U.S. Department of Labor

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

BRB No. 15-0190

INNOCENT BOB KAGORO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SABRE INTERNATIONAL SECURITY	)	
	)	
and	)	
	)	
THE CONTINENTAL INSURANCE COMPANY	)	DATE ISSUED: Nov. 23, 2015
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
WATERTIGHT SERVICES LIMITED	)	
	)	
Employer	)	DECISION and ORDER

Appeal of the Decision and Order of Larry W. Price, Administrative Law Judge, United States Department of Labor.

Tara K. Coughlin and Troy D. Green, Harrison Township, Michigan, for claimant.

Philip Keidel (Law Offices of Raymond Swan), Wyomissing, Pennsylvania, for Sabre International Security and Continental Insurance Company.

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

PER CURIAM:

Sabre International Security appeals the Decision and Order (2014-LDA-00343) of Administrative Law Judge Larry W. Price 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.*, as extended by the Defense Base Act, 42 U.S.C. §1651 *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).

Claimant, a Ugandan national, was recruited in Uganda by Watertight Services Limited (Watertight), a security staffing company, to provide security services in Iraq for Sabre International Security (Sabre), which had been awarded a contract with the U.S. Government. Watertight and Sabre signed an agreement in which Watertight agreed to "supply Sabre with Ugandan security personnel . . . for work that Sabre has in Iraq," and Sabre agreed to pay Watertight $1,000 per month for each security guard supplied.[1] EX 8. The agreement was for a twelve-month term that went into effect on October 1, 2007.[2] *Id.* On November 7, 2008, claimant signed a two-year term employment contract with Watertight, in which claimant agreed to work as a security guard in Iraq in furtherance of Sabre's contract with the U.S. Government, and Watertight agreed to pay claimant $600 per month. CX K. Claimant's first and only assignment through Watertight was with Sabre, which began in November 2008. CX A.

While in Iraq, claimant worked as a security guard. Sabre supplied claimant with food, shelter, his uniform, gear, weapons, and security badge, and claimant reported to Sabre supervisors. He was stationed initially at Camp Fallujah, then transferred to Camp Baharia. On March 2, 2009, while at Camp Baharia, claimant began experiencing abdominal pain and vomiting blood. CX A. He was treated by the camp physician, but his condition did not improve. At the end of March, claimant requested additional medical treatment, but instead was discharged from his employment; he returned to Uganda on April 3, 2009. Once home, claimant was able to obtain medical treatment only sporadically, due to a lack of money. Claimant was diagnosed as having, and was treated for, *H. pylori* bacteria that doctors said he had contracted in Iraq and which caused his symptoms. CX F. On March 7, 2011, claimant underwent an endoscopy, which showed severe inflammation of his stomach and duodenum. *Id.* On June 25, 2013, claimant was diagnosed with gastroenteritis and ulceration caused or aggravated by his employment in Iraq. CX H. Claimant averred in his affidavit that he continues to

[1] Sabre additionally agreed to pay for the mobilization and demobilization of each person; to provide all uniforms, equipment, and weapons; and to provide all housing and life support. EX 8.

[2] The agreement contained an option to automatically extend the agreement for an additional twelve-month term unless specifically cancelled by the parties. EX 8.

experience gastrointestinal symptoms, and that he had never experienced these symptoms prior to his employment in Iraq. CX A.

Claimant filed a claim under the Act on August 13, 2010, alleging that he was a borrowed employee of Sabre. Sabre's carrier disputed its liability, averring that claimant was an employee of Sabre's subcontractor, Watertight, and therefore is not covered by the terms of Sabre's DBA insurance contract. The administrative law judge found that claimant was a borrowed employee of Sabre, and he held Sabre and its carrier liable for permanent total disability and medical benefits. 33 U.S.C. §§907, 908(a). Sabre appeals only the administrative law judge's finding that it and its carrier are liable for benefits by virtue of an employer-employee relationship between Sabre and claimant. Claimant responds, urging affirmance.

Under the Act, only those injuries "arising out of and in the course of employment" are compensable. 33 U.S.C. §902(2). Thus, in order for the Act to apply to an injury, a claimant and an employer must be in an employee-employer relationship at the time of the injury. *See American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Fitzgerald v. Stevedoring Services of* America, 34 BRBS 202 (2001); *Herold v. Stevedoring Services of America*, 31 BRBS 127 (1997). An "employer" includes borrowing employers under the borrowed-employee doctrine, and a borrowing employer is liable for any compensation benefits due under the Act to its borrowed employees. *White v. Bethlehem Steel Corp.*, 222 F.3d 146, 34 BRBS 61(CRT) (4th Cir. 2000); *Total Marine Services, Inc. v. Director, OWCP*, 87 F.3d 774, 30 BRBS 62(CRT) (5th Cir. 1996). The courts have applied various tests for determining whether a claimant is a borrowed employee such that the borrowing employer is liable to the claimant under the Act. The United States Court of Appeals for the Second Circuit, within whose jurisdiction this case arises, has held that an administrative law judge may apply whichever test he determines is best suited to the facts of a particular case. *Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT); *see also Herold*, 31 BRBS 127. In this case, the administrative law judge used the test enunciated in *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969), and *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).[3] The *Ruiz-Gaudet* test has nine criteria for determining if

[3] In addition to the *Ruiz-Gaudet* factors, other tests used to evaluate whether a claimant is a borrowed employee include the "right to control" test (four factors: the right to control the details of the job, the method of payment, the furnishing of equipment, and the right to discharge the employee); the "relative nature of the work" test (two criteria: the nature of the claimant's work and the relation of that work to the regular business of the employer); and the Restatement (Second) of Agency test (five criteria: the extent of control, the kind of work done, the skill needed for it, the method of payment, and the length of time worked). *See Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980); *Burbank v. K.G.S., Inc.*, 12

an employee is a borrowed servant, none of which is determinative in and of itself: (1) who has control over the employee and the work he is performing, other than mere suggestions of details or cooperation; (2) whose work was being performed; (3) was there an agreement or meeting of the minds between the lending and borrowing employers; (4) did the employee acquiesce in the new work situation; (5) did the lending employer terminate its relationship with the employee; (6) who furnished tools and place for performance; (7) was the new employment over a considerable length of time; (8) who had the right to discharge the employee; and (9) who had the obligation to pay the employee. *Ruiz*, 413 F.2d at 312-313. The goal of the *Ruiz-Gaudet* test is to permit the factfinder to determine which employer is responsible for the working conditions experienced by the employee and the risks inherent therein. *See generally Gaudet*, 562 F.2d at 357.

In finding that an employer-employee relationship existed between claimant and Sabre, the administrative law judge found the *Ruiz-Gaudet* test best suited for the facts of this case, but stated that he would have reached the same conclusion under any of the tests. Decision and Order at 8. The administrative law judge found that each criterion of the *Ruiz-Gaudet* test supports the conclusion that claimant was Sabre's borrowed employee, and not Watertight's employee. *Id*. Sabre does not contest the use of the *Ruiz-Gaudet* test in this case, but challenges the administrative law judge's findings with respect to some of the criteria. Specifically, Sabre alleges the administrative law judge erred in finding that: Watertight effectively terminated its relationship with claimant; Sabre furnished the place for claimant's work performance; Sabre had the right to terminate claimant's services; and Sabre had the obligation to pay claimant. Sabre asserts that: Watertight maintained control over claimant because, per the terms of his employment contract, claimant was obligated to inform Watertight of any decision to resign; the place of performance was furnished by the U.S. Government; both Watertight and Sabre had the right to terminate claimant's services; and the transfer of funds from Sabre to Watertight does not constitute Sabre's payment of claimant's wages. Consequently, Sabre asserts that claimant failed to establish an employee-employer

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BRBS 776 (1980); Restatement (Second) of Agency, §220, Subsection 2. Additionally, the United States Courts of Appeals for the Fourth and Eleventh Circuits have adopted their own tests. *Langfitt v. Federal Marine Terminals, Inc.*, 647 F.3d 1116, 45 BRBS 47(CRT) (11th Cir. 2011) (three criteria: whether the employee consented to employment by the borrowing employer, whether the work the employee performed was that of the borrowing employer, and whether the borrowing employer had the right to control the details of the employee's work); *White v. Bethlehem Steel Corp.*, 222 F.3d 146, 34 BRBS 61(CRT) (4th Cir. 2000) ("authoritative direction and control" test requires a court to inquire whose work is being performed by determining who has the power to control and direct the individual in the performance of his work).

relationship with Sabre and the administrative law judge's decision should be reversed. We disagree.

Initially, we note that Sabre does not challenge the administrative law judge's finding that the first four criteria of the *Ruiz-Gaudet* test support a finding that claimant was Sabre's employee.[4] These findings alone strongly support the conclusion that Sabre was claimant's borrowing employer because "[t]he first factor, the question of who has control over the employee and the work he is performing, has been considered the central issue of 'borrowed employee' status . . . although not necessarily determinative." *Melancon v. Amoco Production Co.*, 834 F.2d 1238, 1244-45 (5th Cir. 1988); *see, e.g., Hebron v. Union Oil Co. of California*, 634 F.2d 245 (5th Cir. 1981). Moreover, these unchallenged factors alone would be sufficient for a finding that Sabre was responsible for the working conditions claimant experienced and the risks inherent therein. *Gaudet*, 562 F.2d at 357.

Contrary to Sabre's contention, the administrative law judge rationally found that the remaining criteria also support a finding that Sabre was claimant's employer. The administrative law judge found that the fifth criterion supports an employer-employee

[4] Thus, we affirm, as unchallenged on appeal, the findings that: (1) Sabre exercised control over claimant throughout claimant's employment in Iraq; (2) all of the work claimant performed was for Sabre; (3) the contract between Watertight and Sabre demonstrates a meeting of the minds that claimant would be the borrowed employee of Sabre, he would perform Sabre's work, and Sabre had the right to control the manner and details of the work; and, (4) claimant acquiesced in the work situation with Sabre as he executed a contract with Watertight wherein he agreed to provide security services to Sabre, and he worked for Sabre in Iraq for nearly five months without questioning his work arrangement. Decision and Order at 8-9; CX K; EX 8; *see Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

Sabre also contends that the five months claimant worked makes the time element (Criterion 7) neutral. The focus of this inquiry is whether the employment was of sufficient duration that the employee could reasonably be presumed to have evaluated the risks of the work situation and acquiesced thereto. *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). As the administrative law judge accurately observed that 100 percent of claimant's work in Iraq over five months was with Sabre, the administrative law judge rationally found the facts relevant to this criterion supportive of claimant's status as Sabre's borrowed employee. *Id.*; *see also Sealand Terminals, Inc. v. Gasparic*, 7 F.3d 321, 28 BRBS 7(CRT) (2d Cir. 1993) (deferring to administrative law judge's rational inferences).

relationship between claimant and Sabre because the evidence demonstrates that claimant received all of his work instructions and supervision from Sabre's management; claimant did not receive any work orders from Watertight or report to its offices.[5] Decision and Order at 10; CX A. The administrative law judge rationally found the sixth criterion supportive of an employer-employee relationship because the evidence establishes that Sabre furnished all equipment and tools claimant used to complete his work,[6] all of his work was performed at Sabre's deployment locations in Iraq,[7] and Watertight did not control the locations to which claimant was assigned. Decision and Order at 10; CX A at 1-2; CX K at 34-35, 41; EX 8 at 2-4; *see* n. 1, *supra*. Further, the administrative law judge rationally found the eighth and ninth criteria supportive of a borrowed-employee relationship because the evidence establishes that Sabre had a right to discharge claimant and Sabre furnished the funds to pay claimant's wages.[8] Although claimant's wages of $600 per month were directly paid to claimant by Watertight, Sabre paid Watertight $1,000 per month for claimant's services. Since payments by Sabre were discernibly set based on a monthly amount for individual security personnel and the claimant was paid monthly, the administrative law judge permissibly found that Sabre was obligated to pay claimant's wages. Decision and Order at 11; *Melancon*, 834 F.2d at 1246; *Capps v. N.L.*

[5] Although claimant's employment contract obligated him to notify Watertight of any decision to resign, a lending employer is not required to sever its relationship with the employee completely. Indeed, such a requirement would effectively eliminate the borrowed servant doctrine. *Capps v. N.L. Baroid-NL Industries, Inc.*, 784 F.2d 615, 617-618 (5th Cir.), *cert. denied*, 479 U.S. 838 (1986). The focus of this factor is on the lending employer's relationship with the employee while the borrowing occurs, and it is the parties' actions in carrying out a contract at the worksite, rather than the express contract provisions, that establish the nature of the lending employer's relationship with the employee. *Melancon v. Amoco Production Co.*, 834 F.2d 1238, 1245 (5th Cir. 1988). Where the lending employer exercises no control over the employee while he works for the borrowing employer, this factor is satisfied. *Id.; Capps*, 784 F.2d at 617-618.

[6] Sabre does not challenge this finding. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

[7] As it is undisputed that Sabre, not Watertight, was awarded the security contract with the U.S. Government, by arguing that the contract with the U.S. Government established the place of performance, Sabre effectively concedes that it, not Watertight, furnished the place of performance.

[8] Sabre contends that both Watertight and Sabre had a right to discharge claimant. However, the eighth criterion is satisfied if the borrowing employer has the right to terminate the employee's services with it. *Capps*, 784 F.2d at 618.

Baroid-NL Industries, Inc., 784 F.2d 615, 617-618 (5th Cir.), *cert. denied*, 479 U.S. 838 (1986).

The administrative law judge's finding that each of the *Ruiz-Gaudet* criteria weighs in favor of an employer-employee relationship between Sabre and claimant is rational, supported by substantial evidence and in accordance with law. *Melancon*, 834 F.2d 1238; *Fitzgerald*, 34 BRBS 202. Therefore, we affirm his finding that claimant was the borrowed employee of Sabre such that Sabre is the employer liable for claimant's benefits. *Melancon*, 834 F.2d at 1245-1246; *Capps*, 784 F.2d at 617-618; *see also Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT). Thus, we also reject Sabre's argument that its carrier cannot be liable for claimant's benefits under the Act because the terms of its insurance policy do not cover the injuries of Sabre's subcontractor's employees. As the administrative law judge rationally found claimant is the borrowed employee of Sabre, it was unnecessary for him to address whether Sabre's insurance contract covers Watertight's employees. Sabre is primarily liable for claimant's benefits under the Act and it obtained DBA insurance to secure payments to its employees. EXs 4-7; *see* 33 U.S.C. §904(a); *B.S. Costello, Inc. v. Meagher*, 867 F.2d 722, 22 BRBS 24(CRT) (1st Cir. 1989); *see generally Delgado v. Air Serv Int'l, Inc.*, 47 BRBS 39 (2013); *see also West v. Kerr-McGee Corp.*, 765 F.2d 526 (5th Cir. 1985).

Accordingly, the administrative law judge's Decision and Order 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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GREG J. BUZZARD
Administrative Appeals Judge