

SECTION 4

Digests

Board affirms administrative law judge's determination that claimant is employee of uninsured subcontractor and that employer is liable for compensation payable pursuant to Section 4(a). Administrative law judge properly applied relative-nature-of-the-work test to determine that claimant, a roofer, was not an independent contractor at the time of injury. Claimant typifies type of employee intended to be covered under the Act because employer had reason to know that its subcontractor (claimant's employer) was uninsured and employer could have avoided compensation liability. Carle v. Georgetown Builders, Inc., 19 BRBS 158 (1986).

The Board reversed the administrative law judge's finding that Starlit Partnership, a partnership formed by a real estate broker and a psychologist for the purpose of purchasing, renovating and reselling homes which had hired claimant's employer, EHT Construction, to perform carpentry work on two properties it owned, was secondarily liable for paying claimant's benefits under Section 4(a). The Board reasoned that since the claim arose in the D.C. Circuit, the two-part test for "general employer" liability set forth in National Van Lines, Inc., 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979), was applicable. Under this test, Starlit could not be considered a general employer under Section 4(a). The Board also noted that Starlit was not the type of "general employer" contemplated by Section 4(a). Dailey v. EHT Construction Co., 20 BRBS 75 (1986).

In suit filed by an employee of a contractor engaged to scrub the hull of a vessel against the vessel owner, the court held that the vessel owner could not be considered a general contractor. In absence of federal precedent, the court applied Florida law, which states that a general contractor is one who has a contractual obligation, a portion of which he sublets to another. As the vessel owner did not meet this definition, there was no basis for dual owner-contractor liability. Roach v. M/V Aqua Grace, 857 F.2d 1575 (11th Cir. 1988).

Board holds that a claimant's employer retains ultimate responsibility for paying a compensation award, even where: 1) the employer has properly obtained workers' compensation insurance; 2) its insurer has been adjudicated insolvent; and 3) such responsibility may impose an unanticipated financial burden on the employer. Otherwise, the claimant would have no means of obtaining compensation for his work injury. Moreover, since employer, a "subcontractor," had obtained workers' compensation insurance, the Board determined that it "secured" workers' compensation insurance, thus exempting its "general employer" from compensation liability under Section 4(a), despite that employer's insurer was later adjudicated insolvent. Meagher v. B.S. Costello, Inc., 20 BRBS 151 (1987), aff'd, 867 F.2d 722, 22 BRBS 24 (CRT)(1st Cir. 1989).

The First Circuit affirms Board's holding that an employer is liable for paying a claimant's benefits if its insurance carrier becomes insolvent, under Section 4(a), and that this liability cannot be judicially shifted to the Special Fund under Sections 18 and 44(c). B.S. Costello, Inc. v. Meagher, 867 F.2d 722, 22 BRBS 24 (CRT)(1st Cir. 1989), aff'g 20 BRBS 151 (1987).

The Board reversed the administrative law judge's determination that Chubb is liable for claimant's longshore benefits for his injury occurring in the port of Kingston, Jamaica, holding that the insurance policy contained no longshore endorsement, as required by Section 35 of the Act, and although the policy covers injuries occurring "worldwide," it clearly limits Chubb's liability to benefits payable under the Pennsylvania workers' compensation law, as if the injury occurred in Pennsylvania. The Board, therefore, held employer liable for claimant's benefits. *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff'd on recon.*, 35 BRBS 190 (2002).

The Board declined to modify or void its previous decision holding employer, and not either carrier, liable for benefits on the basis of the employer's discharge in bankruptcy. Enforceability of a decision is not a matter for the Board's review. Rather, Section 18(b) provides for the contingency that the liable employer is insolvent. Specifically, under that section, claimant may be able to obtain benefits from the Special Fund at the discretion of the Secretary. *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001).

The Fifth Circuit upholds ruling that claimant hired by an employer, Champion, which was a labor service contractor, who worked exclusively for Chevron was a borrowed employee of Chevron. Court rejects the argument that the contract between Champion and Chevron prohibited such a finding since the contract did not expressly prohibit employees of Champion from becoming borrowed employees of Chevron. Since the Longshore Act is thus claimant's sole remedy against Chevron, his suit was dismissed. Alexander v. Chevron, U.S.A., 806 F.2d 526 (5th Cir. 1986), cert. denied, 483 U.S. 1005 (1987).

In a suit by claimant, an employee of a contractor, against Amoco, on whose oil platform claimant was working when injured, the court applied the nine factors as set out in Ruiz, 413 F.2d 310 (5th Cir. 1969), to determine whether claimant was a borrowed employee of Amoco, and affirmed the district court's finding that he was such an employee for LHWCA purposes. Thus, the Longshore Act was claimant's sole remedy against Amoco. The 1984 Amendments to Sections 4(a) and 5(a) do not restrict borrowed employee status only to instances when the lending employer fails to secure workers' compensation coverage and the borrowing employer does. Melancon v. Amoco Production Co., 834 F.2d 1238 (5th Cir. 1988).

The Board noted that federal pre-emption applies to the Act in general. However, it held that the administrative law judge unnecessarily applied pre-emption in determining that the state-created insurance fund, FIGA, which is expressly relieved of liability for interest and penalties under Florida law, is not liable for interest and a Section 14(e) penalty under the Act. The Board held that the Florida statute merely limits the liability of FIGA and does not deny claimant any of his rights under the Act. The Board reversed the administrative law judge and determined that employer is liable for interest and the penalty under Section 4 of the Act under the rationale of *B.S. Costello*, 867 F.2d 722, 22 BRBS 24 (CRT)(1st Cir. 1989). *Canty v. S.E.L. Maduro*, 26 BRBS 147 (1992).

The Board holds that LIGA cannot be held liable for claimant's benefits in the stead of the bankrupt carrier, because under Louisiana law, there is no cut-through endorsement. Thus, as the employer is ultimately responsible for the payment of benefits under Section 4, the only relevant inquiry under Section 33(g) is whether claimant received employer's written consent prior to entering into a third-party settlement. Under these circumstances, claimant's failure to obtain the consent of the bankrupt carrier or its liquidator cannot bar the claim. *Deville v. Oilfield Industries*, 26 BRBS 123 (1992).

In this case arising under the jurisdiction of the Fifth Circuit, the Board, applying *West v. Kerr-McGee Corp.*, 765 F.2d 526 (5th Cir. 1985), found that Section 4(a), as amended in 1984, has no bearing on the borrowed employee doctrine. The Board noted the evaluation of the legislative history that appeared in *West*, and found that Congress's sole purpose in amending Section 4(a) was to overrule *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925 (1984), and not to amend the borrowed servant doctrine or modify existing law. Accordingly, if the general contractor is the employee's true employer under the borrowed employer doctrine, the contractor is liable for the employee's compensation under Section 4(a) regardless of whether its behavior as a general contractor or insurance guarantor would otherwise cause it to be "deemed" an employer under the amended statutory scheme. *Arabie v. C.P.S. Staff Leasing*, 28 BRBS 66 (1994), *aff'd sub nom. Total Marine Services, Inc. v. Director, OWCP*, 87 F.3d 774, 30 BRBS 62 (CRT), *reh'g en banc denied*, 99 F.3d 1137 (5th Cir. 1996).

As Total Marine stipulated that it is claimant's borrowing employer, it is thus the employer liable for claimant's compensation under the Act. The second sentence of Section 4(a) concerning the liability of subcontractors is inapplicable to such a situation. Total Marine must indemnify claimant's formal employer for compensation benefits the formal employer has paid to the injured worker. *Total Marine Services, Inc. v. Director, OWCP*, 87 F.3d 774, 778-779, 30 BRBS 62, 66(CRT), *reh'g en banc denied*, 99 F.3d 1137 (5th Cir. 1996), *aff'g Arabie v. C.P.S. Staff Leasing*, 28 BRBS 66 (1994).

The Board determines that the *National Van Lines* test should not be applied to this case involving the oil industry, and that Louisiana law, as developed in the Fifth Circuit, should be applied to determine if Exxon is liable as the general contractor given the subcontractor's insolvency. In order to hold Exxon liable for claimant's compensation as a "general contractor" pursuant to Section 4(a) the administrative law judge must make a finding of whether Exxon customarily and regularly engages in offshore drilling on its own as part of its regular trade, business or occupation, or, if not, whether the oil and gas industry as a whole operates in this manner. *Sketoe v. Dolphin Titan Int'l*, 28 BRBS 212 (1994)(Smith, J., dissenting).

The Board reaffirms its holding in *Sketoe I*, 28 BRBS 212, that the *Chavers* test should be applied to this cases involving the oil industry to determine whether Exxon is a contractor pursuant to Section 4(a). The Board affirms the administrative law judge's conclusion that Exxon is not a contractor and is not liable for compensation, holding that there is substantial evidence to support the administrative law judge's determination that neither Exxon nor the industry customarily or regularly engage in offshore drilling in the sense that Exxon employees do not physically drill the wells. *Sketoe v. Dolphin Titan Int'l*, 31 BRBS 218 (1998) (Smith, J., dissenting), *aff'd on other reasoning*, 188 F.3d 596, 33 BRBS 151(CRT)(5th Cir. 1999), *cert. denied*, 120 S.Ct. 1562 (2000).

In affirming the Board's holding that Exxon is not a contractor and therefore not liable for compensation under Section 4(a) upon the insolvency of claimant's employer, the Fifth Circuit held that the Board erred in applying a state law test. Rather, the court reasoned that Exxon's status as an oil and gas lessee of the United States conferred on it ownership of a real right, with a duty that is correlative and incidental of that real right, as opposed to a general contractor passing its own contractual obligation to a subcontractor. Therefore, the court held that Exxon was not liable under Section 4(a). *Sketoe v. Exxon Co., USA*, 188 F.3d 596, 33 BRBS 151(CRT) (5th Cir. 1999), *aff'g on other reasoning Sketoe v. Dolphin Titan Int'l*, 31 BRBS 218 (1998)(Smith, J., dissenting), *cert. denied*, 120 S.Ct. 1562 (2000).

The Board affirms the administrative law judge's finding that NNS is not potentially liable to claimant, as the decedent's employer was not a "subcontractor" of NNS. NNS was the owner of the ship shed decedent's employer was renovating and was not under a contractual obligation to do so. Thus, the case does not present the "two contract" factual scenario of *National Van Lines*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979). Moreover, there is no evidence that NNS is in the business of renovating buildings or that its own employees usually perform this type of work. *Dailey*, 20 BRBS 75 91986). Thus, NNS merely contracted out a job to an independent contractor, and cannot be held liable due to employer's failure to secure longshore insurance. *Boyd v. Hodges & Bryant*, 39 BRBS 17 (2005).

The Board rejected the borrowing employer's contention that the Act does not permit the reimbursement sought by the lending employer's insurer in this case. The Board held that under *Total Marine*, 87 F.3d 774, 30 BRBS 62(CRT) (5th Cir. 1994), the borrowing employer is solely liable for a claimant's benefits, in the absence of a valid and enforceable indemnification agreement stating otherwise. Therefore, reimbursement between borrowing and lending employers is permitted under the Act. *Schaubert v. Omega Services Industries*, 32 BRBS 233 (1998).