

BRB No. 01-0561

RUBY MAE MICKENS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
NEWPORT NEWS SHIPBUILDING	)	DATE ISSUED: <u>April 2, 2002</u>
AND DRY DOCK COMPANY	)	
	)	
Self-Insured	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

Before: DOLDER, Chief Administrative Law Judge, SMITH and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order (00-LHC-2077) of Administrative Law Judge Daniel A. Sarno, 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'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant, who was employed as a material ordering clerk for employer, alleges that she suffered injuries to both her knees as well as her back and right leg when she fell while crossing railroad tracks on her way from employer's parking lot to her office building on October 8, 1997. As a material ordering clerk, claimant works in an office building described as employer's Building 1773, where she is required to use a computer to request materials needed by employer's supervisors and insure that the paperwork is correct. *See* HT at 12, 36-37. If, upon the materials' arrival in an adjacent warehouse, it is determined that they do not match the order submitted by claimant, claimant will leave her office in order to check the part number and address any discrepancies that might be found between the material ordered and the material received. HT at 13. While in employer's warehouse, claimant might be required to tag an item if the employee whose

job it is to tag the material is not available. HT at 13. Claimant testified, however, that these visits to the warehouse occurred “very seldom” and that she actually tagged items “not often.” HT at 11, 13. If the item were less than ten to fifteen pounds and if a material support man was not available, claimant testified that she would place the items on a pallet whereupon someone else would assure that the supervisor received it. HT at 14, 41. Claimant testified that this task was also performed “not often,” which she opined was maybe once a week. HT at 14. The frequency with which claimant was required to visit employer’s warehouse ranged from twice a week to twice a month depending upon the accuracy of the orders received. HT at 36-37.

In his Decision and Order, the administrative law judge determined that claimant is excluded from coverage pursuant to Section 2(3)(A) of the Act, 33 U.S.C. §902(3)(A). Specifically, the administrative law judge found that while the employment tasks performed by claimant are integral to the smooth-functioning of employer’s shipyard, those tasks are exclusively clerical in nature; moreover, the administrative law judge found that claimant’s visits to employer’s warehouse were merely incidental to the performance of her clerical duties as a material ordering clerk. Accordingly, claimant’s claim for benefits under the Act was denied.

On appeal, claimant challenges the administrative law judge’s finding that she is not covered under Section 2(3) of the Act. Employer has not responded to this appeal.

For a claim to be covered by the Act, claimant must establish that her injury occurred upon the navigable waters of the United States, including any dry dock, or on a landward area covered by Section 3(a) and that her 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, claimant must satisfy the “situs” and the “status” requirements of the Act.<sup>1</sup> *Id.*; see also *Crapanzano v. Rice Mohawk, U.S. Constr. Co., Ltd.*, 30 BRBS 81 (1996).

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 *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). To satisfy this requirement, she need only “spend at least some of [her] time” in indisputably 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. *Stone*, 30 BRBS 209; *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff’d*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990).

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<sup>1</sup>In the instant case, the parties stipulated that claimant met the situs requirement. See Decision and Order at 2.

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) (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 excluded from coverage by the specific exceptions contained in Section 2(3). *See Daul v. Petroleum Communications, Inc.*, 32 BRBS 47 (1998); *King v. City of Titusville*, 31 BRBS 187 (1997); *Stone*, 30 BRBS 209. Thus, clerical work which is pertinent, and even integral, to shipbuilding is nonetheless excluded if the work is exclusively clerical and office-oriented. *See Ladd v. Tampa Shipyards, Inc.*, 32 BRBS 228 (1998); *Stone*, 30 BRBS at 213; *Sette v. Maher Terminals, Inc.*, 27 BRBS 224 (1993).

