

JOHN SANTORA)	
)	
Claimant-Petitioner)	DATE ISSUED: _____
)	
v.)	
)	
SEA-LAND SERVICE,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Respondent)	DECISION and ORDER

Appeal of the Decision and Order of Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Michael E. Glazer (Israel, Adler, Ronca & Gucciardo), New York, New York, for claimant.

Keith L. Flicker and Kenneth M. Simon (Flicker, Garelick & Associates), New York, New York, for self-insured employer.

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

PER CURIAM:

Claimant appeals the Decision and Order (94-LHC-1775) of Administrative Law Judge Stuart A. Levin 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 the 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).

Claimant sought compensation under the Act in connection with an August 2, 1993, left hip injury he sustained while attempting to sit down in his office chair. Claimant worked for employer as a Chief Delivery Clerk, a job which involved the processing of documents necessary for the receipt, storage, and release of cargo. The administrative law judge found that claimant's work was ordinarily performed in his office; if there were no problems with the cargo, claimant could perform all of his work in the office. However, if a problem arose with the paperwork regarding a cargo shipment such as illegible or missing marks or cargo which did not match the bill of lading, the Chief Delivery Clerk would leave the office

to rectify the problem. When problems arose regarding damaged cargo, the checker would inform the dock boss, and in his absence, claimant could be notified, requiring that he leave his office to inspect the problem and make decisions about moving the damaged cargo. In addition, the administrative law judge found that the Chief Delivery Clerk may also leave the office to resolve problems arising when cargo is dispatched from the warehouse to truckers in order to resolve problems including incorrect quantities or counting discrepancies.

The sole issue before the administrative law judge was whether claimant satisfied the status requirement set forth in Section 2(3) of the Act, 33 U.S.C. §902(3) (1994). The administrative law judge found that claimant failed to establish status because his primary duties were clerical. Specifically, he found that although claimant, while working as a Chief Delivery Clerk, occasionally went to the loading dock when a recount of cargo was necessary or a mark needed to be clarified, there was no showing that he actually participated in the loading or unloading of cargo. Rather, the administrative law judge found that claimant merely handled the documents necessary to move the cargo and determined that under the United States Court of Appeals for the Third Circuit's decision in *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476, 5 BRBS 393 (3d Cir. 1977), and the Board's decision in *Sette v. Maher Terminals, Inc.*, 27 BRBS 224 (1993), this clerical function was not covered employment and denied the claim accordingly. Decision and Order at 2. Claimant appeals the denial of benefits, and employer responds, requesting affirmance of the decision below.

Claimant contends that the administrative law judge erred in denying benefits. Specifically, claimant argues that inasmuch as his work required him to assist checkers and perform functions identical to those of a checker, including tracking the identity, quantity, and condition of cargo, and preventing theft, the administrative law judge erred in finding that he was an office clerical employee excluded pursuant to Section 2(3)(A) of the Act. Claimant maintains that inasmuch as employer provided him with metal seals and a tool to fix the seals to containers, a function that obviously cannot be performed in an office, he was not performing exclusively office clerical work. Moreover, claimant contends that contrary to the administrative law judge's determination, the fact that he was not involved in the loading and unloading of cargo is not determinative, as checkers, who are prohibited from handling cargo, are nonetheless covered employees under *Northeast Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Claimant also asserts that the administrative law judge erred in finding that he was not a covered employee under *Farrell* and *Sette*, because, unlike those employees, his duties were not exclusively clerical. Claimant contends that because his duties, as well as custom and practice in the industry, required him to frequently leave the office to deal with checkers, observe cargo, place seals on containers, and deal with truckers picking up cargo, he is a covered employee under Section 2(3) of the Act.

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon a covered situs under Section 3(a) and that he was a maritime employee under Section 2(3) of the Act. 33 U.S.C. §§902(3), 903(a). See *Director, OWCP v. Perini North River Associates*, 459 U.S. 297, 15 BRBS 62 (CRT)(1983); *P.C. Pfeiffer Co. v. Ford*,

44 U.S. 69, 11 BRBS 320 (1979); *Caputo*, 432 U.S. at 249, 6 BRBS at 150; *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996). Thus, in order to demonstrate that he is covered by the Act, a claimant must satisfy both the “situs” and “status” requirements.¹

Generally, a claimant satisfies the “status” requirement if he is an employee engaged in work which is integral to the loading, unloading, construction or repairing of vessels. See, e.g., *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96 (CRT)(1989). To satisfy this requirement, an employee must spend “at least some of [his] time in indisputably longshoring operations.” *Caputo*, 432 U.S. at 273, 6 BRBS at 165. Although an employee is therefore covered if some portion of his activities constitute covered employment, these activities must be more than episodic, momentary, or incidental to non-maritime work. *Levins v. Benefits Review Board*, 724 F.2d 6, 16 BRBS 24 (CRT)(1st. Cir. 1984); *Boudloche v. Howard Trucking Co.*, 632 F. 2d 1346, 12 BRBS 732 (5th Cir. 1980), cert. denied, 452 U.S. 915 (1981). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this claim arises, deems activities “maritime” if they are “an integral or essential part of the chain of events leading up to the loading, unloading or building of a vessel.” *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 67, 25 BRBS 112, 121 (CRT)(3rd Cir. 1992).

Under the 1972 Act, workers who performed purely clerical tasks were excluded from coverage, while cargo checkers were viewed as directly involved in the movement of cargo and thus covered. See *Caputo*, 432 U.S. 267 n. 27, 6 BRBS at 161 n. 27. The Act, as amended in 1984, explicitly excludes “individuals employed exclusively to perform office clerical, secretarial, security, or data processing work” from coverage. 33 U.S.C. §902(3)(A) (1994). See *Sette*, 27 BRBS at 224. In adopting this exclusion, however, Congress did not exclude cargo checkers, who remain covered by the Act. H.R. Rep. 98-1027, 98th Cong., 2d Sess., 22-23. Thus, where claimant works “some of his time” as a checker, he is not exclusively an office clerical employee, and the exclusion in Section 2(3)(A) is not applicable. *Riggio v. Maher Terminals, Inc.*, 31 BRBS 58, 61 (1997); *Caldwell v. Universal Maritime Service Corp.*, 22 BRBS 398 (1989). In this case, claimant contends that because he assisted checkers in tracking the identity, quantity, and condition of cargo, and in preventing theft, the work he performed was not exclusively clerical and thus he does not fall within the exclusion of Section 2(3)(A).

On the facts presented, we cannot affirm the administrative law judge’s finding that claimant is excluded from coverage as a clerical worker. In denying coverage based on the fact that claimant’s work was primarily clerical, the administrative law judge relied on the

¹The parties have stipulated that claimant met the situs requirement in this case. Decision and Order at 1.

Board's decision in *Sette* as holding, pursuant to the Third Circuit's decision in *Farrell*, that claimant is not covered by the Act in circumstances where his primary duties are those of a clerical worker. In fact, *Sette* did not apply a primary duties test; rather, the "primary duties" language in *Sette* merely describes the court's decision in *Farrell*. The Board's decision in *Sette* applied *Farrell* to an employee who was solely a clerical worker. The *Sette* opinion discussed the analysis of *Farrell* in light of more recent Supreme Court decisions, specifically noting that the "primary duties test" was rejected by the Court's subsequent holding in *Caputo*, 432 U.S. at 273, 6 BRBS at 165, that an employee is covered if he spends "at least some of [his] time in indisputably longshoring operations." See *Sette*, 27 BRBS at 227-228, n.2. In *Sette*, however, there was no allegation that claimant spent any time on other than office clerical work. Claimant argued in *Sette* that movement of paperwork related to cargo created a sufficient nexus to longshoring operations for coverage. The Board rejected this argument based on *Farrell*, finding its holding that purely clerical workers are not covered is wholly consistent with later precedent. See *Caputo*, 432 U.S. at 267, 6 BRBS at 161; *Rock*, 953 F.2d at 64-65, 25 BRBS at 118-119 (CRT). Thus, *Sette* does not support the use of a "primary duties" test in this case, nor can such a test be supported in view of the Supreme Court's decision in *Caputo*. Thus, the administrative law judge erred in this case is not applying the test set forth in *Caputo*.

In addition to considering claimant's coverage under an inappropriate legal standard, the administrative law judge's reliance on *Sette* and *Farrell* is misplaced, as the administrative law judge's findings suggest that claimant was not exclusively an office clerical worker, unlike the employees in those cases. The administrative law judge acknowledged in his decision that as the Chief Delivery Clerk, claimant would occasionally leave the office to assist checkers when a recount of cargo was necessary or a mark needed to be clarified. Moreover, he noted that claimant would also leave the warehouse when discrepancies arose in the count between the checkers and the truckers and that under such circumstances he would seal the trucks or containers pending further inspection by other Sea-Land personnel. Thus, according to the administrative law judge's decision, claimant left the office and worked both in and outside of the warehouse with the checkers on occasion.

As the administrative law judge did not analyze claimant's duties consistent with the test enunciated in *Caputo*, we vacate his finding that claimant is not covered by the Act and remand the case for reconsideration under the appropriate legal standard. Inasmuch as work as a checker continues to be covered by the Act, the administrative law judge should determine on remand whether claimant spent "at least some" of his time in such covered activities. *Riggio*, 31 BRBS at 61.² If claimant spent "some of his time" assisting checkers

²In rendering his Decision and Order, the administrative law judge did not consider the affidavits and deposition testimony claimant introduced from several of his co-workers which appear to corroborate his testimony. In addition, he did not consider the contrary testimony of Earl Wade, employer's manager of safety and security, that from a job responsibilities perspective there was no reason for claimant to perform any duties in the

or otherwise performed a checker's duties, he is covered by Section 2(3), and the administrative law judge must address all remaining issues.

Accordingly, the administrative law judge's Decision and Order is vacated, and the case is remanded for further consideration in accordance with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

warehouse and that any non-clerical duties he performed were not part of his assigned duties. In reconsidering claimant's status on remand, the administrative law judge should consider this evidence. In order for a claimant to be covered, his maritime work must be a non-discretionary regular portion of his job duties. *See McGoey v. Chiquita Brands, Int'l*, 30 BRBS 237 (1997).