BRB Nos. 07-0382
and 07-0382A

D.R.	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
SEA-LAND SERVICES, INCORPORATED (a.k.a., CSX LINES)	)	DATE ISSUED: 11/30/2007
	)	
and	)	
	)	
KEMPER INSURANCE COMPANIES	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	DECISION and ORDER

Appeals of the Decision and Order Awarding Benefits and the Order Denying Claimant's Motion for Reconsideration of Paul A. Mapes, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., and Michael F. Pozzi, Renton, Washington, for claimant.

Frank B. Hugg (Law Offices of Frank B. Hugg), Oakland, California, for employer/carrier.

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

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Awarding Benefits and the Order Denying Claimant's Motion for Reconsideration (2005-LHC-2193) of Administrative Law Judge Paul A. Mapes 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

Claimant was involved in a slip and fall accident while working for employer as a gatehouse dispatcher at its Dutch Harbor, Alaska, terminal on February 24, 2002. As a result, he was diagnosed with a first-degree right shoulder separation and a cervical disc herniation at the C5-6 level. Both conditions eventually required surgery and resulted in the imposition of medically sanctioned light-duty work restrictions from February 24, 2002. Claimant, not having worked since his February 24, 2002, accident, filed a claim seeking benefits under the Act. Employer controverted arguing, in part, that claimant was excluded from coverage pursuant to Section 2(3)(A) of the Act, 33 U.S.C. §902(3)(A), because his work as a gatehouse dispatcher was exclusively clerical in nature.

In his decision, the administrative law judge determined that claimant was not excluded from the Act's coverage as a clerical employee under Section 2(3)(A) of the Act, as claimant's duties as a gatehouse dispatcher involved the exercise of judgment and expertise beyond that exhibited by clerical workers and involved work outside the physical confines of his office, *i.e.*, the gatehouse. The administrative law judge found claimant invoked the Section 20(a) presumption, 33 U.S.C. §920(a), with regard to the connection between his cervical and right shoulder conditions and his employment and that employer rebutted the presumption. Based on the record as a whole, the administrative law judge found that claimant's cervical and right shoulder conditions are related to the February 24, 2002, work incident. The administrative law judge further found that claimant could not return to his usual employment and that employer did not establish the availability of suitable alternate employment until October 10, 2005. He thus awarded claimant temporary total disability benefits from March 11, 2002, to July 11, 2005, permanent total disability benefits from July 12, 2005,[1] through October 9, 2005, and permanent partial disability benefits thereafter based on the maximum compensation rate of Section 6(b), 33 U.S.C. §906(b).

Claimant sought reconsideration, arguing that the administrative law judge misapplied the maximum compensation rate of Section 6(b). The administrative law judge rejected claimant's argument, citing the Board's decision in *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006). He nevertheless corrected claimant's award of benefits to reflect a calculation error made by the district director and referred the case to

[1] The administrative law judge found, based on Dr. Wickler's opinion, that claimant reached maximum medical improvement for his conditions as of July 12, 2005.

the district director for a determination as to claimant's entitlement to an additional assessment on unpaid compensation pursuant to Section 14(f), 33 U.S.C. §914(f).

On appeal, claimant challenges the administrative law judge's decision to limit claimant's disability compensation to the maximum rate, pursuant to Section 6(c) of the Act, 33 U.S.C. §906(c), in effect at the time of his injury.[2] In its cross-appeal, employer asserts that the administrative law judge erred in finding Section 2(3)(A) inapplicable, and thus, in finding that claimant established that he is covered under the Act. Claimant responds, urging affirmance.

Claimant argues that the administrative law judge erred in establishing a compensation rate for his temporary total, permanent total, and permanent partial disability benefits by reference to the maximum rate in effect as of the date of injury, *i.e.*, February 24, 2002. Claimant acknowledges that the administrative law judge's award and denial of reconsideration are in accordance with the Board's decision in *Reposky*, 40 BRBS 65, but submits that the Board's decision therein was in error.

In his initial decision, the administrative law judge found that the compensation rate for claimant's temporary total, permanent total, and permanent partial disability benefits is $966.08, "the maximum rate for injuries occurring between October 1, 2001, and September, 30, 2002." Decision and Order at 32-33. The administrative law judge added that, with regard to claimant's award of permanent total disability benefits for the period between July 12, 2005, and October 9, 2005, claimant is entitled to "any increases required under Section 6 of the [Act]." *Id.* On reconsideration, the administrative law judge denied claimant's motion based on the Board's holding in *Reposky*, 40 BRBS 65, that "a claimant receiving temporary total disability compensation remains at the maximum rate in effect when benefits commence because, on the following October 1, he would not be receiving benefits for permanent total disability or death and is therefore not entitled to the new maximum rate." *Reposky*, 40 BRBS at 76; *see also Puccetti v. Ceres Gulf*, 24 BRBS 25, 32 (1990). The administrative law judge, however, agreed with the parties that the district director incorrectly calculated the compensation rate for the period

[2] Section 6(b) provides for a maximum compensation rate of 200 percent of the national average weekly wage, which is determined each October 1 pursuant to subsection (b)(3). Section 6(c) provides

> (c) Determinations under subsection (b)(3) with respect to a period shall apply to employees or survivors currently receiving compensation for permanent total disability or death benefits during such period, as well as those newly awarded compensation during such period.

33 U.S.C. §906(c).

of permanent total disability benefits between October 1, 2005, and October 9, 2005. Specifically, the administrative law judge found, pursuant to *Reposky*, 40 BRBS at 79, that claimant's entitlement to permanent total disability benefits must reflect the increase in the maximum compensation rate as of October 1, 2005, to $1,073.64, thereby resulting in his entitlement to additional permanent total disability benefits for the period of October 1 through October 9, 2005.

As claimant concedes, "the administrative law judge's award and denial of reconsideration in this case are in accordance with the Board's decision in *Reposky*." Claimant's Brief in Support of P/R at 4. In *Reposky*, the Board initially rejected the claimant's contention that the statutory maximum rate as of the date the administrative law judge issued her decision in July 2005 should apply to all periods of temporary total disability, including those predating the decision. *Reposky*, 40 BRBS at 76. Rather, the Board held, citing its prior decisions in *Kubin v. Pro-Football, Inc.*, 29 BRBS 117 (1995), and *Puccetti*, 24 BRBS 25, that the pertinent maximum rate is determined by the date the disability commences, as this interpretation of the language of Section 6(c) "maintains consistency in the statute and yields rational results." *Reposky*, 40 BRBS at 76. The Board also held that under the plain language of Section 6(c), claimant is not entitled to a new maximum rate each fiscal year because she was neither currently receiving compensation for permanent total disability nor newly awarded compensation for those periods. *Reposky*, 40 BRBS at 76-77. Lastly, the Board held that in cases where claimant's temporary total disability changes to permanent total disability, the compensation rate for permanent total disability remains the same at the date of maximum medical improvement as the rate in effect for the preceding period of temporary total disability, but that claimant is entitled to the new statutory maximum in effect on October 1 following the date of maximum medical improvement. *Reposky*, 40 BRBS at 77. As the administrative law judge's decisions accord with *Reposky*, 40 BRBS 65, we affirm the administrative law judge's application of the maximum compensation rates.

In its appeal, employer argues that the administrative law judge improperly applied the clerical exclusion by ignoring the congressional intent of the 1984 Amendments to exclude office workers who essentially perform only paper work and administrative tasks. Employer asserts that, as discussed in *Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003), claimant's general confinement, from both a physical and functional standpoint, to the administrative areas of its operations, warrants application of the clerical exclusion under Section 2(3)(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). 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. In this regard, the Board has observed that the legislative history regarding Section 2(3)(A) indicates 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*, 37 BRBS at 3. In other words, the legislative history of Section 2(3)(A) reveals the intent to exclude employees who are "confined physically and by function to the administrative areas of the employer's operations." *Id., citing* 1984 U.S.C.C.A.N. 2734, 2737.

The Board's prior decisions illustrate that the applicability of the Section 2(3)(A) clerical exception hinges on two key elements regarding the work performed: 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); *Morganti v. Lockheed Martin Corp.*, 37 BRBS 126 (2003), *aff'd*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 126 S.Ct. 2319 (2006); *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).

Applying these principles to the instant case, we hold that substantial evidence supports the administrative law judge's finding that claimant's employment duties as a gatehouse dispatcher do not involve exclusively office clerical work. The administrative law judge found that claimant's work required the exercise of judgment and expertise beyond that of a typical clerical worker. *Wheeler*, 39 BRBS 49, *Morganti*, 37 BRBS 126. As the administrative law judge found, claimant's testimony establishes that he was required to perform a variety of tasks, both within an "office" and throughout the terminal as needed. HT at 198-199. Claimant testified that he was required to work with the yard foreman to determine which containers were to be used and where they were to be stored. HT at 85; *see also Wheeler*, 39 BRBS 49, *Morganti*, 37 BRBS 126. More specifically, claimant stated that he advised the yard foremen regarding the priority given to outbound containers and told them which vessel hatches needed to be unloaded first to ensure prompt delivery of incoming containers. HT at 86-92. Claimant also stated that he was, on occasion, responsible for determining the types, and ensuring the availability of, containers needed for transshipping cargo to other ports and finding yard space for the

efficient storage of the containers. *Id*. Thus, claimant's duties as a gatehouse dispatcher did not involve exclusively office clerical work. *Wheeler*, 39 BRBS 49, *Morganti*, 37 BRBS 126.

Moreover, substantial evidence supports the administrative law judge's finding that claimant's duties required him to perform work beyond the confines of his "office," *i.e.*, the gatehouse. Claimant testified that he would occasionally have to physically inspect containers to discern whether they were in a suitable condition or properly loaded,[3] and that he would, at other times, have to go to the freight yard to locate containers or provide additional assistance to drivers.[4] HT at 94-95, 210-213. As the administrative law judge noted, claimant's testimony regarding his "out-of-office activities" is corroborated, in part, by the testimony of a longshoreman, Dan Kondak, who stated that he would generally see claimant working at the gatehouse, but that "it wouldn't be uncommon to see him anywhere," HT at 229, as well as that of Mr. Lynch, who was the manager of the CSX Lines terminal at Dutch Harbor, which indicates that employer expects gatehouse dispatchers to do whatever needs to be done to serve the customers. HT at 257-58; *see also Boone*, 37 BRBS 1; *Jannuzzelli*, 25 BRBS 66.

As the administrative law judge's finding that the work which claimant performed as a gatehouse dispatcher was not exclusively office clerical work is supported by substantial evidence, his conclusion that the clerical exception to coverage under Section 2(3)(A) is inapplicable is affirmed. *Wheeler*, 39 BRBS 49; *Morganti*, 37 BRBS 126; *Boone*, 37 BRBS at 1.

Employer also argues that the administrative law judge erred in finding that claimant established he is a maritime employee under the Act, asserting that as a gatehouse dispatcher his exposure to the "perils and hazards of the unloading process"

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[3] Claimant explained that in inspecting containers, it would be necessary, from time to time, for him to break the seal on the container, attach a new seal, and inform others that the seal had been changed. HT at 95-96.

[4] Claimant stated that his job responsibilities made it necessary for him to leave the gatehouse to go to the freight yard to locate recently off-loaded containers, HT at 97-98, to determine which containers might be fully loaded and ready for pickup, HT at 195-196, or to accompany customers to the freight yard to determine the contents of a particular container. HT at 98. Claimant would also leave the gatehouse to assist a driver or customer deal with problems, such as when he would "hold the door" so that a driver could back a container up to a loading dock, HT at 99, 176, or go to the dock to aid a driver in dealing with broken pallets which might be slowing down an unloading process. HT at 99-100.

was inconsequential and negligible. Claimant urges the Board to reject employer's contention regarding his status as a maritime employee as it was not raised before the administrative law judge in this case. We agree.

At the hearing, employer's counsel stated that it was raising the applicability of the Section 2(3)(A) exclusion in this case, that it did not dispute that the location of the injury, within its terminal premises, satisfied the situs requirement of Section 3(a) of the Act, 33 U.S.C. §903(a), and that there were no "other coverage or jurisdictional issues." HT 25-37. Employer's post-hearing brief similarly indicates that its arguments on coverage were limited to the applicability of the Section 2(3)(A) exclusion. In this regard, employer stated "[a]dmittedly, claimant was working in a position that was an integral part of the longshoring operation in Dutch Harbor." Employer's Post-Hearing Brief at 17. Accordingly, the administrative law judge found that situs was stipulated, that "the [employer and its carrier] concede that the claimant had status as a maritime worker under the provisions of subsection 2(3) at the time of his work injury," and that employer's argument regarding coverage was limited to whether claimant's work as a gatehouse dispatcher was "within the scope of the subsection 2(3)(A) exclusion." Decision and Order at 15, 17.

The Board previously has declined to address factual issues when those arguments were not raised before the administrative law judge. Because employer failed to first raise the general status issue before the administrative law judge, and instead essentially conceded that claimant established, by virtue of his employment as a gatehouse dispatcher, both the status and situs elements of coverage, we decline to address it on appeal. *Turk v. E. Shore R.R., Inc.*, 34 BRBS 27 (2000); *Boyd v. Ceres Terminals*, 30 BRBS 218, 223 (1997); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). The administrative law judge's determinations that the clerical exclusion at Section 2(3)(A) is inapplicable, and thus, that claimant is entitled to coverage under the Act, are affirmed.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Denying Claimant's Motion for Reconsideration are 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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JUDITH S. BOGGS
Administrative Appeals Judge