BRB No. 96-1136

VINCENT J. RIGGIO	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	DATE ISSUED:_____
MAHER TERMINALS, INCORPORATED	)	
	)	
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 Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

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

William J. Broderick, New York, New York, for self-insured employer.

Laura Stomski (J. Davitt McAteer, Solicitor of Labor; Carol A. DeDeo, Associate Solicitor; Samuel J. Oshinsky, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (94-LHC-1948) of Administrative Law Judge Ainsworth H. Brown 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 testified he is a clerk/checker for employer. He belongs to the checker's local. Although he is on employer's permanent hire list, he is not on a specified job list, and he testified he can be assigned work as either a clerk in an office or a checker in the lanes or the field. Tr. at 38, 42-43, 45-48. On February 3, 1994, claimant was working as a delivery clerk in an office on Berth 62 of employer's facility in Port Shipley. He injured his shoulder when he pushed his chair back from the desk and one of the rollers got caught, tipping the chair. *Id.* at 36. Employer paid claimant benefits under the state workers' compensation law. Claimant filed a claim for benefits under the Act.

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) (1988). The administrative law judge found that claimant is a delivery clerk who falls under the clerical exclusion of Section 2(3)(A), 33 U.S.C. §902(3)(A) (1988), and that even if he "had occasional forays into the lanes," he did not change his status from that of a clerical worker. Decision and Order at 3. Thus, the administrative law judge found that claimant failed to meet his burden of proving that he is covered under the Act. *Id.* Claimant appeals the denial of benefits, and the Director, Office of Workers' Compensation Programs (the Director), responds, in agreement with claimant. Employer responds, urging affirmance.

Claimant contends the administrative law judge erred in denying benefits. Specifically, claimant contends the administrative law judge erred in finding him to be an excluded clerical employee pursuant to Section 2(3)(A) of the Act because his work as a clerk bears a close functional relationship with the loading and unloading process. Moreover, claimant asserts that he is covered under the Act because of his work as a checker. The Director argues in favor of claimant, initially contending that the Section 20(a), 33 U.S.C. §920(a), presumption should be applied to the "coverage determinative facts;" thus, he argues, the burden of persuasion lies on employer to prove that claimant is not a maritime employee. The Director also argues that the administrative law judge erred in denying benefits as a matter of law, as his findings of fact establish that claimant worked some of the time as a checker -- an indisputably longshore activity that is not excluded. Employer argues that the administrative law judge properly relied on *Maher Terminals, Inc. v. Farrell*, 548 F.2d 476, 5 BRBS 393 (3d Cir. 1977), and on *Sea-Land Service, Inc. v. Rock*, 953 F.2d 56, 25 BRBS 112 (CRT) (3d Cir. 1992), to conclude that claimant's work as a delivery clerk does not bring him into the realm of coverage, as that type of work does not expose him to the longshore hazards contemplated by Congress in conferring coverage.

For a claim to be covered by the Act, a claimant must establish that his injury occurred upon the navigable waters of the United States, including any dry dock, or that his injury occurred on a landward area covered by Section 3(a) and that his work is maritime in nature and is not specifically excluded by the Act. 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.[1] *Id.*; *see also Crapanzano v. Rice Mohawk, U.S. Construction Co., Ltd.*, 30 BRBS 81 (1996).

Generally, a claimant satisfies the "status" requirement if he 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, 23 BRBS 96 (CRT) (1989). To satisfy this requirement, he need only "spend at least some of [his] time in indisputably longshoring operations." *Caputo*, 432 U.S. at 273, 6 BRBS at 165. The United States Court of Appeals for the Third Circuit, which has jurisdiction over this case, 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." *Rock*, 953 F.2d at 67, 25 BRBS at 121 (CRT). Employees who are hired exclusively to perform office clerical work

[1]Employer conceded that the situs requirement was met in this case. Decision and Order at 2.

are specifically excluded from coverage. 33 U.S.C. §902(3)(A) (1988);[2] *Stone*, 30 BRBS at 213. Both claimant and the Director contend that claimant's duties as a checker prevent him from being considered "exclusively clerical."

In this case, claimant testified that he worked as both a checker and a clerk. Claimant testified that when he worked as a clerk, his work was exclusively in an office. As a receiving clerk, he would receive the report generated by the checker and enter the information into a computer. As a delivery clerk, he would enter information into the computer from the delivery order and generate a report to clear the cargo for land transport. Claimant was injured while working as a clerk. Claimant stated that when he worked as a checker, he worked in the trucking lanes and on the pier receiving and delivering containers to a ship in conjunction with crane operations. He would check seals and container numbers as well as license plate numbers, generating a document verifying that all was in order. Tr. at 38-41, 45-46, 48, 50-52, 55-56, 62-65. He noted, however, that clerks earn more than checkers because they use computers and add figures and checkers do not. *Id*. at 43, 55-56. Claimant stated that his time was divided evenly between the two types of work. He testified that he prefers working as a clerk and that his supervisor assigns him

---

[2]Section 2(3)(A), 33 U.S.C. §902(3)(A) (1988) (emphasis added), 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--
>
> (A) individuals employed *exclusively to perform office clerical*, secretarial, security, or data processing *work* [if such persons are covered by State workers' compensation laws].

this work whenever he can. If claimant is unable to obtain a clerk position, he accepts work as a checker. *Id*. at 48-49, 76.

The administrative law judge questioned claimant's credibility, stating:

> It is clear from the testimony that the Claimant's recollection of work in the lanes immediately preceding the injury is incorrect and his reference to a 50/50 split of his time may be viewed as suspect as well. It is not an accurate appraisal of his testimony to say that it is "undisputed" as his veracity was directly challenged on cross-examination with telling effect and not rehabilitated on redirect.

Decision and Order at 2-3.[3] The administrative law judge, however, acknowledged three times in his decision that claimant functioned "on occasion" as a checker. Despite this acknowledgment, he concluded that claimant failed to establish his "status" by a preponderance of the evidence. Therefore, he found that claimant is a clerical worker excluded from coverage. *Id.* at 2-3.

Checkers are covered under the Act. *Caputo*, 432 U.S. at 249, 6 BRBS at 150*; Levins v. Benefits Review Board*, 724 F.2d 4, 16 BRBS 24 (CRT) (1st Cir. 1984); *see also Stone*, 30 BRBS at 211 n.4. A claimant employed exclusively as an office-bound delivery clerk who processes paperwork for the release of cargo, however, is not covered under the

[3]Claimant testified that sometime during the week before he was injured, he worked outdoors as a checker, although on the date of the injury, he was working as a delivery clerk in an office. Tr. at 49-50, 65. On cross-examination, employer presented records which established that claimant worked solely as a delivery clerk between January 25 and February 4, 1994. Emp. Ex. 1; Tr. at 59-62. Claimant then testified that he may have mistaken the time period, but that he does occasionally work as a checker and did so as recently as a few days before the hearing. Tr. at 61-62. In light of claimant's erroneous recollection of his work just prior to the injury, the administrative law judge viewed claimant's testimony concerning the rest of his work history as suspect. Decision and Order at 2-3.

Act as amended in 1984, even if his work is integral to the shipbuilding, ship repair or loading/unloading process. *Sette v. Maher Terminals, Inc.*, 27 BRBS 224 (1993); *see also Farrell*, 548 F.2d at 478, 5 BRBS at 396; *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); *Bergquist v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 131 (1989). We therefore reject claimant's contention that his duties as a delivery clerk, which solely involve paperwork and computer work in an office setting, though related to loading and unloading, are sufficient to confer status. *Sette*, 27 BRBS at 224.

Nevertheless, we cannot affirm the administrative law judge's finding that claimant is excluded from coverage. In a case where a claimant worked as an office clerk but was subject to reassignment as a checker, the Board held that he is covered. *Caldwell v. Universal Maritime Service Corp.*, 22 BRBS 398 (1989). Thus, we hold that the administrative law judge erred in thrice stating that claimant "occasionally" worked as a checker but then concluding that claimant is an office bound delivery clerk excluded from coverage. If claimant occasionally works as a checker, he is not "exclusively" a clerical employee, and the exclusion in Section 2(3)(A) is not applicable. *Caldwell*, 22 BRBS at 398. By acknowledging claimant's work as a checker but finding this did not change his "preferred status" as a delivery clerk, it appears the administrative law judge applied a "moment of injury" or "substantial portion" test to this case. Both standards have been rejected. *Caputo*, 432 U.S. at 273, 6 BRBS at 165; *Levins*, 724 F.2d at 4, 16 BRBS at 24 (CRT); *Schwabenland v. Sanger Boats*, 683 F.2d 309, 16 BRBS 78 (CRT) (9th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *Graziano v. General Dynamics Corp.*, 663 F.2d 340, 14 BRBS 52 (1st Cir. 1981). A person is "engaged in maritime employment" under Section 2(3) if he spends "at least some of [his] time" engaged in maritime work. *Ford*, 444 U.S. at 83 n.18, 11 BRBS at 328 n.18; *Caputo*, 432 U.S. at 273-274, 6 BRBS at 165; *McGoey v. Chiquita Brands International*, ___ BRBS ___, BRB No. 96-593 (Jan. 28, 1997). Therefore, if claimant is subject to reassignment as a checker and/or occasionally worked as a checker, claimant's employment is covered under the Act. *Caldwell*, 22 BRBS at 398. Consequently, we vacate the denial of benefits, and we remand the case for further consideration using the proper standards.[4] *Caputo*, 432 U.S. at 273-274, 6 BRBS at 165*;*

[4]In light of our decision to remand this case for further consideration using the appropriate legal standard, we decline to address the Director's Section 20(a) argument. 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 Stone v. Ingalls Shipbuilding, Inc.*, 30 BRBS 209 (1996); *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).

McGoey, slip op at 2*; Caldwell*, 22 BRBS at 398.

Accordingly, the administrative law judge's Decision and Order Denying Benefits is vacated, and the case is remanded for further consideration in accordance with this opinion.

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge