SECTION 4

Section 4(a)

Section 4(a) provides that an employer shall be liable for the payment of compensation, medical benefits, and death benefits due an injured employee and, therefore, must secure payment of these benefits by becoming insured or by qualifying as a self-insurer. *See* Section 32. It further provides that a subcontractor shall not be deemed to have failed to do so if the contractor provides insurance for the benefit of the subcontractor.

The cases under this section generally fall into two categories, the first involving insurance issues, and the second involving the contractor-subcontractor relationship and whether the borrowed servant doctrine is valid following the 1984 Amendments. In *Droogsma v. Pensacola Stevedoring Co., Inc.*, 11 BRBS 1 (1979), the Board considered whether an insurance carrier had insured employer for compensation liability under the Act, affirming the administrative law judge's finding that American Mutual insured employer under the Act at the relevant time. The Board's authority to resolve insurance contract disputes is discussed in Section 21 and the identification of the liable carrier in a case where multiple carriers are named is addressed in the deskbook section on Responsible Employer. Cases on whether claimant is a borrowed employee are included in the employer-employee relationship portion of that section.

Prior to the 1984 Amendments, Section 4(a) also provided that a contractor must secure payment of these benefits if a subcontractor working under it does not. *See Stillwell v. The Home Indemnity Co.*, 5 BRBS 436 (1977), *appeal dismissed on other grounds,* 597 F.2d 87 (6th Cir. 1979), *cert. denied*, 444 U.S. 869 (1979). Congress clarified the liabilities of contractors and general contractors under this section in the 1984 Amendments. The general contractor is liable for compensation payments and is thus immune from suit in tort pursuant to Section 5(a) only if the subcontractor fails to secure such payment. The subcontractor is not deemed to have failed to secure payment merely because the general contractor has purchased "wrap-up" insurance on behalf of all of its subcontractors; in such instances the contractor does not enjoy Section 5(a) immunity. *Joint Explanatory Statement of the Conference Committee*, H.R. Rep. 98-1027, 98th Cong., 2d Sess., 24, reprinted in 1984 U.S.C.C.A.N. 2772, 2774. *See* Section 5(a).

In *Director, OWCP v. National Van Lines, Inc.*, 613 F.2d 972, 986-987, 11 BRBS 298, 316 (D.C. Cir. 1979), the Court of Appeals for the D.C. Circuit stated that an employer would be deemed a "contractor" under Section 4(a) where "the injured employee was engaged in work either that is a subcontracted fraction of a larger project or that is normally conducted by the general employer's own employees rather than by independent contractors." Since the claimant in that case was injured while performing duties which had been delegated to claimant's employer by National Van Lines and which National

Van Lines had itself been under a contractual obligation to perform, the court held National Van Lines secondarily liable for benefits pursuant to Section 4(a).

Digests

Insurance Issues

The Board held 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 affirmed the Board's holding that an employer is liable for paying claimant's benefits if its insurance carrier becomes insolvent 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 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).

The Board reversed the administrative law judge's determination that an insurer, 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). On reconsideration, 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).

Contractor-Subcontractor

Board affirmed the administrative law judge's determination that claimant is an employee of uninsured subcontractor and that employer, the general contractor, is liable for compensation payable pursuant to Section 4(a). The administrative law judge properly applied the "relative nature of the work" test to determine that claimant, a roofer, was not an independent contractor at the time of injury. Claimant typifies the type of employee intended to be covered under the Act because employer had reason to know that its subcontractor 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, was applicable. Under this test, Starlit could not be considered a general contractor 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 Constr. Co.*, 20 BRBS 75 (1986).

In suit filed against the vessel owner by an employee of a contractor engaged to scrub the hull of a vessel, 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).

The Fifth Circuit upheld a ruling that claimant who was hired by an employer, Champion, which was a labor service contractor, and who worked exclusively for Chevron was a borrowed employee of Chevron. The court rejected 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 factor test of *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).

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) (5th Cir. 1996). In affirming this decision the Fifth Circuit stated that as Total Marine stipulated that it is claimant's borrowing employer, it is 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) (5th Cir. 1996), *aff'g Arabie v. C.P.S. Staff Leasing*, 28 BRBS 66 (1994).

The Board determined 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 as to 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). Following remand, the Board reaffirmed this holding regarding the test to be applied in determining whether Exxon is a contractor pursuant to Section 4(a). The Board affirmed 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 engages 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*, 529 U.S. 1057 (2000).

In affirming the Board's decision in *Sketoe*, the Fifth Circuit held that the Board erred in applying the state law test it relied upon. Rather, the court applied the ordinary meaning of the term "contractor" and reasoned that the Act distinguishes between employers who are owners, as in *Dailey,* 20 BRBS 75, and those who are general contractors working under contractual obligations to others, as in *National Van Lines.* As 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 its being a general contractor passing its own contractual obligation to a subcontractor, the court held that Exxon was not a contractor and thus was not liable under Section 4(a). *Sketoe v. Exxon Co., USA*, 188 F.3d 596, 33 BRBS 151(CRT) (5th Cir. 1999), *cert. denied*, 529 U.S. 1057 (2000).

The Board affirmed 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 the renovation. Thus, the case does not present the "two contract" factual scenario of *National Van Lines*, 613 F.2d 972, 11 BRBS 298. 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. 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).

In this case, claimant was exposed to asbestos while on a one-week assignment for his employer HOC to do carpentry work on a barge owned by B&R. HOC was insolvent, so claimant sought benefits against B&R under Section 4(a). The Board affirmed the administrative law judge's findings that HOC was not a "subcontractor" of B&R, and thus, that B&R cannot be held liable for any benefits due claimant pursuant to Section 4(a) as a result of HOC's insolvency, as the findings are in accordance with the standard espoused by the Fifth Circuit in *Sketoe,* 188 F.3d 596, 33 BRBS 151(CRT). The Board held that, as the administrative law judge found, this case did not involve a "two-contract" situation like the one presented in *National Van Lines*, but rather is more akin to the ownership situations delineated in *Boyd,* 39 BRBS 17 and *Dailey,* 20 BRBS 75. *Touro v. Brown & Root Marine Operators*, 43 BRBS 148 (2009).

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).

In this case involving claimant, his direct employer, AG Jersey, and its sister and parent companies, AG UK and AG PLC, respectively, the Board noted that the contractor/subcontractor relationship was not at issue. Because AG UK provided the DBA insurance for AG Jersey employees, for the benefit of AG Jersey, AG Jersey did not "fail" to provide insurance for its employees such that Section 5(a) applies. Thus, AG UK's having secured insurance does not, by itself, render it claimant's "employer." *Newton-Sealey v. ArmorGroup (Jersey) Services, Ltd.*, 47 BRBS 21 (2013) (*see* digest under Employee/Employer relationship for further details).

Section 4(b)

Section 4(b) provides: "Compensation shall be payable irrespective of fault as a cause for the injury." 33 U.S.C. §904(b). *See Voris v. Texas Employer's Ins. Ass'n*, 190 F.2d 929 (5th Cir. 1951), *cert. denied*, 342 U.S. 932 (1952); *Woodham v. U.S. Navy Exchange*, 2 BRBS 185 (1975); *Fields v. Henderson,* 1 BRBS 37 (1974), *aff'd mem. sub nom. Fields v. Director, OWCP*, 535 F.2d 1324 (D.C. Cir. 1976) (table). Section 3(c) provides the sole exception to this rule, excluding injuries due solely to the intoxication of the employee or to the willful intent of the employee to injure himself or another. *Newport News Shipbuilding & Dry Dock Co. v. Hall*, 674 F.2d 248, 14 BRBS 641 (4th Cir. 1982). *See* Section 3(c) of this deskbook for additional discussion of this exclusion.

Thus, benefits may not be denied on the basis that claimant was at fault, and employer is liable for workplace injuries regardless of a lack of fault on its part in creating the working conditions giving rise to injury. The Act is premised on a compromise between employer and employee, wherein

> employers relinquish common law defenses such as the fellow servant rule and assumption of risk and in turn are assured that the exclusive remedy for employees will be the limited workers' compensation benefits; employees, correspondingly, relinquish their right to sue the employer …in return for the certainty of strict liability compensation for employment related injuries.

Newport News Shipbuilding & Dry Dock Co. v. Hall, 674 F.2d at 250, 14 BRBS at 645, *citing Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268, 282 n.24, 14 BRBS 363, 368 n.24 (1980). In describing this compromise, the Supreme Court stated that the Act was designed to strike a balance between the concerns of employers and employees, thus, "[e]mployers relinquished their defenses to tort actions in exchange for limited and predictable liability. Employees accept the limited recovery because they receive prompt relief without the expense, uncertainty, and delay that tort actions entail." *Morrison-Knudsen Constr. Co. v. Director, OWCP,* 461 U.S. 624, 636, 15 BRBS 155, 159(CRT) (1983).

In *Hall*, the Fourth Circuit affirmed a Board decision, *Hall v. Newport News Shipbuilding & Dry Dock Co.,* 13 BRBS 873 (1981), holding that a claimant who knowingly and willfully made false representations as to his physical condition in his employment application and at a pre-hiring physical was not precluded from receiving benefits under the Act. *Accord Hallford v. Ingalls Shipbuilding Div., Litton Systems, Inc.,* 15 BRBS 112 (1982) (Ramsey, C.J., dissenting). In both *Hall* and *Hallford,* employer relied on claimant's misrepresentations in deciding to hire him and his subsequent injury was causally related to prior injuries which he knowingly concealed. Regardless, in the absence of a specific statutory exclusion for such misrepresentation, claimant was not

barred from the receipt of benefits under the Act. *See* Section 31(a) (providing criminal penalties for a claimant who knowingly and willfully makes a false statement or representation for the purpose of obtaining a benefit under the Act).

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In this psychological injury case, the Board held that the administrative law judge erred in holding that claimant was not entitled to the Section 20(a) presumption based on claimant's stressful working conditions. In his analysis, the administrative law judge erred in considering whether employer's interactions with claimant, including claimant's treatment by her supervisor, were legitimate or justified. The Board noted that such a focus suggests a requirement that the supervisor be at fault in order for claimant to have a viable claim, which is contrary to the Act which rests on strict liability and excludes tort concepts like fault and negligence. *Sewell v. Noncommissioned Officers' Open Mess, McChord Air Force Base*, 32 BRBS 134 (1998) (*en banc*) (Brown and McGranery, JJ., dissenting), *aff'g on recon.* 32 BRBS 127 (1997) (McGranery, J., dissenting).

The Ninth Circuit adopted the Board's decision in *Marino*, 20 BRBS 166 (1988), holding that psychological injuries resulting from legitimate personnel actions are not compensable, as opposed to injuries arising from general working conditions such as harassment, which are compensable, *see Sewell,* 32 BRBS 127 (1997), *on recon.,* 32 BRBS 134 (1998). The court stated that this rule strikes an appropriate balance between the needs of employers and employees. The court rejected claimant's contention that such a holding runs afoul of the no-fault scheme of Section 4(b). In this case, claimant conceded that substantial evidence supported the finding that his psychological injuries were caused by legitimate personnel actions, namely disciplinary actions and reprimands. Thus, the court affirmed the denial of benefits. *Pedroza v. BRB*, 583 F.3d 1139, 43 BRBS 51(CRT) (9th Cir. 2009).

Where claimant was injured in an automobile accident resulting from a seizure, and his doctor had restricted him from driving as a result of his seizure disorder, the Board reversed the denial of benefits. That claimant disregarded his doctor's instructions is irrelevant, as Section 4(b) excludes the consideration of fault in assessing the cause of injury. Moreover, as claimant did not show "willful intent" to injure himself, the Section 3(c) exclusion is also not applicable. *Jackson v. Strachan Shipping Co.,* 32 BRBS 71 (1998) (Smith, J., concurring & dissenting).

The Board affirmed the administrative law judge's finding that claimant's breaking of a company rule against drinking on the job did not take him out of the course of his employment. Claimant's injury occurred within the time and space boundaries of his employment. Claimant's violation of the rule implicates fault, which is irrelevant under the Act unless Section 3(c) applies. Moreover, case precedent in state workers' compensation schemes establishes that a violation of a rule on how an employee should

perform his work (sober) does not take the employee out of the course of his employment. *G.S. [Schwirse] v. Marine Terminals Corp.*, 42 BRBS 100 (2008), *modified in part on recon.*, 43 BRBS 108 (2009).

In this DBA case, claimant was employed as a contractor in Afghanistan where he sustained injuries as a result of passively resisting MPs during a dispute. The Board held that the administrative law judge's denial of benefits based on his findings that claimant was at fault or that the injury-causing incident did not directly involve employer or its personnel was erroneous. Consideration of fault is directly contrary to the plain language of Section 4(b). Moreover, the Board held that an employer's direct involvement in the injury-causing incident is not necessary for any injury to fall within the zone of special danger. The limits of the zone of special danger are defined by whether the injury occurred within the zone created by the obligations and conditions of that employment. The Board agreed that claimant was at fault in causing the altercation, but concluded that once fault is eliminated from consideration, all that remains is an injury on a base in Afghanistan that is rooted in the conditions and obligations of claimant's employment. Consequently, the Board reversed the administrative law judge's conclusion that claimant's behavior removed him from the zone of special danger created by his employment, held that the injury was work-related, and therefore remanded the case for consideration as to the merits of claimant's claim. *N.R. [Rogers] v. Halliburton Services,* 42 BRBS 56 (2008) (McGranery, J., dissenting).

The administrative law judge erred in finding that employer was not liable for the injuries claimant sustained when he was assaulted by a co-worker. The administrative law judge erred in stating that the incident occurred as a result of a third party's intentional conduct. This standard applies only to a subsequent, intervening cause, not to the original injury, as the Act applies irrespective of fault. Moreover, the fact that claimant and the assailant were employed by separate subcontractors does not mean they were not "co-workers." They worked together in the confined environment of the rig and employer retained the right to, and in fact did, fire them after the incident. *Phillips v. PMB Safety & Regulatory, Inc.*, 44 BRBS 1 (2010).

Claimant alleged he was injured in a collision between the truck he was driving and another truck. The Board reversed the administrative law judge's finding that employer rebutted the Section 20(d) presumption that claimant did not intentionally injure himself. The Board held that there is no direct evidence that claimant intended to injure himself and the evidence relied upon by the administrative law judge to find claimant's "intent" cannot support the inferences he drew. The evidence of record indicates both drivers were found to be at fault. Moreover, if claimant's negligent conduct precipitated the collision, such does not preclude recovery under Section 3(c). The Act, 33 U.S.C. §904(b), applies irrespective of fault or negligence unless a specific exclusion applies. *Jarrett v. CP & O, LLC*, 51 BRBS 41 (2017), *vacated on recon.*, __ BRBS __ (2018).

On reconsideration, the Board re-addressed claimant's appeal, taking employer's contentions into account. Claimant alleged he was injured in a collision between the truck he was driving and another truck. The Board reversed the administrative law judge's findings that employer rebutted the Section 20(d) presumption that claimant did not intentionally injure himself and that the claim is barred by Section 3(c) . The Board held that there is no direct evidence that claimant intended to injure himself and the evidence relied upon by the administrative law judge to find claimant's "intent" cannot support the inferences he drew. The evidence of record indicates both drivers were found to be at fault. Moreover, if claimant's negligent conduct precipitated the collision, such does not preclude recovery under Section 3(c). The Act, 33 U.S.C. §904(b), applies irrespective of fault or negligence unless a specific exclusion applies. *Jarrett v. CP & O, LLC*, __ BRBS __ (2018), *vacating on recon.* 51 BRBS 41 (2017).