U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 16-0645

TOM L. MAYS	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
HUNTINGTON INGALLS, INCORPORATED (AVONDALE OPERATIONS)	)	DATE ISSUED: July 28, 2017
	)	
Self-Insured Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Modification of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Isaac H. Soileau, Jr., and Ryan A. Jurkovic (Soileau & Associates, L.L.C.), and Susanne W. Jernigan (The Jernigan Firm), New Orleans, Louisiana, for claimant.

Richard S. Vale and Pamela Noya Molnar (Blue Williams, L.L.P.), Metairie, Louisiana, for self-insured employer.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order on Modification (2015-LHC-01301) of Administrative Law Judge Clement J. Kennington 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'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

This case has a long history and has been to the Board multiple times. Only the

relevant facts and procedural history will be summarized here.

Claimant, who was a welder for employer for over 13 years, sustained a blow to his head, a fracture of the right cheek, and a serious eye injury when he was kicked in the face by John Gliott, another worker, during an altercation at work on March 18, 1991. Claimant was treated for his injuries, underwent surgery and was also seen by several psychiatrists because of a resulting psychological injury. Employer voluntarily paid claimant temporary total disability and medical benefits from March 18 through August 6, 1991, at which time, in light of medical recommendations, employer believed claimant could return to work. Claimant did not return to work and sought additional benefits. In its first decision, the Board affirmed the administrative law judge's denial of additional disability benefits, as well as his finding that employer refused to approve a change of physicians. The Board remanded the case for reconsideration of the necessity and reasonableness of the medical expenses sought by claimant. *Mays v. Avondale Industries, Inc.*, BRB No. 98-1084 (May 3, 1999). Following remand and appeal, the Board affirmed the administrative law judge's award of medical benefits. *Mays v. Avondale Industries, Inc.*, BRB No. 00-0557 (July 11, 2001).[1]

Meanwhile, claimant had filed and settled a tort suit in Louisiana state court against Gliott and International Marine & Industrial Applicators, Incorporated (International Marine), for $60,000.[2] *Mays v. Gliott*, No. 430-626 (La. Dist. Ct. Aug. 4, 2000). Claimant did not obtain employer's prior written approval of the settlement; however, employer was involved in the settlement process to the degree that it had notice of it. After the settlement, employer sought to terminate claimant's medical benefits via Section 33(g)(1) of the Act, 33 U.S.C. §933(g)(1). The administrative law judge determined that Section 33(g)(1) does not apply and that claimant satisfied the notice requirement of Section 33(g)(2), 33 U.S.C. §933(g)(2). He also found that Section 33(f) of the Act, 33 U.S.C. §933(f), applies such that employer is entitled to credit its liability for medical benefits against the net settlement amount.[3] The administrative law judge

[1] The administrative law judge's decision was deemed affirmed by application of Pub. L. No. 106-554, 114 Stat. 2763. However, the Board reviewed the contentions and held that the decision should be affirmed on its merits as well.

[2] Gliott was employed by International Marine, a contractor hired by employer to clean out and sandblast the tanks on the ship. In exchange for the $60,000, and for employer's waiver of its intervention, claimant agreed to dismiss all claims against Gliott, International Marine, and employer under the Act. EX 27 (2015 hearing). Claimant was represented by an attorney in the tort proceedings.

[3] Section 33(g)(2) requires notice of the termination of the third-party proceedings in two instances: "(1) Where the employee obtains a judgment, rather than a settlement, against a third party; and (2) Where the employee settles for an amount greater than or

denied claimant's motion for modification on the issue of whether he is entitled to additional disability compensation, finding it was untimely filed.

On appeal, the Board affirmed the administrative law judge's findings that: claimant entered into an enforceable settlement agreement;[4] Section 33(g)(1) does not apply because the settlement for $60,000 was for an amount greater than the amount of compensation to which claimant was entitled under the Act ($5,514.68); and Section 33(f) applies, entitling employer to offset the net proceeds of the settlement against the medical benefits awarded under the Act. Additionally, the Board held that claimant's motion for modification was not untimely filed because it was filed during the pendency of the proceedings on the initial claim. The Board remanded the case for the administrative law judge to consider claimant's contentions on modification. *Mays v. Avondale Industries, Inc.*, BRB Nos. 03-0228/A (Nov. 25, 2003).

In November 2006, claimant filed a motion with the administrative law judge objecting to his motion for modification going forward.[5] The administrative law judge granted claimant's motion on December 7, 2006, reminding him that, if he wished to re-file for modification, he must abide by the limitations in Section 22, 33 U.S.C. §922. Between 2007 and 2012, claimant filed various letters with the district director, the administrative law judge, and the Board about his rights with respect to modification of

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equal to the employer's total liability." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 482, 26 BRBS 49, 53(CRT) (1992). An employer is entitled to a Section 33(f) credit in the amount of the net proceeds of a third-party settlement against its liability for all past and future medical benefits because the Section 33(f) offset for the "amount" determined to be payable to the claimant under the Act includes both medical benefits and disability compensation. *O'Brien v. Evans Financial Corp.*, 31 BRBS 54 (1997) (Brown, J., dissenting on other grounds), *rev'd on other grounds sub nom. Evans Financial Corp. v. Director, OWCP*, 161 F.3d 30, 32 BRBS 193(CRT) (D.C. Cir. 1998).

[4] At this juncture, claimant was asserting there was no valid settlement because he had refused to sign the agreement, alleging fraud. The state court granted the motion to enforce and held that an agreement had been reached and was valid. *Mays v. Gliott*, 793 So.2d 574 (La. App. 5th Cir.), *writ denied*, 795 So.2d 1195, *recon. denied*, 798 So.2d 955 (La. 2001); *see* EXs 28-32 (2015 hearing). The Board held the settlement was valid pursuant to the doctrine of collateral estoppel. *Mays v. Avondale Industries, Inc.*, BRB Nos. 03-0228/A (Nov. 25, 2003).

[5]Claimant had fired his attorney and was alleging collusion and other wrong-doings by various people involved in the matter and did not believe the proceedings would be fair.

the administrative law judge's award. In 2008, claimant sought, and the district director denied, an order declaring employer in default for failure to pay medical benefits. In December 2013, the administrative law judge determined that claimant's letters dated in 2007 were timely, and were sufficient to constitute a motion for modification, and in March 2014, the case was remanded to the district director for an informal conference to consolidate and frame the issues claimant sought to address. *See Mays v. Avondale Industries, Inc.*, BRB Nos. 09-0221, 12-0663 (Aug. 20, 2013); Order Granting Remand (Apr. 17, 2014).

Following additional informal proceedings, the case was forwarded to the administrative law judge to address claimant's motion for modification. Claimant was represented by counsel before the administrative law judge. Claimant asserted there were mistakes regarding Gliott's employment status as a "third party" as it related to the tort settlement, as well as his own medical condition and average weekly wage. Employer responded that claimant had never previously questioned Gliott's status as a "third party" or a "borrowed employee." Employer also argued that the borrowed employee issue is a legal, not a factual, issue, and, therefore, is not subject to modification. Applying the *Ruiz* factors,[6] the administrative law judge found that eight of the nine factors weighed against finding that Gliott was employer's borrowed employee; thus, the administrative law judge found the preponderance of the evidence supports the conclusion that Gliott was an employee of a contractor, not employer's borrowed employee. Consequently, Gliott and his employer were "third parties," and the tort settlement with them was a "third-party settlement" subject to the provisions of Section 33 of the Act. Decision and Order on Modif. at 3, 7. Based on his review of the medical evidence, the administrative law judge found that claimant has been totally disabled by his work injury since March 18, 1991, and he calculated that claimant would be entitled to an additional $335,012.08 under the Act as of July 6, 2016. Supp. Decision and Order at 1; Decision and Order on Modif. at 9. As that amount far exceeds the $60,000 unapproved third-party settlement, the administrative law judge stated that Section 33(g)(1) of the Act mandates forfeiture of claimant's disability and medical benefits. The administrative law judge, thus, denied claimant's motion for modification. Decision and Order on Modif. at 9-10.

