BRB Nos. 02-0414
and 02-0414A

DOROTHY BOONE Claimant-Petitioner Cross-Respondent v. NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY Employer-Respondent Cross-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: MAR 5, 2003 DECISION and ORDER

Appeals of the Decision and Order on Remand of Fletcher E. Campbell, Jr., Administrative Law Judge, United States Department of Labor.

John H. Klein (Montagna, Breit, Klein, Camden, L.L.P.), Norfolk, Virginia, for claimant.

Jonathan H. Walker (Mason, Cowardin & Mason, P.C.), Newport News, Virginia, for employer.

Before: SMITH, McGRANERY and GABAUER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order on Remand (1999-LHC-1828) of Administrative Law Judge Fletcher E. Campbell, 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 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).

This case is before the Board for a second time. To recapitulate the facts, claimant was working as a materials supply clerk when she sustained an injury to her right knee on July 10, 1998. As a materials supply clerk, claimant would remove invoices attached to individual boxes and containers of materials upon their arrival on trucks to employer's warehouse and then place a numerical code on each invoice to denote its destination within employer's shipyard. She also took the numerical code to a data entry clerk, who recorded the arrival of the materials and created a receipt. Claimant testified that she was not required to open the cartons to check the materials or to move them, as that duty is performed by checkers, nor was she involved in the process of loading or unloading materials. Moreover, she stated that her job was limited to the receiving area of employer's warehouse, and that at no time was she required to enter any of the construction or repair areas or to go on board ships in order to perform her job. At the time of her injury, claimant was kneeling on a pallet in the receiving area, assigning numbers to various materials as they were being unloaded from the truck, when she slipped from the pallet and hurt her right knee.

In his original decision, the administrative law judge found that claimant is excluded from coverage under Section 2(3)(A) of the Act, 33 U.S.C. §902(3)(A), because the evidence does not show that she is a "maritime employee" under the Act. Specifically, the administrative law judge found that claimant's work is exclusively clerical in nature, and that claimant's duties are not essential or integral to the building or repairing of ships. Thus, the administrative law judge denied benefits.

Claimant appealed this decision to the Board. In its original decision, the Board affirmed the administrative law judge's finding that claimant's duties were clerical in nature and that she thus was excluded from coverage pursuant to Section 2(3)(A). *Boone v. Newport News Shipbuilding & Dry Dock Co.*, BRB No. 00-0766 (Apr. 24, 2001)(unpub.). The Director, Office of Workers' Compensation Programs (the Director), filed a timely motion for reconsideration of this decision, urging the Board to consider the effect on this case of the decision of the United States Court of Appeals for the Fourth Circuit in *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 47 F.3d 1166, 29 BRBS 75 (CRT)(4th Cir. 1995)(table), *vacating* 28 BRBS 42 (1994). The Director also contended that the administrative law judge erred in finding that claimant's work was not integral to the shipbuilding process.

On reconsideration, the Board remanded the case for the administrative law judge to make a finding as to whether claimant performed her duties in an office setting. Citing *Williams*, the Board instructed the administrative law judge that if claimant did not work

exclusively in an office, she cannot be excluded under Section 2(3)(A). *Boone v. Newport News Shipbuilding Co.*, BRB No. 00-0766 (Sept. 14, 2001)(on recon.)(unpub.). In addition, the Board applied the decisions in *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989), and *White v. Newport News Shipbuilding & Dry Dock Co.*, 633 F.2d 1070, 12 BRBS 598 (4th Cir. 1980), and held that claimant's work was integral and essential to shipbuilding and that she therefore is a "maritime employee." Thus, the Board reversed the administrative law judge's conclusion on this point.

In his decision on remand, the administrative law judge found that claimant did not work exclusively in a business office. He found that her main work location was the warehouse floor, and that traditional business office functions were not performed there. Therefore, the administrative law judge awarded claimant temporary total disability benefits from January 21, 1999 to January 25, 1999, and permanent partial disability benefits pursuant to Section 8(c)(2), 33 U.S.C. §908(c)(2), for a seven percent disability to the leg thereafter.[1]

On appeal, claimant contends that the administrative law judge miscalculated her permanent partial disability benefits by awarding $66^{2/3}$ percent of the compensation rate rather than $66^{2/3}$ percent of claimant's average weekly wage, which the parties agree was $325.63. Consequently, claimant contends that the administrative law judge's award should be modified to reflect an award of $6,564.70 ([.07 x 288] x 325.63). Employer does not dispute that the administrative law judge's calculation was in error.

On cross-appeal, employer contends that the administrative law judge erred in finding that claimant is covered under the Act. Initially, employer contends that the Board improperly overturned the administrative law judge's original determination that claimant was not a maritime employee, in order to preserve this issue for appeal. In addition, employer contends that the administrative law judge used an overly narrow definition of "business office," and that the evidence supports a finding that claimant is an office clerical worker excluded from coverage under the Act. Finally, employer contends that the administrative law judge should have considered employer's objection to claimant's affidavit regarding the photographs submitted by employer to illustrate her workplace. Claimant responds, urging affirmance of the administrative law judge's finding on remand that she is not excluded from coverage as a clerical employee.

Initially, we will address employer's contention that the Board erred in holding that claimant's job was an integral and essential ingredient of the shipyard process.

[1]The administrative law judge calculated claimant's permanent partial disability benefits as follows: .07 x .667 x 288 x $325.63.

Consistent with Supreme Court law and prevailing circuit opinions, the Board held in its decision on reconsideration that claimant's duties of receiving the shipbuilding materials and forwarding them to the correct destination in the shipyard is integral and essential to the shipbuilding process, as "without an employee to receive materials and forward them to the correct destination within the shipyard, the shipbuilding process could not continue." *Boone*, recon. slip op. at 6; s*ee Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989); *White*, 633 F.2d 1070, 12 BRBS 598; *see also Sumler v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 97 (2002); *Ruffin v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 52 (2002); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 36 BRBS 21 (2002). As the Board thoroughly considered this issue in its decision on reconsideration, we reaffirm its holding that claimant is a maritime employee under the Act as it constitutes the law of the case. *See, e.g., Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff'd on recon.*, 35 BRBS 190 (2002).

Employer also contends that the administrative law judge used an overly narrow definition of the term "office" to determine that claimant is not excluded from coverage pursuant to Section 2(3)(A) of the Act. Section 2(3)(A) states:

> 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—
>
> 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); *see also* 20 C.F.R.§701.301(a)(12)(iii)(A). In *Williams v. Newport News Shipbuilding & Dry Dock Co.*, 47 F.3d 1166, 29 BRBS 75(CRT)(4th Cir. 1995)(table), *vacating* 28 BRBS 42 (1994), the Fourth Circuit held in an unpublished decision that the administrative law judge in that case failed to consider, *inter alia*, "the ultimate questions whether Petitioner's duties were exclusively clerical and performed *exclusively* in a business office." *Williams*, 29 BRBS at 78(CRT) (emphasis added). In its decision on reconsideration in the present case, the Board agreed with the Director's position that the legislative history regarding Section 2(3)(A) indicates that the term "office" modifies the term "clerical," and that only clerical work performed exclusively in a business office is intended to be excluded. *Boone*, recon. slip op. at 4.

On remand, the administrative law judge found that while the term "business office" is not defined by statute or pertinent case law, it is generally understood to be an enclosed or semi-enclosed area which is likely to be characterized by the presence of desks, chairs, telephones, computer terminals, copy machines, and perhaps book shelves. Decision and Order on Remand at 2. The administrative law judge found that this contrasts with a warehouse, which is a large open area where supplies are received, stored, and dispensed. We hold that these determinations are rational. The administrative law judge next found that claimant's main work area in the instant case was in a warehouse and that computer work, telephoning, copying and other traditional business office functions would not have been performed in that area. Thus, the administrative law judge concluded that claimant did not work exclusively in a business office. The administrative law judge based this finding on the photographs submitted by employer, claimant's affidavit, and claimant's testimony at the hearing, all of which he found were uncontradicted.[2]

Employer contends that claimant's work area should be characterized as a "rolling business office." However, 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." *See* 1984 U.S.C.C.A.N. 2734, 2737. The administrative law judge considered the function of claimant's work area and concluded that it was a warehouse floor and not a "business office," and this finding is rational and supported by substantial evidence. Therefore, we affirm the administrative law judge's finding that claimant did not work exclusively in a business office and thus is not excluded from coverage under the Act pursuant to Section 2(3)(A). The award of benefits therefore is affirmed.

In addition, we agree with claimant's contention on appeal that the administrative law judge erred in his calculation of claimant's benefits pursuant to

[2]We reject employer's contention that the administrative law judge erred by considering claimant's affidavit, which was submitted to explain whether the photographs submitted by employer accurately represented her work place. Inasmuch as claimant's testimony and the photographs alone support the administrative law judge's finding, the administrative law judge's error, if any, in considering claimant's affidavit, which was not subject to cross-examination, is harmless.

Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2), as the administrative law judge erroneously reduced the award by an additional one-third. A schedule award runs for the proportionate number of weeks attributable to the loss of use of the body part, at the full compensation rate. 33 U.S.C. §908(c)(19); *MacLeod v. Bethlehem Steel Corp.*, 20 BRBS 234 (1988); *Byrd v. Toledo Overseas Terminal*, 18 BRBS 144 (1986). Therefore, we modify the administrative law judge's award of permanent partial benefits for the injury to claimant's leg to reflect an award of $66^{2/3}$ of claimant's average weekly wage for seven percent of 288 weeks pursuant to Section 8(c)(2), for a total award of $6,564.70.

Accordingly, the permanent partial disability award of benefits is modified to reflect claimant's entitlement to $6,564.70 pursuant to Section 8(c)(2), (19). In all other respects, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

PETER A. GABAUER, Jr.
Administrative Appeals Judge