BRB No. 04-0424

GAIL M. STALINSKI	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ELECTRIC BOAT CORPORATION	)	DATE ISSUED: 01/14/2005
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Lee J. Romero, Jr., Administrative Law Judge, United States Department of Labor.

Nathan Julian Shafner (Embry & Neusner), Groton, Connecticut, for claimant.

Mark Oberlatz and Peter D. Quay (Murphy and Beane), New London, Connecticut, for self-insured employer.

Mark A. Reinhalter and Richard A. Seid (Howard Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor of Labor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2003-LHC-459) of Administrative Law Judge Lee J. Romero, 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 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). The Board heard oral argument in this case in Boston, Massachusetts, on September 21, 2004.

Claimant worked as a clerk in employer's Quality Assurance department from 1984 until 1996.[1] EX 5. During this period of time her primary duties with employer involved overseeing the computer documentation and recording of the pipe hangers and pipe joints installed by employer's employees for United States Navy submarines. Claimant performed the majority of her employment duties in an office setting and described them as involving mostly typing and filing. Tr. at 24, 28, 38-40, 44. Specifically, claimant testified that employer's pipe fitters would come to her with a list of numbers documenting specific pipe hangers and pipe joints which they needed to perform their work. Claimant would then print up paper cards for the pipe fitters who, after they had completed their respective installations, would sign and forward the cards to employer's inspectors. After inspecting the work, the inspectors would sign and return the cards to claimant, who would then either approve or disapprove them. *Id.* at 37. When the paper card was approved, claimant was required to enter the information from the card into a computer. Disapproval of a card resulted in the card's being returned to the inspector or pipe fitter so that the problem could be corrected.[2] *Id.* at 24-27. Claimant additionally testified that she occasionally reviewed blueprints with inspectors in her office, *id.* at 26-27, 38-39, and that on a couple of occasions she took cards onto a submarine, although she could not recall the exact number of times that she had done so. *Id.* at 27, 39. Claimant testified that she went to a vessel "a couple of times with the carpenter" when she was assigned to the employer's tile program. This program required the use of a hand-held computer to read the bar codes which were attached to sound-

[1] Previously, claimant worked as an inspection clerk in employer's inspection department from 1980 to 1984.

[2] These cards are similar to time cards; specifically, pipe fitters and inspectors signed the cards when their respective work was performed, thus indicating that the work was completed. Approval of a card, and the subsequent entry of its information into the computer, indicated that the installed joint or hanger in question was sold and could be charged to the Navy. Tr. at 24-26. Disapproval of a returned card would occur when the appropriate employee had not signed the card correctly, or when the dates contained on the card appeared to be incorrect. *Id*. at 37-38.

proofing tiles installed on the hulls of submarines; claimant testified that she had made "maybe" three such visits when a problem had arisen with the bar codes.[3] *Id.* at 40-41.

Claimant's testimony regarding her employment duties was corroborated by Mr. DeVoe, her supervisor from 1989 to 1996, who testified that claimant generally worked at her desk in employer's office performing the duties of a clerical employee, evaluating records and updating databases. EX 10 at 6-7. Although he testified that claimant was required to go into production areas to evaluate records and resolve discrepancies should they arise, Mr. DeVoe could not recall claimant's having to board a vessel. *Id.* at 7-11, 17. Claimant's co-workers, Ms. Gencarella and Ms. Olsen, similarly testified regarding claimant's responsibilities for downloading data from the hand-held computers used by employer's carpenters and inputting data into employer's computer system from the cards returned by employer's employees. CXs 10 at 5-17; 11 at 12-16.

In March 1991, claimant sought treatment at employer's yard hospital for numbness in her fingers. In 1992, claimant commenced treatment with Dr. Wainright after complaining of right hand and wrist discomfort. Ultimately, claimant sought additional treatment with Dr. Cherry, who performed bilateral carpal tunnel surgery in May and July 2002. Although employer initially paid claimant disability and medical benefits under the Act, it subsequently contested claimant's claim for further benefits.

In his Decision and Order, the administrative law judge determined that claimant is excluded from coverage pursuant to Section 2(3)(A) of the Act, 33 U.S.C. §902(3)(A). Specifically, the administrative law judge found that claimant exclusively performed traditional office clerical and data entry work for employer, that claimant's occasional visits to employer's production areas were incidental to her clerical/data-entry duties, and that her occasional non-clerical duties were too sporadic to warrant coverage under the Act. Assuming, *arguendo,* that claimant was covered under the Act, the administrative law judge determined that claimant's bilateral carpal tunnel conditions were not related to her employment with employer. Accordingly, the claim for benefits under the Act was denied.

On appeal, claimant challenges the administrative law judge's findings that she is not covered under the Act and that her bilateral carpal tunnel conditions are not work-related. Initially, claimant argues that her employment duties were integral to employer's operations and that she is therefore an employee covered under the Act. Additionally, claimant contends that the administrative law judge erred in concluding that she was employed exclusively to perform office clerical work and that her work outside of employer's office was too sporadic to warrant coverage under the Act. Employer responds, urging affirmance of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a brief in support of claimant's position on appeal and urges the Board to remand the case for the

[3] Each sound-proofing tile was given a numerical designation so that it could be traced in the event of a future vessel incident.

administrative law judge to reconsider whether all of claimant's activities outside of employer's office were entirely clerical.

For a claim to be covered by the Act, a claimant must establish that her injury occurred in an area covered by Section 3(a) and that her work constitutes "maritime employment" under Section 2(3). 33 U.S.C. §§902(3), 903(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); *Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996); *Kennedy v. American Bridge Co.*, 30 BRBS 1 (1996). Thus, in order to demonstrate that coverage exists, a claimant must satisfy the "situs" and the "status" requirements of the Act. *Id.*; *see also Crapanzano v. Rice Mohawk, U.S. Constr. Co., Ltd.*, 30 BRBS 81 (1996). The issue in this case concerns whether claimant has status under Section 2(3).[4]

Generally, a claimant satisfies the status requirement as a maritime employee if she is an employee engaged in work which is integral to the loading, unloading, constructing, or repairing of vessels. *See Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). To satisfy this requirement, she need only "spend at least some of [her] time" in indisputably 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. *Stone*, 30 BRBS at 209*; Coleman v. Atlantic Container Service, Inc.*, 22 BRBS 309 (1989), *aff'd*, 904 F.2d 611, 23 BRBS 101(CRT) (11th Cir. 1990). A key factor in determining status is the nature of the activity to which an employee may be assigned. *Ford*, 444 U.S. at 82, 11 BRBS at 328.

In 1984, Congress amended Section 2(3) to specifically exclude certain employees from coverage. Section 2(3)(A) provides:

> 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--
>
> (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) (1994) (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

[4] The administrative law judge found, and employer does not challenge, that claimant meets the situs requirement as set out in Section 3(a) of the Act, 33 U.S.C. §903(a). Decision and Order at 27-28.

longshoring, shipbuilding and harbor work.[5] H.R. Rep. No. 570, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 2735. The Board has held that while a claimant's duties may fall within the general scope of Section 2(3) as "maritime employment," such a claimant may nonetheless be excluded from coverage by the specific exceptions.[6] *See Daul v. Petroleum Communications, Inc.*, 32 BRBS 47 (1998); *King v. City of Titusville*, 31 BRBS 187 (1997); *Stone*, 30 BRBS 209.

In support of her contentions of error, claimant initially avers that since her employment duties were fundamentally essential and thus integral to employer's shipbuilding process, she has satisfied the status requirement necessary for coverage under the Act. Claimant's assertion is without merit. Although, as the administrative law judge found, the parties do not dispute that claimant's employment duties were integral to employer's vessel production process, Decision and Order at 10, it is well-established that work which may be integral to employer's operations and thus within the general definition of maritime employment may be nonetheless excluded under Section 2(3)(A) if the work is exclusively clerical and office-oriented. *See Ladd v. Tampa Shipyards, Inc.*, 32 BRBS 228 (1998); *Stone*, 30 BRBS at 213; *Sette v. Maher Terminals, Inc.*, 27 BRBS 224 (1993). We therefore reject claimant's contention that whether her work is integral to employer's shipbuilding process is determinative of her coverage under the Act.

