

BRB No. 97-0490

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

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

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

Keith L. Flicker (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 and Decision and Order on Motion to Reconsider (94-LHC-1564) 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 worked for employer as an assistant dock boss, a job which involved processing documents necessary for the release of cargo. The administrative law judge found that claimant’s duties were primarily performed in an office, although he occasionally left the office to deliver documents to truck drivers and, when there was a problem, he would go down to the dock to recount cargo from a container or classify "wrong marks" on

doors. Claimant also acted as dock boss when the regular dock boss, Mr. Powell, was on vacation. Claimant testified that, while 60 to 70 percent of his duties involved clerical paperwork in the office, six to seven times a day he was called upon to supervise and assist checkers in the warehouse. Tr. at 66, 88. Claimant was injured on July 23, 1992, while acting as dock boss for Mr. Powell.

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 duties were clerical. Specifically, he found that although claimant's duties as an assistant dock boss required him to occasionally go 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 handled the cargo. Rather, the administrative law judge found that he handled the documents necessary to move the cargo and determined that under the United States Courts of Appeals for the Third Circuit's decision in *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476, 5 BRBS 392 (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. Decision and Order at 3. In his Decision and Order on Motion to Reconsider, the administrative law judge rejected claimant's allegation that he was denied due process, and reiterated his prior finding that claimant failed to establish status. In so doing, he explained that, contrary to claimant's assertions, his initial finding that claimant was not a covered employee was not based on the assumption that there is no jurisdiction under the Act unless the involved employee physically loaded and unloaded cargo, but reiterated that as claimant's "primary duties" were those of a clerical worker handling cargo documents, he was not covered. 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 the administrative law judge erred in finding him to be an excluded clerical employee pursuant to Section 2(3)(A) of the Act, asserting that his duties were not clerical but rather involved assisting, supervising, and assigning work to checkers, which is covered activity. Claimant contends that the administrative law judge erred in finding that he was not a covered employee under *Farrell* and *Sette* based on the fact that his primary duties were clerical because the "primary duty" test was rejected by the United States Supreme Court in *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). Furthermore, claimant contends that *Sette* and *Farrell* are factually distinguishable from this case because, unlike the employees in those cases, his duties were not exclusively clerical. Claimant contends that his duties assisting and supervising checkers were integral to the loading and unloading process and, thus, sufficient to confer coverage under 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*, 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 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. BRB*, 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 case 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) (3d 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, 6 BRBS at 161. 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 Terminal Inc.*, 31 BRBS 58, 61 (1997); *Caldwell v. Universal Maritime Service Corp.*, 22 BRBS 398 (1989). In this case, claimant contends that his duties assisting, supervising, and assigning work to checkers prevent him from being considered “exclusively clerical.”

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

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 stated that the Board's decision in *Sette* held that, pursuant to the Third Circuit's decision in *Farrell*, "in circumstances in which 'claimant's *primary duties* were those of a clerical worker ... he was not covered by the Act.'" Decision and Order at 3 (emphasis in original). In fact, *Sette* did not apply a "primary duties" test. The language quoted by the administrative law judge is taken from the Board's description of the *Farrell* case. 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*, moreover, there was no allegation claimant spent any time on other than clerical duties. 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*.

In addition, the administrative law judge's reliance on *Sette* and *Farrell* is misplaced, as the administrative law judge's findings demonstrate claimant was not exclusively an office clerical worker, unlike the employees in those cases who were solely responsible for paperwork.² The administrative law judge acknowledged in his decision that as an acting and assistant dock boss, claimant would "occasionally" leave the office to address counting or marking snafus. Thus, according to the administrative law judge's decision, claimant worked in the warehouse with the checkers on occasion. In addition, as an assistant dock boss and acting dock boss, claimant testified he was responsible for assigning work to the checkers, Tr. at 68. Such work has been recognized as covered activity. *Jannuzzelli v. Maersk Container Service Co.*, 25 BRBS 66 (1991).

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. The case is remanded for reconsideration, addressing whether claimant spent "at least some" of his time in covered activity, consistent with the fact that work as a checker

²Unlike the claimants in *Farrell* and *Sette*, in the present case claimant does not argue that the office clerical work he performs is integral to the process of loading or unloading cargo. His argument here concerns his other duties.

continues to be covered by the Act. See *Caputo*, 432 U.S. at 273-274, 6 BRBS at 165; *McGoey v. Chiquita Brands Int'l*, 30 BRBS 237 (1997); *Riggio*, 31 BRBS at 61. Thus, if claimant spent "some of his time" supervising checkers or assisting as a checker, he is covered by Section 2(3), and the administrative law judge must address the remaining issues in this case.

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Motion to Reconsider are vacated, and this case is remanded for further consideration in accordance with this opinion.³

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

³Claimant's counsel has petitioned for attorney's fees for work performed before the Board. As the case is being remanded and the degree of success which claimant will ultimately achieve is yet to be determined, we deny the fee at this time. See *generally Eckstein v. General Dynamics Corp.*, 11 BRBS 781 (1980). Claimant may refile his fee petition if benefits are awarded on remand.