In the instant case, claimant asserts that the administrative law judge erred in denying her coverage under the Act since the record establishes that her employment duties as a material ordering clerk were an essential and integral part of employer's shipbuilding process, that a substantial stoppage in the shipbuilding process would occur should claimant's duties not be performed, and that her work in employer's warehouse was neither momentary nor episodic. In addressing this issue, the administrative law judge concluded that, although the tasks performed by claimant were integral to the smooth functioning of employer's shipyard, claimant's job as a material ordering clerk involved exclusively clerical duties which exclude her from coverage under the Act. Specifically, the administrative law judge found that claimant's employment tasks included ordering materials to be delivered, comparing the materials received with the invoice order, and should a discrepancy be found to exist, occasionally tagging the arrived materials. *See* HT at 11. Moreover, the administrative law judge noted claimant's testimony that the majority of her work is performed either on a telephone or computer terminal in an office setting. *See* HT at 36. Lastly, the administrative law judge found that although claimant occasionally was required to visit employer's warehouse to ensure that the proper materials had in fact been delivered, and that claimant would at times move items weighing less than fifteen pounds onto pallets, those visits are merely incidental to the performance of her clerical responsibilities. *See Ladd*, 32 BRBS 228; *Stone*, 30 BRBS 209. The administrative law judge therefore concluded that claimant was employed exclusively to perform office clerical work, which was excluded from coverage under the Act by Section 2(3)(A).

We reject claimant's initial contention that she must only show that her position was integral to and an essential link in the shipbuilding process in order to establish coverage under the Act, as this assertion fails to recognize that Congress has specifically excluded from coverage certain employees who otherwise would be engaged in maritime employment. See *Ladd*, 32 BRBS 228; *Daul*, 32 BRBS 47. Moreover, claimant's argument that the Board's decision in *Jannuzzelli v. Maersk Container Service Co.*, 25 BRBS 66 (1991), mandates a finding of status in this case is misplaced. In *Jannuzzelli*, the Board held that a longshore employee was not excluded by Section 2(3)(A), even though he worked primarily in an office on payroll and cost-allocation matters, since 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. Claimant was also subject to reassignment as a checker. As these duties were integral to the unloading of ships, required claimant to work at the docks, and were performed almost every day, claimant was not engaged exclusively in office clerical work and Section 2(3)(A) did not apply. In the instant case, however, the vast majority of claimant's duties are performed in an office environment and involve clerical work. The administrative law judge's finding that claimant's occasional visits to employer's warehouse were merely incidental to the performance of her clerical responsibilities is supported by the record. Specifically, claimant testified that she visited employer's adjacent warehouse only if a discrepancy occurred between materials ordered and materials delivered, that those visits were infrequent, and that she would immediately return to her office in order to insure that the paperwork was ultimately correct. Thus, her purpose in going to the warehouse was in furtherance of her responsibility to ensure correct paperwork for the appropriate materials to be obtained.

The case at bar is therefore analogous to *Ladd* and *Stone*. In *Ladd*, the claimant worked as a production clerk which required him to prepare production reports, deliver correspondence, answer telephones, type and file. Additionally, 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 80 percent of his employment duties in a house trailer which served as his office; the remaining 20 percent of claimant's time was spent making trips throughout the yard to gather and deliver correspondence and summon people to meetings. *Ladd*, 32 BRBS at 228-229. The administrative law judge found that claimant's work was clerical in nature, that it was performed primarily in an office setting, and that claimant's trips throughout the yard were merely an extension of his office work; accordingly, the administrative law judge concluded that claimant was a clerical employee excluded from coverage under the Act. *Id.* at 231. The Board affirmed this determination, holding that the administrative law judge's findings were rational and supported by substantial evidence. *Id.*

Similarly, in *Stone*, the claimant 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,

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 visits to employer's warehouse are simply a continuation of her clerical responsibilities are rational and supported by substantial evidence. As the administrative law judge's decision comports with applicable law, his finding that claimant is excluded from coverage under Section 2(3)(A), and thus is not entitled to benefits, is affirmed. *Ladd*, 32 BRBS 228; *Stone*, 30 BRBS 209; *see also Sette*, 27 BRBS 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 is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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PETER A. GABAUER, Jr.  
Administrative Appeals Judge