Claimant next contends that the administrative law judge erred in determining that she engaged in exclusively clerical work for employer, and that her work outside of the office was too sporadic to warrant coverage under the Act. Claimant asserts that her employment responsibilities went beyond the scope of clerical work and that she was

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[5] Claimant argues that the administrative law judge erred by applying a "perils of the sea" test in determining coverage. Although the administrative law judge used the term "perils of the sea" on two occasions in his decision, *see* Decision and Order at 21, 27, a reading of the administrative law judge's decision reveals that he did not rely solely on such a test but properly addressed the relevant facts in light of the statutory provision, 33 U.S.C. §902(3)(A). Accordingly, any error in the administrative law judge's reference to the "perils of the sea" is harmless.

[6] As the Director correctly states in his brief, the exclusions from coverage enumerated in Sections 2(3)(A) – (F) of the Act, 33 U.S.C. §902(3)(A) – (F), apply only if the employee involved is "subject to coverage under a State workers' compensation law." Although the administrative law judge did not address this clause in his decision, neither party before the administrative law judge averred that claimant was not covered by the Connecticut workers' compensation statute, nor did either party present evidence on this issue. Additionally, both parties remained silent when given the opportunity to address this issue at oral argument. Accordingly, as this issue was effectively waived by the parties, we need not remand the case for the administrative law judge to determine whether claimant is covered by a state workers' compensation law.

required to leave employer's office "routinely and consistently." For the reasons that follow, we affirm the administrative law judge's decision.

In rendering his findings on this issue, the administrative law judge thoroughly considered each of claimant's contentions and, relying on claimant's testimony as well as the testimony of claimant's co-workers, he concluded that pursuant to the relevant caselaw claimant's employment duties as a clerk, although integral to the shipbuilding process, exclude her from coverage pursuant to Section 2(3)(A) of the Act. Decision and Order at 21-25. Specifically, the administrative law judge found that claimant testified that her employment duties with employer consisted mostly of typing, filing, and computer and data entry, and that she processed data contained on paper cards or within hand-held computers that consisted of inspection or inventory tracking information.[7] Claimant additionally described the process of approving or disapproving a submitted paper card that was returned to her after a joint or hanger had been installed and inspected. Tr. at 37-38. After addressing the totality of claimant's testimony regarding her employment duties, the administrative law judge found that this testimony was consistent with the testimony of her supervisor, Mr. DeVoe, and her co-workers, Ms. Gencarelle and Ms. Olsen. Thus, based upon the totality of claimant's testimony as supported by that of her co-workers, the administrative law judge found that claimant's employment duties did not require her to inspect parts to be installed by employer's employees or to handle shipbuilding materials; rather, the administrative law judge concluded that claimant's employment duties involved the handling of data contained on paper cards or within hand-held computers, and that claimant's trips outside of

[7] In her brief, claimant states without citation to the record that she "went on board submarines at times to troubleshoot with the inspections," that she assisted analysts on the submarines, and that she trained carpenters and was thus "essentially doing the carpenter's jobs." *See* Clt's br. at 12-13. The record, however, including claimant's own testimony, contains no evidence that would support this statement. Rather, claimant's testimony reflects that although she was an inspection clerk from 1980 to 1984, that position required her to perform data-entry functions. Tr. at 18-19. Claimant did not testify that she helped to "troubleshoot with the inspections;" to the contrary, claimant specially stated that she was not an inspector and that she did not have to look at the installed joints themselves. *Id.* at 38, 42. Regarding assistance provided to analysts, claimant did testify that on one occasion around 1985 she went onboard a submarine with an analyst to "figure out" a ripout. *Id.* at 22-23. Claimant, however, could remember no details of this event. *Id.* Similarly, claimant recalled one time when she accompanied an analyst onto a submarine with cards; she could not, however, remember the activity or reason for this visit. *Id.* at 27. Lastly, while claimant vaguely testified that she went with a carpenter a couple of times because of a problem with a bar code, the record contains no evidence regarding these visits. *Id.* at 41. Claimant's interpretation of her work with employer's analysts/inspectors and carpenters record is not supportive by the record and is rejected.

employer's office were incidental to her clerical work and simply too sporadic to warrant coverage under the Act.[8] Decision and Order at 21-22, 25. Pursuant to these findings, the administrative law judge concluded that Section 2(3)(A) excluded claimant from coverage under the Act.

In this regard, the administrative law judge determined that claimant's duties were not akin to those of a checker,[9] and that accordingly the instant case is distinguishable from the Board's decision in *Jannuzzelli v. Maersk Container Serv. Co.*, 25 BRBS 66 (1991). In *Jannuzzelli*, the Board held that an employee was covered by the Act, even though his duties were primarily clerical, when at least some of his time was spent at the dock checking in longshoremen, checking to see if the work crews were sufficiently staffed, and hiring more workers if there were not sufficient employees to unload the vessels. These duties established that claimant was not engaged "exclusively" in office clerical work under Section 2(3)(A). In comparing claimant's job duties here to those of the employee in *Jannuzzelli*, the administrative law judge found that claimant was not required to make substantive decisions nor was she subject to reassignment as a checker; rather, the administrative law judge determined that claimant's duties were to deliver, retrieve or maintain the integrity of employer's data and computers. Decision and Order at 23. Here, claimant did not make staffing or other decisions similar to those in *Januzzelli*, and her duties examining employer's paper cards for the correct signatures and dates are not similar to those of a checker examining cargo, as they were performed solely to satisfy clerical requirements, *i.e.*, checking the accuracy of the cards submitted to her for processing. We thus affirm the administrative law judge's determination on this issue.

[8] Claimant testified that although she spent most of her time in her office, she took paper cards to a vessel on a couple of occasions, that she went to a vessel "a couple of times" with a carpenter, and that she visited vessels "maybe" three times while working with employer's tile program. Tr. at 27, 39-41.

[9] A "checker" is a longshoreman responsible for checking and recording cargo as it is loaded or unloaded from vessels or containers. *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 6 BRBS 150 (1977). In *Caputo*, a claimant working as a checker was held covered because the task is integral to the loading process as altered by the advent of containerization. The Court noted that Congress, in adopting the 1972 Amendments, specifically stated checkers would be covered by Section 2(3), contrasting them with "purely clerical employees" who were never intended to be covered. *Id.*, n.27.

Claimant's duties in the instant case are similar to those of other workers who perform necessary but clerical work in an office setting and are thus excluded by Section 2(3)(A). *See, e.g., Ladd*, 32 BRBS 228; *Stone,* 30 BRBS 209. The administrative law judge found that claimant's employment duties as a clerk for employer required her to perform traditional office clerical and data entry work, that these duties were performed in an office setting, and that claimant's forays outside of her office were merely incidental to her clerical work. These findings are supported by substantial evidence. Although claimant may have performed work that was integral to employer's shipbuilding process, she was employed in an office setting performing clerical and data-processing activities and on the rare occasions when she left the office, she continued to perform clerical work. As a worker processing paperwork who even out of the office performed clerical tasks, claimant's job is distinguishable from that of a worker who is primarily performing office clerical work but is subject to regular assignments performing other tasks. On the evidence presented here, the administrative law judge's conclusion that claimant, through application of the Section 2(3)(A) clerical exclusion, is not covered by the Act must be affirmed.[10] *Ladd*, 32 BRBS 228; *Stone*, 30 BRBS 209; *see also Sette*, 27 BRBS 224; *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); *Bergquist v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 131 (1989).

[10] Because we affirm the administrative law judge's conclusion that claimant has not fulfilled the status requirement necessary for coverage under the Act, we need not address claimant's contention that the administrative law judge erred in finding that her injuries are not work-related.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is 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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REGINA C. McGRANERY
Administrative Appeals Judge