Claimant, who is represented by an attorney, appeals the administrative law judge's finding that he entered into a "third-party" settlement. Therefore, claimant contends he is entitled to additional disability and medical benefits. Employer responds,

[6] *Ruiz v. Shell Oil Co.*, 413 F.2d 320 (5th Cir. 1969); *see also Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913 (1978). The *Ruiz-Gaudet* test considers nine factors for determining if an employee is a borrowed servant, such as who has control over the employee and his work, who can hire, pay, or fire him, and was there an agreement between the two employers.

urging affirmance. Claimant filed his own pleading in reply, and shortly thereafter, his attorney filed a reply brief on his behalf.[7]

Claimant contends the administrative law judge erred in finding Gliott to be a "third party." Claimant asserts that Gliott was immune from tort liability because employer "admitted" Gliott was a "co-employee" on numerous occasions, the Board classified workers in similar positions as "co-employees" in *Phillips v. PMB Safety & Regulatory, Inc.*, 44 BRBS 1 (2010), and Gliott was employer's borrowed employee under the *Ruiz* test.

Section 22 of the Act provides the only means for re-opening a claim that has been finally adjudicated, as it allows the modification of a prior decision on the grounds that there has been a change of conditions or a mistake in the determination of fact. 33 U.S.C. §922; *see Metropolitan Stevedore Co. v. Rambo [Rambo I]*, 515 U.S. 291, 30 BRBS 1(CRT) (1995); *Banks v. Chicago Grain Trimmers Ass'n, Inc.*, 390 U.S. 459 (1968). A basic criterion for re-opening a case under Section 22 is whether reopening it will "render justice under the Act." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971); *Banks*, 390 U.S. 459. The party moving for modification, here claimant, has the burden of establishing the mistake or change. *Metropolitan Stevedore Co. v. Rambo [Rambo II]*, 521 U.S. 121, 31 BRBS 54(CRT) (1997); *Wheeler v. Newport News Shipbuilding & Dry Dock Co.*, 37 BRBS 107 (2003).

Initially, we reject employer's assertions that the question of whether Gliott is a borrowed employee has been raised improperly. Employer asserts it is a purely legal question that is not subject to modification. Contrary to employer's assertion, borrowed employee status is a mixed question of fact and law.[8] *McCord v. Cephas*, 532 F.2d 1377,

[7] Counsel also filed a request to strike claimant's "brief." We deny counsel's motion to strike, and we accept both briefs on claimant's behalf into the record. 20 C.F.R. §§802.213, 802.215, 802.219(f). Claimant is informed, however, that the Board does not have jurisdiction to address the constitutional issues he raises in his pleading. 20 C.F.R. §802.102.

[8] Although the issue of whether a worker is a borrowed employee is a question of law if the facts of the employment are undisputed, the *Gaudet* court stated that the issue "concerns not only the facts themselves but the implications to be drawn from the facts." Further, it is not solely a question of law if it can be shown that "genuine disputes exist over enough determinative factual ingredients to make a difference" in the court's conclusion. *Gaudet*, 562 F.2d at 357-358; *see also Melancon v. Amoco Production Co.*, 834 F.2d 1238, 1245 (5th Cir. 1988); *Alday v. Patterson Truck Line, Inc.*, 750 F.2d 375 (5th Cir. 1985).

3 BRBS 371 (D.C. Cir. 1976); *Edwards v. Willamette Western Corp.*, 13 BRBS 800 (1981) (Miller, dissenting); *see Capps v. N. L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986), *cert. denied*, 479 U.S. 838 (1986); *Gaudet v. Exxon Corp*., 562 F.2d 351 (5th Cir. 1977), *cert. denied,* 436 U.S. 913 (1978); *Ruiz v. Shell Oil Co*., 413 F.2d 310 (5th Cir. 1969).

We also reject employer's assertion that claimant should have raised the question of Gliott's employment status when employer first sought to apply the Section 33(g) bar. An administrative law judge's authority to reopen proceedings is not limited to particular facts but extends to all mistaken determinations of fact. *O'Keeffe*, 404 U.S. 254; *Banks*, 390 U.S. 459; *Island Operating Co., Inc. v. Director, OWCP [Taylor],* 738 F.3d 663, 47 BRBS 51(CRT) (5th Cir. 2013). This includes mixed questions of fact and law. *Finch v. Newport News Shipbuilding & Dry Dock Co.*, 22 BRBS 196 (1989). A case may be re-opened for a mistake in fact even if the issue was not raised in the earlier proceedings. *R.V. [Vina] v. Friede Goldman Halter*, 43 BRBS 22 (2009). The moving party may demonstrate the mistake in fact by presenting wholly new evidence or cumulative evidence, or by urging further reflection of the evidence initially submitted. *Dobson v. Todd Pacific Shipyards Corp.*, 21 BRBS 174 (1988). As it is a mixed question of fact and law, claimant acceptably raised the issue of Gliott's employment status in a motion for modification; therefore, he bears the burden of establishing that the previous finding that the Section 33(g) bar applies was mistaken.

Claimant contends he did not reach a "third-party" settlement within the meaning of Section 33 because Gliott was an "employee" of employer. Employer responds that the administrative law judge properly found that Gliott worked for a subcontractor at employer's facility and was not its employee. Pursuant to Section 33(i) of the Act, 33 U.S.C. §933(i), the right to compensation under the Act is the exclusive remedy if an employee is injured by the negligence of any person in the same employ. *Traywick v. Juhola*, 922 F.2d 786 (11th Cir. 1991). A borrowed servant becomes the employee of the borrowing employer; therefore, if a claimant and his co-worker are "persons in the same employ" within the meaning of Section 33(i), tort liability is precluded. *Perron v. Bell Maintenance & Fabricators*, 970 F.2d 1409, *reh'g denied*, 976 F.2d 732 (5th Cir. 1992), *cert. denied*, 507 U.S. 913 (1993). However, pursuant to Section 33(a) of the Act, 33 U.S.C. §933(a), a claimant may proceed in tort against a third party if he determines that the "third party" may be liable for damages related to his work-related injuries. *See United Brands Co. v. Melson*, 594 F.2d 1068, 10 BRBS 494 (5th Cir. 1979).

The sole issue raised on appeal is whether Gliott is a "third party" or employer's borrowed employee. The administrative law judge applied the *Ruiz* factors and concluded that Gliott was a "third party" and was not in employer's employ. In support of his contention, claimant asserts error in the administrative law judge's failure to address and apply the Board's decision in *Phillips*, 44 BRBS 1, and in his application of

the *Ruiz* test. For the reasons that follow, we reject claimant's contention, and we affirm the administrative law judge's finding that Gliott was not employer's borrowed employee.

It is first necessary to address the facts of Gliott's employment. Employer contracted with International Marine to clean and sandblast tanks on the ship on which claimant and Gliott worked. International Marine hired Gliott, among others, to perform the work. The job at employer's facility was to last 90 days. International Marine supervised its own workers, provided them with tools and equipment, and retained the authority to fire them, although employer had the right to remove them from its facility. International Marine also provided its own certificates of workers' compensation insurance and liability insurance, and its employees wore different badges from those worn by employer's employees. At the completion of the job, employer inspected the work and paid International Marine the fixed price in a lump sum. International Marine paid its own workers, and these employees left employer's premises when the project was completed. *See* Tr. at 82-83 (2015 Hearing). Claimant does not dispute these facts and, thus, has not established the existence of "genuine disputes" over any "determinative factual ingredients." *Gaudet*, 562 F.2d at 357–358. Rather, claimant challenges the application of the borrowed employee criteria to the facts of Gliott's employment.

We reject claimant's assertion that the administrative law judge failed to apply *Phillips* to this case, as the facts are distinguishable. The Board summarily stated in *Phillips* that Mr. Fruge, who injured claimant Phillips, was not a third party because he and Phillips were co-workers confined to working on the oil rig for Chevron, albeit employed by different subcontractors. *Phillips*, 44 BRBS at 3. The Board relied on the decision of the United States Court of Appeals for the Fifth Circuit in *Perron*, which involved two workers, Perron and Lee, who were confined to working on an oil rig for Gulf. Neither man was directly employed by Gulf; they were employed by two separate subcontractors. However, because the undisputed facts established that Gulf maintained all direction and control over both Perron and Lee, they were found to be "in the same employ." *Perron*, 970 F.2d at 1410-1412; *Perron v. Gulf Oil Corp.*, 893 F.2d 344 (5th Cir. 1989) (table), *cert. denied*, 497 U.S. 1025 (1990).

Both *Phillips* and *Perron* involved companies which supplied laborers to the oil rigs, and there is no dispute that the oil companies, Chevron and Gulf, respectively, had control over those laborers. In this case, however, employer specifically disputes that Gliott was its employee, and claimant does not dispute that Gliott's work was directed and supervised by International Marine.[9] Further, unlike workers in the oil platform

[9] We reject claimant's assertion that employer "admitted" Gliott was its employee by labeling him a "co-employee" in its pleadings, reports, and discovery. At no time did employer admit that Gliott was its employee, borrowed or otherwise. Moreover, to give

cases, Gliott was able to freely come and go from employer's facility. That his duties were in the confines of a ship's tank does not mandate the conclusion that Gliott was employer's employee. Therefore, the administrative law judge rationally declined to apply a "confined environment" test to this case. Decision and Order on Modif. at 7.

Our analysis of each of the nine *Ruiz* factors also leads us to conclude that the administrative law judge's finding that Gliott was not a borrowed employee is rational and supported by substantial evidence. *Ruiz*, 413 F.2d 320; *see also Gaudet*, 562 F.2d 351. In applying the *Ruiz* factors, no one factor is dispositive, but the factors are intended to determine which employer has control of the employee and his work, as this is the central issue of borrowed employee status. *Melancon v. Amoco Production Co.*, 834 F.2d 1238, 1245 (5th Cir. 1988); *Fitzgerald v. Stevedoring Services of America*, 34 BRBS 202 (2001). Focus also has been placed on whether the second employer was responsible for the working conditions experienced by the employee and whether the employment was of sufficient duration such that the employee could reasonably be presumed to have evaluated the risks of the work situation and acquiesced thereto. *Alday v. Patterson Truck Line, Inc.*, 750 F.2d 375 (5th Cir. 1985); *Gaudet*, 562 F.2d at 357; *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 this case, the administrative law judge focused on certain facts, particularly that International Marine: supervised Gliott; paid him; supplied his tools and equipment; provided his insurance; and retained the authority to fire him. These facts support the administrative law judge's findings that: International Marine controlled Gliott's work;[10] there was no agreement between the two employers that Gliott would become employer's servant;[11] Gliott did not acquiesce to becoming employer's employee;[12] International

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such significance to employer's word usage would require us to place similar significance on claimant's references to Gliott as a "third party" in his earlier pleadings.

[10] *See Holmes v. Seafood Specialist Boat Works*, 14 BRBS 141, 145 (1981) (Miller, J., dissenting) (facts cited by administrative law judge support finding that the employer did not have control over the claimant's work); *Gordon v. Commissioned Officers' Mess, Open*, 8 BRBS 441 (1978) (employer did not have control over the details of the decedent's work); *compare with Melancon*, 834 F.2d at 1245 (focus is on individual workers' assignments and instructions); *Fitzgerald*, 34 BRBS at 207-208; Tr. at 76, 82-83 (2015 Hearing) (employer did not supervise, monitor, or direct Gliott's work).

[11] *Compare with Melancon*, 834 F.2d at 1245; *Fitzgerald*, 34 BRBS at 209 (employee's understanding that he would be taking instructions from the contracting party is sufficient to constitute an "understanding" between the employers). As employer

Marine did not sever its relationship with Gliott;[13] and, International Marine retained the obligation to pay Gliott's wages.[14] Neutral to the equation are that Gliott was performing the work of both employer and International Marine; International Marine furnished Gliott's tools and equipment while employer furnished the premises; and the 90-day contract under which Gliott worked does not constitute a "considerable" amount of time, such that Gliott could be presumed to be a borrowed employee.[15] Finally, weighing for

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asserts, the existence of a contract specifically stating that an employee would not be considered an employee or agent of the contracting party does not override the reality that the employee would take instructions from the contracting party. In this case, the contract was a purchase order and Gliott did not take instructions from employer.

[12] Although claimant is correct that Gliott continued his job and "accepted" his working situation because that is where his company was working, there is no evidence that Gliott acquiesced to becoming an employee of employer. *Alday v. Patterson Truck Line, Inc.*, 750 F.2d 375, 379 (5th Cir. 1985). Also noteworthy is the fact that Gliott and International Marine did not raise the borrowed employee defense to establish tort immunity.

[13] Claimant is correct that a lending employer need not sever its relationship with its employees to satisfy this factor. *Melancon*, 834 F.2d at 1246; *Fitzgerald*, 34 BRBS at 209. However, the focus of this factor is on the lending employer's relationship with the employee while the "borrowing" occurs. For example, in *Melancon*, the formal employer's control over its employee was nominal while he worked for Amoco, and in *Fitzgerald*, the formal employer ceded control to SSA while the claimant worked there. In this case, International Marine did not sever its relationship with Gliott; instead, it actively supervised him throughout the project.

[14] Where a formal employer bears the responsibility for paying its employees, but receives the proceeds to make those payments from the contracting company, the contracting company has the obligation to pay the employee. *Melancon*, 834 F.2d at 1246; *Capps v. N. L. Baroid-NL Industries, Inc.*, 784 F.2d 615, 618 (5th Cir. 1986); *Fitzgerald*, 34 BRBS at 210. In *Melancon* and *Capps*, the contracting companies paid the nominal employers for the employees' services based on the number of hours the employees worked, and the nominal employers kept either a percentage or paid the employee at a lower hourly rate. *Melancon*, 834 F.2d at 1246; *Capps*, 784 F.2d at 618. In this case, however, employer paid International Marine a set amount pursuant to the purchase order for the contracted job. International Marine then paid its employees, including Gliott, for their work. Tr. at 82-83, 89 (2015 Hearing). The amount International Marine received from employer was not connected to the hours worked.

[15] According to the Fifth Circuit, a lengthy period of employment tends to support

borrowed employee status is the right to terminate factor.[16]

Although our review indicates the administrative law judge may have erred in finding that eight of nine factors favor Gliott's not being a borrowed employee, substantial evidence supports that at least five of nine factors favor the finding that International Marine, and not employer, had the right to control Gliott's work. Therefore, we affirm the administrative law judge's finding that Gliott is a "third party" and not employer's borrowed employee. Claimant has shown neither a genuine dispute with the "factual ingredients" of Gliott's employment nor any reversible error in the administrative law judge's application of those facts to the *Ruiz* test. Thus, claimant has not borne his burden of showing a mistake in the determination that he entered into a "third-party" settlement pursuant to Section 33(a) of the Act.

As claimant did not establish a mistake in the determination of this fact, it was proper for the administrative law judge to deny claimant's motion for modification.[17] *See generally A.S. [Schweiger] v. Advanced American Diving*, 43 BRBS 49 (2009) (McGranery, J., dissenting); *Kinlaw v. Stevens Shipping & Terminal Co.*, 33 BRBS 68 (1999), *aff'd mem.,* 238 F.3d 414 (4th Cir. 2000). The result of the denial of claimant's motion for modification is that the administrative law judge's prior award of medical benefits to claimant and offset to employer of the net amount of the third-party settlement pursuant to Section 33(f) remain in effect. *See, e.g., Schweiger*, 43 BRBS at 54.

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a finding that the worker is a borrowed employee. *Capps*, 784 F.2d at 618. Nevertheless, a laborer employed for only one day may be a borrowed servant. *Id.* In this case, International Marine supervised Gliott throughout the 90-contract period, Gliott did not spend "considerable" time under employer's control, and thus the length of his employment is a neutral factor. *Id.; compare with Melancon*, 834 F.2d at 1246 (7-year service under contracting employer's control supported the borrowed employee finding).

[16] As claimant asserts, the proper focus of this factor is whether the employer had the right to terminate the employee's services with itself – not whether it could terminate his employment with his formal employer. *Melancon*, 834 F.2d at 1246; *Capps*, 784 F.2d at 618; *Fitzgerald*, 34 BRBS at 210. Here, employer retained the right to remove workers from its yard but not to fire them from employment with International Marine. Tr. at 83 (2015 Hearing). As this satisfies the factor in favor of a borrowed employee, the administrative law judge incorrectly concluded otherwise.

[17] The administrative law judge's Order specifically states: "Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, Claimant's request for modification lacks merit and is therefore DENIED." Decision and Order on Modif. at 10.

Accordingly, the administrative law judge's denial of claimant's motion for modification is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge