

U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001



BRB No. 18-0148

CASSANDRA MOTTON)	
)	
Claimant-Petitioner)	
)	
v.)	
)	
HUNTINGTON INGALLS INDUSTRIES,)	
INCORPORATED)	
)	DATE ISSUED: 11/14/2018
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 of Monica Markley, Administrative Law Judge, United States Department of Labor.

Charlene A. Moring (Montagna Klein Camden, LLP), Norfolk, Virginia, for claimant.

Ann Marie Scarpino (Kate S. O'Scannlain, Solicitor of Labor; Kevin Lyskowski, Acting Associate Solicitor; Mark A. Reinhalter, 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, BOGGS and BUZZARD, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2016-LHC-01349) of Administrative Law Judge Monica Markley 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 rational, supported by substantial evidence, and in accordance with law. 33 U.S.C. §921(b)(3); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant alleged that she injured her knees on February 17, 2016, during the course of her employment with employer as a drawing clerk. The parties stipulated that claimant was temporarily totally disabled from March 16 to June 30, 2016, and that she was able to return to her usual employment on July 1, 2016. Employer contended that claimant's position as a drawing clerk is excluded from the Act's coverage and that her injuries were not work-related.

The administrative law judge found that claimant is excluded from coverage under the Act, pursuant to the clerical worker exclusion of Section 2(3)(A), 33 U.S.C. §902(3)(A). The administrative law judge summarized claimant's job duties as verifying administrative data, retrieving requested documents, and checking these documents in and out of her office. Decision and Order at 17. She determined that claimant performed exclusively office clerical work, which is excluded from coverage. *Id.* As claimant is subject to coverage under the Virginia workers' compensation law, the administrative law judge denied the claim under the Act.

On appeal, claimant challenges the administrative law judge's finding that she is not entitled to coverage under the Act.¹ Claimant contends that her drawing clerk duties

¹ On August 9, 2018, claimant also filed a motion to vacate the administrative law judge's decision and to remand the case to a properly appointed administrative law judge, pursuant to *Lucia v. Sec. & Exch. Comm'n*, 138 S. Ct. 2044 (2018). Claimant contests the validity of the administrative law judge's appointment in this case. The Director, Office of Workers' Compensation Programs (the Director), responds that this issue was not timely raised. We agree with the Director. Claimant did not raise any issue in her initial brief to the Board concerning the administrative law judge's appointment under the Appointments Clause of the U.S. Constitution and thus forfeited this argument. *See* 20 C.F.R. §802.211. The Appointments Clause issue is "non-jurisdictional," *see Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009), and is subject to the doctrines of waiver and forfeiture. *Id.*; *see Lucia*, 138 S. Ct. at 2055 ("one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case is entitled to relief"); *Freytag v. Comm'r*, 501 U.S. 868 (1991). Accordingly, claimant's motion is denied.

constitute maritime employment and that the administrative law judge erred by not considering whether her job duties are an integral and necessary part of the shipbuilding process, which, claimant avers, overrides the applicability of the clerical worker exclusion. Employer did not respond to this appeal.

For a claim to be covered by the Act, a claimant must establish that her injury occurred at a maritime situs as defined in 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). The only issue in this case concerns whether claimant met the status requirement under Section 2(3).

Generally, a claimant satisfies the status requirement of Section 2(3)(A) if she is an employee engaged in work which is integral to the loading, unloading, constructing, dismantling or repairing of vessels. *Chesapeake & Ohio Ry. Co. v. Schwalb*, 493 U.S. 40, 23 BRBS 96(CRT) (1989). 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) (emphasis added).² The legislative history of this exclusion 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.³ H.R. Rep. No. 570, 98th Cong., 2d Sess. (1984), *reprinted in* 1984 U.S.C.C.A.N. 2735.

² In her decision, the administrative law judge stated that claimant is subject to coverage under Virginia’s workers’ compensation laws. Decision and Order at 17.

³ In order for this exclusion to apply, the employee’s duties must be exclusively clerical and exclusively performed in a business office. *Williams v. Newport News*

It is well established that, while a claimant's duties may be integral to shipbuilding or to the loading and unloading of vessels, such a claimant may nonetheless be excluded from coverage by the specific exceptions. See *Stalinski v. Electric Boat Corp.*, 38 BRBS 85 (2005); *Daul v. Petroleum Communications, Inc.*, 32 BRBS 47 (1998), *aff'd*, 196 F.3d 611, 33 BRBS 193(CRT) (5th Cir. 1999); *Bergquist v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 131 (1989). In *Stalinski*, 38 BRBS 85, the claimant worked as a clerk in the employer's Quality Assurance Department. Her job duties involved overseeing the documentation of pipe hangers and pipe joints; she would occasionally go to production areas to evaluate records and resolve discrepancies. *Id.* at 85-86. The Board rejected claimant's contention that, because her duties were integral to the shipbuilding process, the administrative law judge erred by denying coverage based on the clerical worker exclusion. *Id.* at 88. In *Ladd v. Tampa Shipyards, Inc.*, 32 BRBS 228 (1998), the claimant prepared production and manpower distribution reports, and also delivered correspondence, answered telephones, typed and filed documents. The administrative law judge denied coverage, finding that the claimant's duties included merely checking the accuracy of the reported numbers and that he was not involved in any decision-making. *Id.* at 230. The Board affirmed the finding that these duties were clerical and the denial of coverage based on the clerical exclusion. *Id.* at 231. In *Stone*, 30 BRBS 209, the claimant's work occurred predominantly in a trailer office and involved ordering and tracking materials and researching budgets and dates of completion. The Board affirmed the administrative law judge's finding that Section 2(3)(A) applied, holding that, "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." *Id.* at 214. Accordingly, we reject claimant's contention that the administrative law judge erred by not addressing whether her duties are integral to the shipbuilding process. Claimant is not entitled to coverage under the Act if her job duties are within the clerical worker exclusion of Section 2(3)(A), even if they are integral to shipbuilding. *Bergquist*, 23 BRBS 131.

With regard to her job duties, claimant testified that she works in a "support trades department." CX 4 at 12. Specifically, she is trained in reading revisions to construction blueprints and work packages, and she ensures that the trade workers have the latest documents and paperwork before they board ships to perform their jobs. *Id.* Her office also records document updates. *Id.* at 31. Claimant testified that the trade workers tell her what package or drawing is needed. Tr. at 17, 36. She retrieves the document and verifies, by cross-referencing with a computer program, that the document is up-to-date. If claimant sees a discrepancy between the information on the computer and the document, she checks with the engineering department, which is responsible for making corrections and

Shipbuilding & Dry Dock Co., 47 F.3d 1166, 29 BRBS 75(CRT) (4th Cir. 1995) (table), *vacating* 28 BRBS 42 (1994); *Gelinas v. Electric Boat Corp.*, 45 BRBS 69 (2011).

instructing her what to do. *Id.* at 18-20. Claimant testified that the majority of her work involved checking in and out blueprints and work packages. *Id.* at 36; CX 4 at 13.

Based on claimant's testimony, the administrative law judge found that claimant's work as a drawing clerk is performed in a trailer that is set up as an office, with desks, filing cabinets, and computers, and that she has no duties aboard ships. Decision and Order at 15; Tr. at 20, 22-23, 36; CX 4 at 13, 15, 36-37. The administrative law judge determined that claimant's duties are performed exclusively in an office setting and that "any forays outside of Claimant's office were incidental to her clerical work." Decision and Order at 16; *cf. Boone v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 1 (2003) (work performed on a warehouse floor is not an office setting and is not within the clerical worker exclusion).

The administrative law judge also found that claimant's work of retrieving and verifying documents and checking them in and out of the office is "exclusively clerical" work, subject to the Section 2(3)(A) exclusion. Decision and Order at 16-17. The administrative law judge rejected claimant's contention that her job duties are similar to those in *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 39 BRBS 49 (2005). In *Wheeler*, the claimant's job title was senior engineering analyst; his duties included reviewing specifications for parts used in the construction and repair of vessels and verifying that the proper parts were received and used properly. The claimant would utilize various database systems, computer programs, or, if necessary, visually inspect the parts and materials to determine whether they were appropriate. If the requisitioned parts were incorrect for the purpose for which they were designated, he would determine which parts were in fact required, and he would leave his office to meet with employer's engineers to recommend the appropriate part. *Id.* at 51. The Board held that substantial evidence supported the administrative law judge's finding that the claimant's job "required the exercise of judgment and expertise" that goes beyond typical clerical work. *Id.* at 52; *see also Morganti v. Lockheed Martin Corp.*, 37 BRBS 126 (2003), *aff'd*, 412 F.3d 407, 39 BRBS 37(CRT) (2d Cir. 2005), *cert. denied*, 547 U.S. 1175 (2006). In this case, the administrative law judge determined that claimant's job duties do not require such expertise; rather, her job is to verify administrative data and retrieve requested documents from cabinets and drawers, then check out these documents, and check them back in. Decision and Order at 16-17. The administrative law judge concluded that, "regardless of whether claimant's work is integral to the shipbuilding process . . . she exclusively performs clerical office work and thus falls within the statutory exclusion in Section 2(3)(A)" *Id.* at 17.

We affirm the finding that claimant is excluded from the Act's coverage. The administrative law judge's finding that claimant works in an office setting, where she verifies administrative data, retrieves requested documents from cabinets and drawers,

checks out these documents, and checks them back in, is supported by substantial evidence. *See Stalinski*, 38 BRBS 85; *Ladd*, 32 BRBS 228; *Stone*, 30 BRBS 209. Indeed, claimant does not challenge these findings concerning her work activities. Moreover, claimant's contention that her work is akin to that of the senior engineering analyst in *Wheeler* because she exercises independent judgment beyond that typically required of clerical work is without merit. The administrative law judge thoroughly addressed this contention, and her conclusion that claimant's work is clerical in nature is rational and supported by substantial evidence. Therefore, we affirm the administrative law judge's denial of coverage under the Act pursuant to Section 2(3)(A) and her consequent denial of the claim.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge