BRB No. 96-358

LINDA D. STONE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
INGALLS SHIPBUILDING,	)	
INCORPORATED	)	DATE ISSUED:______________
	)	
Self-Insured	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits and Denying Claimant's Motion to Reopen and the Decision on Motion to Reconsider of Samuel J. Smith, Administrative Law Judge, United States Department of Labor.

Bobby G. O'Barr, Biloxi, Mississippi, for claimant.

Paul B. Howell (Franke, Rainey & Salloum), Gulfport, Mississippi, for self-insured employer.

LuAnn Kressley (J. Davitt McAteer, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Janet R. Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits and Denying Claimant's Motion to Reopen and the Decision on Motion to Reconsider (94-LHC-3138, 94-LHC-3139) of Administrative Law Judge Samuel J. Smith 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant was hired in 1991 as a joiner-helper at employer's shipyard with the understanding that she may be called upon to perform joiner duties; therefore, she was required to dress accordingly.[1] Emp. Ex. 32 at 16, 25; Tr. at 40. She worked in a trailer office near the main gate of the shipyard, and her duties included ordering material for shipbuilding, tracking material, filing, putting together work-station packages, researching budgets, and acting as a liaison between the foremen and the planners. Emp. Ex. 32 at 17-18. In May 1992, claimant slipped while taking the trash out of the trailer and injured her back.[2] She returned to work with restrictions in February 1994, worked two weeks in light duty, and was again injured on March 1, 1994. On that day, she clocked out, exited a security gate, and as she crossed an access road to get to the employee parking lot, she tripped over a cable on the roadway. She fell and injured her mouth and broke her arm. Tr. at 56-58, 62-66. Claimant returned to work in November 1994 and eventually resumed most of her normal duties except that she can no longer go onto the ship because of her back condition. Employer voluntarily paid claimant disability benefits under the state workers' compensation law. Tr. at 33, 66-68, 95. Thereafter, claimant filed a claim for benefits under the Act.

The administrative law judge found that claimant did not meet the Section 2(3), 33 U.S.C. §902(3) (1988), status requirement for either injury, and she did not meet the Section 3(a), 33 U.S.C. §903(a) (1988), situs requirement for the second injury. Decision and Order at 10-12. The administrative law judge also found it may be asserted that claimant's second injury was within the course and scope of her employment, but he concluded it was unnecessary to make such a determination in light of his previous findings. Decision and Order at 13. Therefore, the administrative law judge denied benefits. He also denied claimant's motion for reconsideration. Claimant appeals the decisions, and the Director, Office of Workers' Compensation Programs (the Director), responds, in agreement with claimant. Employer responds to both parties, urging affirmance. For the reasons that follow, we affirm the administrative law judge's decisions.

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[1]Claimant was required to wear pants to work. When she went outside the office-trailer, she was required to wear safety goggles, steel-toed shoes, ear-plugs, and a hard hat. Emp. Ex. 32 at 25; Tr. at 40.

[2]This was not part of her regular duties, but the man who generally took out the trash was absent that day. Tr. at 56.

Claimant first contends the administrative law judge erred in finding her to be an excluded clerical employee pursuant to Section 2(3)(A) of the Act, 33 U.S.C. §902(3)(A) (1988).[3] For a claim to be covered by the Act, a claimant must establish that her injury occurred upon a site covered by Section 3(a) and that she was a maritime employee under Section 2(3) and not subject to any specific statutory exclusions. 33 U.S.C. §§902(3), 3(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); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996). Thus, in order to demonstrate that she is covered by the Act, a claimant must satisfy both the "situs" and the "status" requirements. *Id.*; *see also Crapanzano v. Rice Mohawk, U.S. Construction 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* 33 U.S.C. §902(3); *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 46, 23 BRBS 96 (CRT) (1989). To satisfy this requirement, she need only "spend at least some of [her] time" in 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. *Boudloche v. Howard Trucking Co.*, 632 F.2d 1346, 12 BRBS 732 (5th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981); *Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101 (CRT) (11th Cir. 1990). In 1984, Congress amended Section 2(3) to specifically exclude certain employees from coverage. Section 2(3)(A) provides:

> (3) 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--
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> (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) (1988) (emphasis added). Both claimant and the Director contend that claimant's duties were not "exclusively" clerical so as to place her within the exclusion.

According to the legislative history, the term "exclusively" modifies all four classifications

[3]The Director argues that Section 20(a), 33 U.S.C. §920(a), places the burden of showing that claimant is not covered on employer. The Board has consistently held that the Section 20(a) presumption does not apply to the legal issues relating to coverage under the Act. *See George v. Lucas Marine Construction*, 28 BRBS 230 (1994), *aff'd mem.*, No. 94-70660 (May 30, 1996); *Davis v. Doran Co. of Calif.*, 20 BRBS 121 (1987), *aff'd mem.*, 865 F.2d 1257 (4th Cir. 1989). Therefore, we reject the Director's argument.

of work. 1984 U.S.C.C.A.N. 2734, 2736; *see also Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991). Specifically, the House committee was concerned with whether the nature of an employee's work exposes him "to traditional maritime hazards." *Id.* It also noted that the term "office" modifies the term "clerical" and that "[n]ot all clerical work is intended to be excluded -- merely that which is performed exclusively in a business office of the employing enterprise."[4] *Id.* at 2737. Moreover, by separately excluding secretarial and data processing employees, Congress clearly recognized that there are employees performing other clerical functions in an office setting and that these employees also are excluded from coverage. In this case, claimant admits that most of her work occurred in an office setting. She also concedes that, as a joiner-helper, it is her responsibility to do paperwork. Emp. Ex. 32 at 43; Tr. at 42-45. Her supervisor, Mr. McLeod, confirmed this information and in fact considered claimant's job "office help." Tr. at 83. However, he also considered their work an important contribution to the shipbuilding process. *Id.* at 93-94.

Claimant performed many tasks for employer. She testified that most of her time is divided between ordering and tracking material and researching budgets and dates of completion, depending on where they are in the building process. All material she ordered and/or tracked was material to be put onto the newly constructed ships. When she received a bill (a list of compartments on the ship and the materials needed for their completion), she would order the materials from a warehouse on the shipyard, file the bill, track the material to make sure it arrived, and if necessary locate missing materials (generally by telephone).[5] Emp. Ex. 32 at 24-27; Tr. at 34, 36-37, 55. Claimant also prepared spread sheets for work-station packages (a list of bills to be worked), gathering and compiling the appropriate information for presentation to the foremen.[6] Emp. Ex. 32 at 29-33. She also mapped the status of the compartments, keeping track of the date each compartment passed quality assurance and was sold. Additionally, claimant balanced her books with those of

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[4]For example, Congressman Miller stated:

> [Checkers and cargo clerks] are to be distinguished from those other employees of waterfront employers, such as office clerical, secretarial, security or data processing workers, who are not intimately concerned with the movement and processing of ocean cargo, and who are confined physically and by function to the administrative areas of the employer's operations.

House Report on Conference Report on S.38 (Sept. 18, 1984). *See* 20 C.F.R. §701.301(a)(12)(iii)(A) (restating statutory exclusion but providing that longshore cargo checkers and cargo clerks are not excluded).

[5]On rare occasions, she had to go to the trim shop by the wet dock to locate small items which had been misplaced there. Emp. Ex. 32 at 33-34.

[6]Claimant testified that all bills and other documents she compiled were completed by others. She did not have the authority to make decisions regarding materials or time frames but merely logged in changes, and reported her findings or information she received to others. Tr. at 45-46, 49, 53.

management and the foremen. If there were any discrepancies, she would meet with management's secretary or the foremen to correct them.[7] Emp. Ex. 32 at 34-35, 38-39. In addition to the above duties, approximately two days per week, claimant would help the secretary in the wet dock building. She would file documents, move boxes, unpack coveralls, answer the phone, punch holes in reports, take head counts, and do whatever needed to be done. Emp. Ex. 32 at 19-20; Tr. at 61-62. Finally, claimant stated that she was not on the clerical wage scale; rather, she was under the union contract making craft wages and required to obey craft rules. Tr. at 70.

In this case, with regard to her first injury, the administrative law judge stated:

> After closely examining [claimant's] duties, the undersigned finds that Claimant is excluded from coverage under Section 2(3)(A). Persuasive in this determination is the fact that the overwhelming majority of Claimant's work was performed in an office. * * * This finding is not affected by the fact that Claimant occasionally went outside and aboard the ships under construction. * * * These extremely rare trips are simply not enough to remove Claimant from the clerical worker exclusion.

Decision and Order at 9-10. The administrative law judge also found that claimant is excluded with regard to her second injury, stating that "her work was even more office oriented" during the two weeks between her return to work and her second injury because she was not keeping the books and had no reason to leave the office. *Id.* at 10-11. Thus, the administrative law judge specifically found that most of claimant's work is performed in an office trailer and that her "extremely sporadic" trips to the ship "hardly subjected her" to traditional maritime hazards. Decision and Order at 10. Claimant contends these findings are in error, and she relies on several cases to support her argument that she is involved in covered employment.

[7]She met with the secretary in the wet dock building and with the foremen on the ships. Emp. Ex. 32 at 38-39; Tr. at 84. According to claimant, she went aboard the ships to correct discrepancies only three or four times before her first injury. Emp. Ex. 32 at 40-42. She was not responsible for the books during the two weeks preceding her second injury, and she has not gone aboard a ship since her first injury, as her back condition prevents such activity. Emp. Ex. 32 at 65; Tr. at 84-85, 95.

For example, claimant contends her situation is similar to that found in *LeBatard v. Ingalls Shipbuilding Div./Litton Systems, Inc.*, 10 BRBS 317 (1979). In *LeBatard*, the Board determined that a senior pipe clerk whose duties included receiving requisitions for pipe, locating the pipe and loading the pipe onto trucks for delivery to the ships or directly onto the ships, was covered under the 1972 Amendments to the Act. The Board held that the claimant was directly involved in shipbuilding because his duties were a necessary prerequisite to shipbuilding. Specifically, the claimant personally located and hand-carried pipes onto the ship under construction which were then installed on the ship. *Id.* at 319-320. By contrast, claimant herein did not personally move ship components, but merely ordered and tracked the parts from her office.

Claimant also asserts her case is analogous to *Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 24 (CRT) (1st Cir. 1984), and to *Powell v. International Transportation Services*, 18 BRBS 82 (1986). In *Levins*, the United States Court of Appeals for the First Circuit concluded that a book clerk who processes ships' manifests, records and identifies cargo, documents receipts and deliveries, and who had to perform these clerical duties on the ship if there were discrepancies, and acted as a "runner" checking the seal numbers on the containers aboard ships when cargo was loaded on vessels under 300 tons was covered under the Act. The First Circuit stated that although the claimant did not actually handle cargo, he was engaged in "peculiarly maritime" work, agreeing with the administrative law judge that the claimant's function was analagous to that of a checker. In addition, the court found the claimant regularly performed maritime duties outside the office. *Levins*, 724 F.2d at 8, 16 BRBS at 31 (CRT).[8] In *Powell*, the claimant was a vessel planning and stowaways coordinator who worked in an office on the dock, planning and coordinating the loading and unloading of vessels, the necessary manpower, and the storage of hazardous materials. The claimant's work determined the sequence in which containers were loaded and their location in order to ensure the vessel's seaworthiness. He was required to be available during the loading and unloading process in case a change in plan was needed. The Board affirmed the administrative law judge's conclusion that the claimant is covered under the Act, finding his work to be peculiarly maritime. The Board also noted that the administrative law judge likened the claimant's duties to that of a supercargo prior to the advent of containerization. *Powell*, 18 BRBS at 83.

The Director, in support of claimant's position, argues that *Lennon v. Waterfront Transport*, 20 F.3d 658, 28 BRBS 22 (CRT) (5th Cir. 1994), is dispositive of the issue herein. The United States Court of Appeals for the Fifth Circuit, which has appellate jurisdiction over the present case, held in *Lennon* that a marine dispatcher meets the status requirement because his job included contacting boats by radio, arranging crew changes, answering the phones, and managing a film account whereby he actually loaded and unloaded the film from passenger ships. The court affirmed the finding that the claimant's work was not exclusively office clerical work and that he handled cargo sufficiently regularly to be covered under the Act. *Id.; see also Boudloche*, 632 F.2d at 1346, 12 BRBS at 732.

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[8]The administrative law judge in the case at bar correctly assessed that the basis for determining coverage does not rest solely on job classification. *See Levins*, 724 F.2d at 7, 16 BRBS at 30 (CRT); Decision and Order at 9. Thus, claimant's union status is not determinative of the coverage issue.

Reliance on the above cases by claimant and the Director is misplaced, as those cases are distinguishable from the present case. In each of these cases, the claimant's work at times involved maritime activities performed outside the office environment requiring his physical presence on the ships or in the terminals to check on cargo or ship components. *LeBatard* and *Lennon* also differ in that the claimants were directly involved in shipbuilding or the loading and unloading process on more than an episodic basis; both employees had duties other than processing paperwork. In *Levins*, the claimant performed duties analagous to those of a checker. In *Powell*, the claimant coordinated manpower efforts and was integral to the loading and unloading process because his work was required for the vessel to be loaded, as he planned the actual placement of containers and determined the manpower necessary for the job. *See also Jannuzzelli v. Maersk Container Service Co.*, 25 BRBS 66 (1991)(Clarke, J., dissenting) (claimant whose primary duties were performed in office not excluded because he regularly worked on docks checking men in to load and unload); *Caldwell v. Universal Maritime Service Corp.*, 22 BRBS 398 (1989) (office bound clerk-checker covered as he was subject to reassignment as a checker and his work hours were tied to the movement of cargo).

In cases in which the 1984 clerical exclusion was applied, the Board has held that a key punch operator and a key machine operator whose duties were exclusively clerical were excluded from coverage under the Act. *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); *Bergquist v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 131 (1989). Further, the Board held that a delivery clerk who processed papers necessary to release cargo to outbound truck drivers was also excluded from coverage. *Sette v. Maher Terminals, Inc.*, 27 BRBS 224 (1993).[9] Thus, clerical work which is pertinent, and even integral, to the longshoring process may still be excluded if the work is exclusively performed in an office.

Clearly, those workers who are not involved in the shipbuilding or longshoring process are excluded from coverage. *See Crapanzano*, 30 BRBS at 81; *Odness v. Import Dealers Service Corp.*, 26 BRBS 165 (1992). Similarly, workers whose jobs are exclusively clerical and performed exclusively in an office are also excluded from coverage pursuant to the provisions of the clerical exclusion in Section 2(3)(A), although they might otherwise qualify as maritime employees. *See Sette*, 27 BRBS at 224; *Hall*, 24 BRBS at 1; *Bergquist*, 23 BRBS at 131. Thus, 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, as is evidenced by the case at bar. In this case, the administrative law judge specifically found that most of claimant's work is performed in an office and that which is not is too sporadic to warrant coverage. *See Odness*, 26 BRBS at 165. Thus, although claimant may perform a function that is integral to the shipbuilding process, she works in an office setting and her visits to the ships were merely incidental to her clerical work. Consequently, the administrative law judge found claimant is an office clerical

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[9]*See also Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112 (CRT) (3d Cir. 1992); *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476, 5 BRBS 392 (3d Cir. 1977)

employee exclusively, and this finding excludes her from coverage.[10] Therefore, we affirm the administrative law judge's conclusion that claimant has not satisfied the status requirement and is not covered by the Act, as his conclusion is supported by substantial evidence and accords with law.[11]

Accordingly, the administrative law judge's decisions are affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

[10]The facts of this case establish that claimant is covered by a state workers' compensation law. *See* 33 U.S.C. §902(3) (1988); Tr. at 66.

[11]Because we affirm the administrative law judge's conclusion that claimant has not fulfilled the status requirement, we need not address claimant's contention that the administrative law judge erred in finding that the second injury occurred on a non-covered situs.