covered by the Act. *Stone*, 30 BRBS at 213.

In the instant case, the administrative law judge's findings that claimant's work is clerical in nature, that it is performed primarily in an office setting, and that claimant's forays outside the office are merely an extension of his office work are rational and supported by substantial evidence. As the administrative law judge's decision comports with applicable law, her finding that claimant, through application of the clerical exclusion set out at Section 2(3)(A), is precluded from coverage under the Act and thus is not entitled to benefits is affirmed. *Stone*, 30 BRBS at 209; see also *Sette*, 27 BRBS at 224 (delivery clerk who processed papers necessary to release cargo to outbound truck drivers excluded as his work was performed in an office setting); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990) and *Bergquist v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 131 (1989) (key punch operators excluded under clerical exception).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge