

[BLR cite: *Hoover v. Manor Mines, Inc.*, 17 BLR 1-1 (1992)]

BRB No. 91-1770 BLA

JOHN H. HOOVER, Deceased)
)
 Claimant-Respondent)
)
 v.)
)
 MANOR MINES, INCORPORATED) DATE ISSUED:
)
 and)
)
 TRAVELERS INSURANCE COMPANY)
)
 Employer/Carrier-)
 Petitioners)
)
 DIRECTOR, OFFICE OF WORKERS')
 COMPENSATION PROGRAMS, UNITED)
 STATES DEPARTMENT OF LABOR)
)
 Respondent) DECISION and ORDER

Appeal of the Decision and Order-Awarding Benefits on Remand of Joan Huddy Rosenzweig, Administrative Law Judge, United States Department of Labor.

Gregg M. Rosen (Sable, Makoroff & Gusky), Pittsburgh, Pennsylvania,
for employer.

Jill Otte (Marshall J. Breger, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, the United States Department of Labor.

Before: SMITH and DOLDER, Administrative Appeals Judges, and BONFANTI, Administrative Law Judge.*

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits on Remand (86-BLA-3299) of Administrative Law Judge Joan Huddy

*Sitting as a temporary Board member by designation pursuant to the Longshore and Harbor Workers' Compensation Act as amended in 1984, 33 U.S.C. §921(b)(5) (1988).

Rosenzweig on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 et seq. (the Act). This case is before the Board for the second time. In Hoover v. Manor Mines, Inc., BRB Nos. 87-3829 BLA and 87-3829 BLA-A (July 31, 1989)(unpublished), the Board determined that claimant was entitled to a review of his claim on the merits, and instructed the administrative law judge to determine the responsible operator issue by considering the factors of employment articulated in Larson's Workmen's Compensation Law. See 1C Larson Workmen's Compensation Law (1980) (hereinafter, Larson's). In the Decision and Order on Remand, the administrative law judge considered the factors of employment in Larson's, supra, and determined that the cumulation of factors led to a conclusion that Manor Mines, Incorporated was the responsible operator in this case. Moreover, benefits were awarded pursuant to 20 C.F.R. Part 718. Employer appeals, contending that the administrative law judge erred in determining that Manor Mines, Incorporated, (hereinafter, Manor Mines) was the responsible operator rather than Copper Valley, Incorporated (hereinafter, Copper Valley).¹ The Director, Office of Workers' Compensation Programs (the Director), responds, requesting affirmance of the decision below. Claimant has not filed a brief in this case. Oral argument in this case was heard by the Board in Pittsburgh, Pennsylvania on May 29, 1992.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated by 30

¹The administrative law judge's finding of entitlement pursuant to Part 718 is not challenged on appeal, and is therefore affirmed. See Skrack v. Island Creek Coal Co., 6 BLR 1-710 (1983).

U.S.C. §932(a); O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

Employer contends that the administrative law judge erred in finding that it was the responsible operator in this case. In support of this contention, employer argues that the administrative law judge erred by finding that claimant worked for Manor Mines from April through August, 1981 (hereinafter, the "period in question"), and that claimant actually worked for Copper Valley during this time. Employer further contends that claimant therefore accumulated in excess of one year of coal mine employment with Copper Valley and that, pursuant to 20 C.F.R. §725.493, Copper Valley should be designated as the responsible operator in this case.

Claimant was a management employee of Manor Mines until March 1981, when the United Mines Workers Association called for a strike at Manor Mines. In March 1981, Manor Mines transferred claimant to Copper Valley to engage in employment at the Copper Valley mine site until the Manor Mines strike was settled.

The record indicates that both Manor Mines and Copper Valley were subsidiaries of a parent corporation, AG Services, Incorporated. Claimant was employed at the Copper Valley site while remaining on the Manor Mines payroll from March to August, 1981. In August 1981, claimant was transferred to the Copper Valley payroll, and remained in the employ of Copper Valley until February, 1982, at which time claimant ceased his coal mine employment. In determining that claimant was a Manor Mines employee for the period in question, the administrative law judge properly considered the factors of employment articulated in Larson's, supra, regarding the right to control details of claimant's work during the period in question, and found that the cumulation of factors weighed in favor of Manor Mines as claimant's employer for the period in question. See Larson's, supra, at §44.00; Crabtree v. Bethlehem Steel Corp., 7 BLR 1-354 (1984); Decision and Order on Remand at 6. The administrative law judge noted that although claimant was working at the Copper Valley site during the period in question, claimant was retained on the payroll of Manor Mines, Manor Mines retained the right to recall claimant in the event the strike was settled, and a 1983 letter from a payroll officer of both Copper Valley and Manor Mines characterized claimant as an employee of Manor Mines for the period in question, which the administrative law judge found as credible evidence regarding the intent of the parties at the time.²

²It is noted that the administrative law judge considered the other factors of employment articulated in Larson's as well, but found them to be inconclusive. The administrative law judge considered the fact that claimant was supervised by Mike Steele during the period in question, who was employed by both Manor Mines and Copper Valley. The administrative law judge also found the record inconclusive regarding which company had the right to fire claimant during the period in question.

Also, it is noted that Robert Seigworth, the payroll officer who characterized claimant as a Manor Mines employee in 1983, later changed his characterization in deposition testimony. The administrative law judge properly considered this testimony, but permissibly found it to not be credible, since the earlier statement was better evidence of the intent of the parties at the time. See Decision and Order on Remand at 6.

Contrary to employer's contentions, no one factor is considered to be more dispositive than the others in making this finding; rather, as the administrative law judge properly determined, it is the cumulation of factors which is to be considered in resolving this issue. See Larson's, supra, at §44.31. Thus, the administrative law judge did not err in relying in part upon the fact that claimant was on the payroll of Manor Mines for the period in question in making this determination, or in partially relying upon the right of Manor Mines to call claimant back to their site at the conclusion of the strike.³ Employer also asserts that the administrative law judge erred in finding the cumulative factors weighed in favor of Manor Mines as responsible operator, since claimant was under the physical control of Copper Valley, was subject to Copper Valley safety rules, was reporting to a Copper Valley supervisor, and was supervising Copper Valley personnel during the period in question. Employer is generally requesting a reweighing of the evidence, which is not the function of this Board. See Anderson v. Valley Camp of Utah, Inc., 12 BLR 1-111 (1989). Thus, we hold that the administrative law judge properly considered the factors regarding the right to control the details of claimant's work to determine that Manor Mines was the employer of claimant for the period in question.

³Although employer states that the record is devoid of evidence that Manor Mines actually intended to call claimant back, the administrative law judge properly found that an employment relationship existed between claimant and Manor Mines for the period in question because Manor Mines was empowered with the right to call claimant back, a fact which is unchallenged by the parties in this appeal. It is the right of control exercised by the employer, rather than the actual control exercised, which is determinative of the employment relationship. See Larson's, supra, at §44.10.

Employer also contends that the administrative law judge should have applied the "borrowed servant doctrine" in this case, which, employer argues, has been routinely applied by the Board to determine that the borrowing employer is liable as responsible operator.⁴ Employer's reliance upon the "borrowed servant doctrine" in this case is misplaced, since this doctrine applies only in instances where the lending employer has surrendered a sufficient degree of control over the employee, a result which has not occurred in this case. See e.g., Peter v. Hess Oil Virgin Islands Corp., 903 F.2d 935 (3d Cir. 1990). The administrative law judge properly considered the "lent employee" factors articulated in Larson's, supra, at §48.00, and properly found that in this case there was no employment relationship between claimant and the borrowing employer, Copper Valley, for the period in question, as there was no evidence of a contract, expressed or implied, until claimant was transferred to the payroll of Copper Valley in August 1981. See Larson's, supra, at §48.10. Accordingly, we affirm the administrative law judge's findings as rational and supported by substantial evidence. Consequently, we also affirm the administrative law judge's findings that claimant was an employee of Manor Mines for the period between April and August, 1981. Inasmuch as claimant failed to establish one year of coal mine employment with Copper Valley, we affirm the administrative law judge's determination that Manor Mines is the responsible operator in this case.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

⁴Generally, the "borrowed servant doctrine" states that where a servant is lent to another employer, the borrowing employer may be liable for claimant's workers' compensation benefits. See Black's Law Dictionary 167 (5th ed. 1979).

RENO E. BONFANTI
Administrative Law Judge