

BRB No. 03-0155

MARQUE E. RAINVILLE )  
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 Claimant-Petitioner )  
 )  
 v. )  
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 THOMAS INDUSTRIAL COATINGS ) DATE ISSUED:Oct. 17, 2003  
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 and )  
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 ST. PAUL FIRE AND MARINE )  
 INSURANCE COMPANIES )  
 )  
 Employer/Carrier- )  
 Respondents ) DECISION and ORDER

Appeal of the Decision and Order of John C. Holmes, Administrative Law Judge, United States Department of Labor.

L. Jack Gibney, Jacksonville, Florida, for claimant.

Robert L. Bambas (Kelley, Kronenberg, Gilmartin, Fichtel & Wander, P.A.), West Palm Beach, Florida, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order (2001-LHC-3367) of Administrative Law Judge John C. Holmes 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=Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant submitted a bid to a ship-building contractor to provide wallpaper hanging services for a ship=s interior. Employer, a company that provides industrial and commercial

painting and interior coating work, won the contract, but hired claimant to complete some of the wallpaper work. On November 4, 2000, claimant Ayanked@ on a pasting machine and pulled it loose, which caused him to fall backwards, strike a railing, and injure his neck and back. Claimant sought benefits under the Act. The only issue presented at the hearing was the existence of an employment relationship between claimant and employer. In his Decision and Order, the administrative law judge found that claimant was an independent contractor and therefore was not an employee. Therefore, the administrative law judge found that employer is not liable for benefits under the Act.

On appeal, claimant contends that the administrative law judge erred in finding that he was not an employee of Thomas Industrial Coatings. Employer responds, urging affirmance of the administrative law judge=s decision.

Claimant contends that the administrative law judge erred in analyzing the evidence in determining the nature of his employment relationship with employer. The Board has identified three tests for determining the existence of an employer-employee relationship.<sup>1</sup> The administrative law judge may apply whichever test is rational considering the facts of the particular case. *Tanis v. Rainbow Skylights*, 19 BRBS 153 (1986); *Carle v. Georgetown Builders, Inc.*, 14 BRBS 45, 48 (1980). The administrative law judge applied the Arelative nature of the work@ test in this case in order to determine if an employer/employee relationship existed. This test has been approved by the Fifth Circuit and requires examining the nature of a claimant=s work and the relation of that work to an employer=s regular business. In analyzing the relationship, the factors to be examined include, among others, whether the claimant=s work is a regular part of the employer=s work, whether the claimant=s work is continuous or intermittent, and whether the duration of 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. *See Haynie v. Tideland Welding Service*, 631 F.2d 1242, 12 BRBS 689 (5<sup>th</sup> Cir. 1980); *Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited*, 625 F.2d 1248, 14 BRBS 356 (5<sup>th</sup> Cir. 1980). Claimant contends that the Aright to control@ factors are accorded no weight in the Arelative nature of the work@ test, and thus that the administrative law judge erred in considering factors such as the method of payment in analyzing the employment relationship. However, contrary to claimant=s contention, the various factors composing the Aright to control@ test are relevant and thus

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<sup>1</sup> The tests include the right to control test and the relative nature of the work test. The administrative law judge may also consider the broad set of criteria listed in the Restatement (Second) of Agency ' 220 (1957), which encompasses factors set forth in each of the other two tests. *See Tanis v. Rainbow Skylights*, 19 BRBS 153 (1986).

may be used in determining the existence of an employer/employee relationship. *See Oilfield Safety*, 625 F.2d at 1253, 14 BRBS at 359; *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207, 211 (1990).

In the present case, the administrative law judge found it relevant that the skill required in claimant=s job was more specific than that of a general laborer or construction worker, which was evidenced by claimant=s independent bid for the paper hanging work alone as opposed to employer=s general bid for the whole interior job. In addition, the administrative law judge found that claimant ran his own enterprise under the name AWallpaper by Marque Rainville,@ he carried his own insurance before allowing it to lapse, and competed with employer in bidding on the wallpaper project. The administrative law judge also found that claimant received little supervision beyond gaining access to the ship, although employer=s representative kept track of the work done and he directed claimant to each day=s work site. The administrative law judge found that while employer would normally hire wallpaper hangers as employees, employer also subcontracted specific projects when it did not have enough employees available to perform the job. The administrative law judge contrasted the fact that the other paper hanger on the job, an employee of employer, stayed at work assisting with other duties on the ship when the pasting machine failed to work, while claimant was free to leave the job. The administrative law judge also found that the method of paying claimant for his services, by the yard of wallpaper rather than by the hour, suggests that employer sought to utilize claimant=s services for this project only. Finally, the administrative law judge found that claimant=s intermittent schedule over the four days of work shows that the parties emphasized completion of the project rather than evincing a continuous employment relationship. Taken together, the administrative law judge concluded that these factors demonstrated that claimant=s relationship to employer most closely resembled that of an independent contractor. Decision and Order at 4-5.

The Board has held that applying the factors to determine whether claimant is an Aemployee@ is a matter for the administrative law judge as trier-of-fact. *See Melech v. Keys*, 12 BRBS 748 (1980). As the administrative law judge thoroughly reviewed the evidence of record, and claimant has not raised any reversible error in his reasoning, we affirm the administrative law judge=s finding that claimant was an independent contractor and did not have an employer/employee relationship with Thomas Industrial Coating. As claimant is not an Aemployee,@ he is not entitled to benefits under the Act. *Cardillo v. Mockabee*, 102 F.2d 620 (D.C. Cir. 1939).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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REGINA C. McGRANERY  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge