BRB No. 03-0292

RICHARD A. WAKELEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MAB, INCORPORATED	)	
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
EASTERN SHIPBUILDING, INCORPORATED	)	DATE ISSUED: Jan. 12, 2004
	)	
and	)	
	)	
CLARENDON NATIONAL INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin & Dulin, Ltd.), Gulfport, Mississippi, for claimant.

Bonnie J. Murdoch, Jacksonville, Florida, for Eastern Shipbuilding and carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order on Remand (2000-LHC-0281; 2000-LHC-0282; 2000-LHC-0283) of Administrative Law Judge Richard D. Mills 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).

This is the second time this case has come before the Board. *Wakeley v. Eastern Shipbuilding, Inc.*, BRB No. 01-335 (Dec. 17, 2001). The facts are undisputed. Claimant worked for the Navy as a diver during all times pertinent to this case, and he was assigned to the Naval Coastal Systems Center (dive locker) in Panama City, Florida. In 1998, work at the dive locker was slow. With permission from the Navy, and with the understanding that Navy work took priority, claimant was allowed to work as a commercial diver, distributing his business card to solicit jobs. Tr. at 130-131, 139, 144.

In late 1997 or early 1998, Eastern Shipbuilding, Inc. (Eastern) sought to have its underwater railway repaired.[1] It "contracted" with MAB, Inc. to complete the repairs.[2] Cl. Ex. 25 at 10. MAB is an underwater construction and repair company, and diving is one of the services it provides, primarily through the labors of its principal and sole stockholder, Mark A. Brooks. Tr. at 46, 62. After inspecting the underwater railway, MAB and Eastern agreed that it was not a one-man job and that additional labor would be needed. Eastern gave MAB the authority to obtain the necessary personnel to complete the job. Tr. at 62-63. MAB "hired" claimant and other divers to assist with this project. In addition to the work on the underwater railway, Eastern occasionally assigned the divers to work on other jobs such as cutting barges or inspecting/repairing new ship construction. Tr. at 48, 94, 154-155.

Claimant filed claims for compensation for three injuries he alleged occurred during the course of his work with MAB at Eastern's facility: a trauma to his shoulder while working on the underwater railway; trauma to his legs, ankles and shoulders when he was assigned by Eastern to work on a newly constructed vessel, the *Swath River*; and carpal tunnel syndrome in his wrists because of the repetitive motion required in using underwater welding and other tools on the Eastern job. Cl. Ex. 1; Tr. at 150, 154-155, 157. The administrative law judge found that Eastern is not an employer or a general contractor but, rather, is an owner or client/customer. Decision and Order at 5. Relying

[1]The underwater railway, which is similar to a standard railway, assists in the launching and dry-docking of ships. Tr. at 79.

[2]Both Eastern and MAB agree there was no formal written contract. Cl. Ex. 25 at 8-10; Tr. at 47, 63. There was an understanding between the two companies, based on prior dealings, and Eastern paid MAB based on invoices it submitted on a "cost-plus" basis.

on *Sketoe v. Exxon Co., USA*, 188 F.3d 596, 33 BRBS 151(CRT) (5th Cir. 1999), *cert. denied*, 529 U.S. 1057 (2000); *Director, OWCP v. National Van Lines, Inc.*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979), *cert. denied*, 448 U.S. 907 (1980), and *Dailey v. Edwin H. Troth, t/a EHT Constr. Co.*, 20 BRBS 75 (1986), the administrative law judge concluded that Eastern was not obligated by contract to perform repairs on the railway and was the "owner" of the property, making MAB the "contractor." Decision and Order at 6.

The administrative law judge then considered the relationship between MAB and claimant. The administrative law judge analyzed this issue under the "relative nature of the work test," which is applied in determining whether an individual is in an employment relationship with a putative employer. *See Haynie v. Tideland Welding Service [Haynie I]*, 631 F.2d 1242, 12 BRBS 689 (5th Cir. 1980), and *Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980). He concluded that claimant was an independent contractor, and not an employee, of MAB, and, as such, he is not entitled to benefits. Decision and Order at 9-10. Claimant appealed, and Eastern and MAB responded, urging affirmance.

The Board held that, under the applicable "relative nature of the work" test, the administrative law judge properly found that claimant is not an employee of Eastern. *Wakeley*, slip op. at 5. With regard to the relationship between claimant and MAB, the Board held that the application of this test was flawed: the administrative law judge incorrectly compared Eastern's business to claimant's work to conclude that claimant was not an employee of MAB. *Id.* Therefore, the Board vacated the determination that claimant is not an employee of MAB, and it remanded the case for further consideration of that relationship. *Id.* at 6. The Board then addressed the relationship between Eastern and MAB for judicial efficiency in the event that, on remand, the administrative law judge were to find claimant was an employee of MAB, affirming the administrative law judge's finding that Eastern was not a contractor with regard to any injury claimant may have sustained on the underwater railway project. *Id.* at 6-8. *See* 33 U.S.C. §904. Thus, if claimant were an employee, MAB alone would be liable for benefits for that injury.[3]

On remand, with regard to the relationship between claimant and MAB, the administrative law judge addressed each factor necessary for consideration under the test and found that claimant does not satisfy the criteria for being an employee and, thus, is an independent contractor. Decision and Order on Remand at 7-8. He, therefore, denied

[3]The Board directed the administrative law judge to reconsider Eastern's status as a contractor with regard to the other injuries alleged by claimant, as they occurred on different projects, if the administrative law judge found claimant was an employee of MAB.

benefits. Claimant appeals the denial of the claim, and Eastern responds, urging affirmance.[4]

The primary issue before the administrative law judge on remand was whether claimant is an employee of MAB or is an independent contractor. Independent contractors are not covered by the Act. *Cardillo v. Mockabee*, 102 F.2d 620 (D.C. Cir. 1939); *Gordon v. Commissioned Officers' Mess*, 8 BRBS 441 (1978). The United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, has held that the proper test for determining whether a claimant is an employee or is an independent contractor is the "relative nature of the work" test. *Haynie I*, 631 F.2d 1242, 12 BRBS 689; *Oilfield Safety*, 625 F.2d 1248, 14 BRBS 356. The test "requires examining the nature of a claimant's work and the relation of that work to an employer's regular business." *Oilfield Safety*, 625 F.2d at 1253, 14 BRBS at 359. The court explained:

> In evaluating the character of a claimant's work, a court should focus on various factors, including the skill required to do the work, the degree to which the work constitutes a separate calling or enterprise, and the extent to which the work might be expected to carry its own accident burden. * * * In analyzing the relationship of the claimant's work to the employer's business the factors to be examined include, among others, whether the claimant's work is a regular part of the employer's regular work, whether the claimant's work is continuous or intermittent, and whether the duration of [the] claimant's work is sufficient to amount to the hiring of continuing services as distinguished from the contracting for the completion of a particular job.

Id. (citation omitted).[5]

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[4]MAB did not respond to claimant's current appeal; however, at this stage of the proceedings, the interests of the two companies coincide.

[5]In *Oilfield Safety*, the court held that the claimant, a safety inspector and part owner of Oilfield Safety, was an employee of both Oilfield Safety and of Harman Unlimited. Factors considered in making this determination included: the emblem on the claimant=s coveralls, how others logged him in/out of the facility, admissions of the employers, payment of his salary, the claimant=s efforts on behalf of the employers, the distribution of business cards, and how the claimant was listed on meal and bunk rosters and on production reports. Accordingly, both employers were held jointly and severally liable for the claimant=s benefits. *Oilfield Safety*, 625 F.2d at 1254-1256, 14 BRBS at 359-361.

In evaluating the character of claimant's work, the administrative law judge first found that claimant's work is specialized and requires expertise in diving and underwater construction. Decision and Order on Remand at 3-4. In this regard, the administrative law judge observed that claimant distributed business cards setting himself out as a "diving specialist." Given the requirements for the project at Eastern and MAB's understanding that claimant was a skilled diver, the administrative law judge reasoned that claimant's work is specialized. *Id.* Claimant argues that his work was not specialized when compared with the business of MAB. We reject claimant's argument. While it is true that claimant's specialty, diving and underwater construction, was the same as MAB's specialty, at this juncture, application of the test requires only consideration of the character of claimant's work and not a comparison between claimant's work and MAB's work. The second aspect of the "relative nature of the work" test is to consider the relationship between the claimant's and the employer's work. Although the factors may overlap, there must be some separate consideration given or the test is redundant. Thus, the facts of this case support the administrative law judge's finding that claimant's work was highly skilled and specialized, and we, therefore, affirm it. *See Oilfield Safety*, 625 F.2d at 1253, 14 BRBS at 359; *Haynie v. Tideland Welding Service [Haynie II]*, 18 BRBS 17 (1985), *aff'd mem. sub nom. Haynie v. U.S. Dep't of Labor*, 797 F.2d 975 (5th Cir. 1986).

Next, the administrative law judge determined that claimant's work was a "separate calling or enterprise." He relied on claimant's business card holding him out as being in the diving business and on the fact that claimant's income tax returns indicated that he maintained a separate diving business for which he claimed losses in both 1997 and 1998. Further, the fact that claimant needed permission from the Navy to perform outside work and that the user of his services was not involved in obtaining that permission persuaded the administrative law judge that claimant's work was a separate enterprise. Thus, he found that claimant's diving business was separate from both his regular job with the Navy as well as from anyone who wished to use his private services. Decision and Order on Remand at 4-5. Claimant argues that the work he performed was not a separate enterprise as the job sites, his assignments and supervision, and his hours were controlled by MAB and Eastern.

Initially, claimant's argument regarding his hours is without merit, as the record establishes that neither Eastern nor MAB controlled claimant's hours, since his job with the Navy superceded any work he performed for MAB. If called, he would have to stop working at Eastern's facility and return to the dive locker. Eastern Ex. 5 at 59; Tr. at 130-131, 139, 144. In any event, while the "control" factors claimant relies upon may be

informative, they are not dispositive.[6] The administrative law judge rationally relied on other relevant factors, and his conclusion that claimant was engaged in a separate enterprise is supported by the record. *See Oilfield Safety*, 625 F.2d at 1253, 14 BRBS at 359; *Haynie II*, 18 BRBS at 19. Accordingly, the finding that claimant's work was a "separate calling or enterprise" is affirmed.

The next factor the administrative law judge addressed in evaluating the character of claimant's work is whether claimant should be expected to carry his own insurance. Although the administrative law judge ultimately decided not to make a definitive finding on this aspect, he stated that it was arguable that claimant should have carried his own insurance. Decision and Order on Remand at 5. Specifically, the administrative law judge considered the testimony of the parties, finding it to be directly contradictory and, thus, of little help.[7] The administrative law judge also considered claimant's tax filings which indicated claimant reported business expenses, including other types of insurance, and stated that this evidence could support a finding that claimant should have been responsible for his own accident insurance. *Id.* Claimant argues that this issue was of

[6]In an unpublished case, the Fifth Circuit explained that one factor to consider in assessing whether a claimant's work is a "separate calling or enterprise" is the method of payment. *In the matter of McKinney Salvage & Heavy Lifting, Inc.*, No. Civ. A. 00-966, 00-2908 (Dec. 28, 2001) (2001 WL 1661842). That is, consideration should be given to the form of payment, the party responsible and whether taxes were withheld. *Id.*, slip op. at 3. In this case, MAB billed Eastern based on claimant's tracking records, and then MAB acted as a conduit and paid claimant. It is undisputed that the checks claimant received from MAB noted payment for "contract labor" or "diving services," no taxes were withheld by MAB, claimant received a Form 1099 from MAB at the end of the tax year instead of a W-2 form, and claimant reported a business loss for both 1997 and 1998. Decision and Order at 4, 7; Cl. Ex. 8 at 2, 5-7, 9, 12-13; MAB Ex. 1; Eastern Exs. 5, 8. Thus, this evidence also supports the administrative law judge's conclusion that claimant's work constitutes a "separate calling or enterprise."

[7]Claimant testified that Navy approval of his private work was conditioned on whether insurance matters were in place before beginning a job. Tr. at 140. Claimant also testified that Mr. Brooks said he (Mr. Brooks) paid $5,000 to secure insurance in the event of any injury. Tr. at 145-146. To the contrary, Mr. Brooks testified that claimant said the Navy would cover any injuries, and that he (claimant) would rather pocket the $5,000 instead of paying for insurance. Cl. Ex. 15 at 30; Eastern Ex. 4. He also testified that claimant knew MAB had no insurance coverage for him based on their work history. Cl. Ex. 15 at 30.

utmost importance and the administrative law judge erred in not making a finding on it.[8] He also argues that the administrative law judge's failure to reach a conclusion violates the Administrative Procedure Act. Contrary to claimant's assertion, this one factor is not dispositive of the issue, *Tanis v. Rainbow Skylights*, 19 BRBS 153 (1986), and, further, all factors of the "relative nature of the work" test need not be found in favor of one party in order for the administrative law judge's conclusion to be supported by substantial evidence. *See, e.g., Eckhoff v. Dog River Marina & Boat Works, Inc.*, 28 BRBS 51 (1994) (four Restatement factors fulfilled). As the testimony is directly contradictory, and there is financial evidence that claimant carried other types of insurance on his private business, it was reasonable for the administrative law judge to surmise that claimant could be responsible for carrying his own accident insurance. *Haynie II*, 18 BRBS at 19. In any event, this factor alone, as the administrative law judge stated, does not resolve the question of whether claimant is an employee of MAB or is an independent contractor, and any error in failing to reach a conclusion on this one issue is harmless, as the administrative law judge properly addressed all components of the test.

After addressing the characteristics of claimant's work, the administrative law judge then considered the relationship between claimant's work and MAB's work. He first considered whether claimant's work is a regular part of MAB's regular work, and he concluded it is not. Decision and Order on Remand at 5-6. The administrative law judge reasoned that MAB's usual work consisted of short-term, one-man jobs performed by Mr. Brooks. The job for which claimant contracted was a large job, lasting nearly one year and involving a number of other divers. Therefore, the administrative law judge determined that claimant was brought in to help out on a "once in a lifetime" type of job "that was outside the normal parameters of MAB's regular business." Decision and Order on Remand at 6. Claimant asserts that he worked at Eastern's facility for approximately one year and that the work he performed was typical of work MAB regularly performs. The administrative law judge's application of this factor of the test is reasonable, and the facts support his finding. Even were we to agree with claimant that, as a diver, his work is part of what MAB does on a regular basis, *see Carle v. Georgetown Builders, Inc.*, 19 BRBS 158 (1986); *Tanis*, 19 BRBS at 157, satisfaction of this single aspect of the test's criteria is insufficient to reverse the administrative law judge's overall conclusion.

The second factor in addressing the relationship between claimant's work and MAB's business is whether claimant's work was continuous or intermittent. The administrative law judge found that claimant and MAB had a history and that this

[8]Claimant also asserts that the Section 20(a), 33 U.S.C. §920(a), presumption applies here to resolve any doubts in favor of longshore coverage. Contrary to claimant's assertion, Section 20(a) does not apply to the issue of whether an employer-employee relationship exists. *Holmes v. Seafood Specialist Boat Works*, 14 BRBS 141 (1981).

involved claimant's being hired for short-duration projects in 1994 and 1996. Decision and Order on Remand at 6. He noted, in this regard, that claimant did not work for MAB at any time during 1997. Again, the tax filings and receipt of 1099 forms instead of W-2 forms weighed heavily in favor of claimant's non-employee status. Further, the administrative law judge relied on claimant's commitment to the Navy and the fact that it took precedence over any other work claimant might perform to support his conclusion that claimant's association with MAB was intermittent and not continuous in nature. Claimant argues that he worked at the job at Eastern for nearly one year on a regular and continuous basis. Historically, the administrative law judge is correct that claimant's work was intermittent. With regard to the particular job at issue, the administrative law judge rationally gave great weight to claimant's Navy commitment and concluded that "continuous" employment was prevented by that commitment. Thus, it was reasonable for him to determine that claimant did not satisfy this factor.

Finally, the administrative law judge found that claimant's work with MAB was contracted for the duration of a specific project and was not a hiring for continuous services. Claimant argues that his work at Eastern was nearly one year in duration and that there was no one specific project for which he was hired but, rather, that he was required to perform a number of different tasks. Contrary to claimant's assertions, it is uncontradicted that Eastern hired MAB to repair its underwater railway and that it was a large job requiring the services of more than one diver. Thus, claimant was contracted by MAB to assist in completing this job. Although claimant may have performed different tasks on Eastern's property, at Eastern's request, he was hired by MAB to repair the underwater railway, and he was not hired on to work for MAB or Eastern after that job was completed. Additionally, as the administrative law judge stated, claimant was paid by MAB based on its invoicing of Eastern for services performed and hours worked. There was no indication he would be paid beyond the completion of the project. Further, although the project lasted nearly one year, it was still of finite duration. Thus, it was rational for the administrative law judge to find that claimant was hired only for a specific project. *See, e.g., Haynie II*, 18 BRBS 17; *compare with Marinelli v. American Stevedoring, Ltd.*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001) (10-year duration was continuous).

The determination of whether claimant is an employee or an independent contractor is fact-intensive, and the application of the test to the facts is the responsibility of the administrative law judge. *Oilfield Safety*, 625 F.2d 1248, 14 BRBS 356; *Holmes v. Seafood Specialist Boat Works*, 14 BRBS 141 (1981). Moreover, it is within the administrative law judge's discretion to assess the credibility of the testimony and weigh the evidence. *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). The administrative law judge has performed his duty, and his conclusions are rational and supported by

substantial evidence. Consequently, we affirm the administrative law judge's determination that claimant is not an employee of MAB, but, rather, is an independent contractor. We, therefore, affirm the denial of benefits. *Mockabee*, 102 F.2d 620.

Accordingly, the administrative law judge's Decision and Order on Remand 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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BETTY JEAN HALL
Administrative Appeals Judge