BRB Nos. 93-817
and 93-817A

DONALD SKETOE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
DOLPHIN TITAN INTERNATIONAL	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
EXXON COMPANY, U.S.A.	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Awarding Benefits of A.A. Simpson, Jr., Administrative Law Judge, United States Department of Labor.

James L. Bates, Jr., Metarie, Louisiana, and Chris J. Roy, Alexandria, Louisiana, for claimant.

Patrick E. O'Keefe (Montgomery, Barnett, Brown, Read, Hammond & Mintz), New Orleans, Louisiana, for Exxon Company, U.S.A.

Joshua T. Gillelan II (Thomas S. Williamson, Jr., Solicitor of Labor; Carol DeDeo, Associate Solicitor; Janet Dunlop, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, BROWN, and McGRANERY, Administrative Appeals Judges.

BROWN, Administrative Appeals Judge:

Exxon Company, U.S.A. (Exxon) appeals, and claimant cross-appeals, the Decision and Order - Awarding Benefits (89-LHC-3195) of Administrative Law Judge A.A. Simpson, Jr., awarding benefits 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 Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *et seq.* (the Act) We must affirm the findings of fact and conclusions of law of the administrative law judge which are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The Board heard oral argument in this case on January 13, 1994, in New Orleans, Louisiana.

To show the relationship of the parties in this case, we start with the fact that Exxon was the holder of a lease that it had obtained from the United States of America giving it the exclusive right and privilege to drill for, mine, extract, remove and dispose of oil and gas deposits in and under a particular described area of the Outer Continental Shelf of the United States seaward of Louisiana. RX-1. Exxon then entered into a contract, dated May 18, 1984, with Dolphin Titan International (Dolphin Titan) whereby Dolphin Titan, as the contractor, would furnish a self-contained platform drilling rig, referred to as the contractor's Drilling Rig Number 125. *See* RX-2. Dolphin Titan was to drill wells from a specified Exxon platform, with maximum depth set at 16,000 feet, set casing, take cover, run tests, and furnish under its exclusive responsibility supervising, technical and rig personnel to perform the subject work. Payment was not on a set specified price but was to be made on a *per diem* basis with rates up to $8,750 per 24-hour day. It is obvious that this was a multimillion dollar venture entered into by people thoroughly familiar with the business.

The drilling contract for Rig 125 provided that all work shall meet the approval of Exxon, but that the detailed manner and method of doing the work shall be determined by the contractor. It specified that Dolphin Titan was an independent contractor and that Exxon was interested only in the results obtained. Despite this, the administrative law judge stated that an examination of the contract indicated that Exxon had the right to supervise the performance of Dolphin in minute detail, an erroneous assertion our dissenting colleague repeats. *See* Smith, J., dissent at 16. The administrative law judge referred to Claimant's Exhibit No. 1 at 1-3; this document, however, was an attachment to a brief. *See* Claimant's brief in opposition to Employer's Motion for Summary Decision. A review of the contract itself, RX-2, fails to reveal any provision giving Exxon the right to supervise the performance of the contract by Dolphin, let alone in minute detail. *See* Cl. Ex. 19 at 14, 15. The specified and written intention of the parties was just the opposite.

Claimant sustained an injury to his right hand on July 15, 1984, while working as a derrickman for Dolphin Titan.[1] Although Dolphin had obtained workers' compensation coverage from Northumberland Insurance Company,[2] it is uncontested that this company was not a carrier authorized by the district director to provide coverage under the Act. *See* 33 U.S.C. §932(a); 20 C.F.R. Part 703. Nonetheless, Northumberland paid claimant benefits until it became insolvent, at which time Dolphin Titan assumed the payments. Dolphin Titan continued to pay claimant's temporary total disability benefits from December 16, 1984, until January 2, 1986, when it also became insolvent. Thereafter, claimant filed a claim against Exxon, seeking to hold it liable as a general contractor based on application of Section 4(a) of the Act, 33 U.S.C. §904(a).

In his Decision and Order, the administrative law judge found that Exxon was a general contractor and thus liable for the payment of compensation under Section 4(a) of the Act, inasmuch as the subcontractor, Dolphin Titan, failed to properly maintain compensation coverage. The administrative law judge also found that as claimant was not totally disabled by his right hand injury, he was limited to scheduled benefits for a 60 percent permanent physical impairment pursuant to Section 8(c)(3), 33 U.S.C. §908(c)(3). Thus, the administrative law judge held Exxon liable for temporary total disability benefits from the date of injury through June 4, 1991, permanent partial disability benefits under Section 8(c)(3) commencing June 5, 1991, interest and medical benefits, subject to a credit for any amounts paid by Dolphin Titan or its insurer.

On appeal, Exxon contends that it is not a general contractor within the meaning of Section 4(a) but rather is the "principal" or "owner" of oil lease rights obtained from the United States Government and that it hired Dolphin Titan for drilling services on its own property. Exxon argues that as it was not contractually obligated to any third party to perform the duties which claimant was executing at the time of his injury, the work cannot be considered a subcontracted fraction of a larger obligation. Moreover, Exxon contends that as it does not own offshore drilling rigs and does not employ drilling crews of its own, the work which Dolphin Titan was performing was not work normally performed by Exxon's own employees. Thus, Exxon contends that it is not a general contractor under the test set forth in *Director, OWCP v. National Van Lines, Inc.*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979). Claimant responds, urging affirmance, contending it does not matter whether Exxon's and Dolphin Titan's relationship was that of contractor and subcontractor or principal and independent contractor. In claimant's view, in either event, Exxon is liable. The Director, Office of Workers' Compensation Programs (the Director), also responds, urging that the administrative law judge's finding that Exxon is liable as a general contractor be affirmed. Claimant cross-appeals the administrative law judge's findings that he has reached maximum medical

[1]The parties stipulated that there was an employee/employer relationship between claimant and Dolphin Titan.

[2]It is not clear how Northumberland Insurance Company became the carrier since ALJ Ex. 7, also referred to as RX-2, the contract between Exxon and Dolphin Titan, contains a Certificate of Insurance issued by Marsh & McClennan, Inc., indicating that the carrier for workers' compensation, including Longshore coverage, was North West Insurance Company.

improvement and that he does not continue to be at least temporarily totally disabled. Exxon responds, urging affirmance of the administrative law judge's findings regarding the nature and extent of claimant's disability. The Director responds, urging that the case be remanded for further findings on the issue of suitable alternate employment.

The issue presented by Exxon's appeal is whether the administrative law judge erred in holding Exxon secondarily liable for paying claimant's benefits pursuant to Section 4(a) of the Act. Section 4(a), as amended in 1984, provides:

> Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908, and 909 of this title. In the case of an employer who is a subcontractor, only if such subcontractor fails to secure the payment of compensation shall the contractor be liable for and be required to secure the payment of such compensation. A subcontractor shall not be deemed to have failed to secure the payment of compensation if the contractor has provided insurance for such compensation for the benefit of the subcontractor.

33 U.S.C. §904(a)(1988). The prior version of Section 4(a), as amended in 1972, provided:

> Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908 and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to the employees of the subcontractor unless the subcontractor has secured such payment.

33 U.S.C. §904(a)(1982)(amended 1984).[3] In this case, both Dolphin Titan and its insurer are insolvent. Thus, the issue is whether Exxon is a "contractor" liable for benefits under Section 4(a).

Although the United States Court of Appeals for the Fifth Circuit has not addressed the issue of contractor liability under Section 4(a), the United States Court of Appeals for the District of Columbia Circuit reviewed a case in which the claimant was injured while working for a company, Eureka, which had been delegated some of National Van Lines' pre-existing contractual obligations to transport goods. *National Van Lines*, 613 F.2d at 972, 11 BRBS at 298 (2-1 decision; in dissent,

[3]The 1984 version applies to cases pending on or filed after the effective date of the Amendments, September 28, 1984. Longshore and Harbor Workers' Compensation Act Amendments of 1984, Pub. L. No. 98-426, §28(a), 98 Stat. 1639, 1655. Both the 1972 and 1984 versions provide, in effect, that in the case of an employer who is a subcontractor, the contractor shall be liable for and be required to secure the payment of compensation to employees of the subcontractor if the subcontractor fails to do so. Since the obligation is the same, we need not decide whether the 1984 version is to be applied retroactively or whether the 1972 version applies. *See generally Rivers v. Roadway Express, Inc.*, 114 S.Ct. 1510 (1994); *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994).

Judge Tamm voted to dismiss on jurisdictional grounds).[4] Like Dolphin Titan in the instant case, Eureka was not properly insured and was bankrupt. The United States Court of Appeals for the District of Columbia Circuit, noting that the issue of whether National Van Lines could be deemed a "contractor" under Section 4(a) was one of first impression, stated:

> A general employer will be held secondarily liable for workmen's compensation when the injured employee was engaged in work either that is a subcontracted fraction of a larger project or that is normally conducted by the general employer's own employees rather than by independent contractors. The most common form of the relationship - and that represented [here] - is where the general employer delegates the performance of portions of its contractual obligations to other firms.

613 F.2d at 986-987, 11 BRBS at 316. In other words, the court noted two situations in which an employer could be deemed a "contractor" under Section 4(a), first, where it subcontracts a fraction of a larger project or, second, where it contracts out work normally conducted by its own employees rather than by independent contractors. The court added that the most common situation was the one in which the employer delegated to others the performance of its general obligations. The court noted that New York and Alaska also followed this rule. The court also endorsed the statement in the Board's *National Van Lines* decision that Section 4(a) applied in cases where a contractor entered into a contract with a third party to perform a service and then delegated its duties to a subcontractor. The court held that the Board did not err in its statement of the law but did so in its application of the law to the facts in *National Van Lines*. As National Van Lines contracted with shippers to carry cargo and delegated some of this work to Eureka, work that would normally be performed by National's own employees, the court held that National Van Lines was liable as the general contractor in light of Eureka's insolvency. In the present case, the administrative law judge found that Exxon was liable to claimant as the "contractor" after purporting to apply the *National Van Lines* test.

[4]The court noted that 41 states and the District of Columbia impose secondary liability for workmen's compensation upon general employers for the benefit of employees of contractors under them, citing 1B A. LARSON, *The Law of Workmen's Compensation*, §49.10 at 9-1 to 9-2 (1979). *See* 1C A. LARSON, §49.10 (1993)(43 states impose secondary liability on the general employer).

In a case similar to the instant case, the United States Court of Appeals for the Fifth Circuit considered the definition of a statutory employer under the Louisiana Workmen's Compensation Act.[5] *Chavers v. Exxon Corp.*, 716 F.2d 315 (5th Cir. 1983). Because of the complexities involved in the development and leasing of offshore oil and gas fields, we believe decisions of the United States Court of Appeals for the Fifth Circuit concerning application of the statutory-employer principle to this industry are more instructive than *National Van Lines,* which presents a completely dissimilar fact pattern.[6] Our dissenting colleague maintains that we are wrong to seek guidance from the Fifth Circuit's decision in *Chavers* because the *Chavers* court was applying a Louisiana statute, not the Longshore Act. He fails to recognize that neither the *National Van Lines* decision nor the *Chavers* decision hinged upon the construction of particular words in the applicable statutes. Each decision recognized that the statute involved sought to impose liability on statutory employers and the courts devised the appropriate tests to determine what is a statutory employer. It is noteworthy that the D.C. Circuit candidly acknowledged in *National Van Lines* that it was guided in its interpretation of Section 4(a) by the "experience of the many jurisdictions" which have considered general contractor liability. *National Van Lines*, 613 F.2d at 986, 11 BRBS at 316. To the extent that the Louisiana statute is more specific than the Longshore Act, it is entirely consistent with the definition of general employer set forth in *National Van Lines*. Thus, reference to *Chavers* is instructive because it applies the statutory employer test to the complex petro-chemical industry in accordance with *National Van Lines*. By contrast, our dissenting colleague's reliance on current Louisiana law is misplaced because it is irrelevant to the Longshore Act and inconsistent with *National Van Lines*.

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[5]The court noted that the statutory-employee section, La.R.S. 23:1061, provides in pertinent part:

> Where any person (in this section referred to as principal) undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person (in this section referred to as contractor) for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any compensation under this Chapter which he would have been liable to pay if the employee had been immediately employed by him....

Chavers, 716 F.2d at 316. Subsequently, this provision of the Louisiana statute was amended; the amended section, however, does not apply retroactively to injuries, such as the one in this case, that occurred prior to January 1, 1990. *See Pierce v. Hobart Corp.*, 939 F.2d 1305 (5th Cir. 1991).

[6]National Van Lines, an interstate trucking carrier, entered into an "Agency Agreement" with Eureka whereby the latter would conduct a portion of National's interstate hauling. Eureka did not have an Interstate Commerce Commission (ICC) Motion Carrier's license. It operated under National's ICC license and certificates of convenience. All of Eureka's trucks were marked with the colors, insignia and logo of National. It moved under the direction of National's dispatcher. It solicited orders for National and made deliveries under its direction. Contractual obligations for haulage remained with National, as well as the right to payment. National trained the Eureka employees and could reject employees who did not successfully complete training. Eureka drivers performed work that would normally be performed by National's own employees. Eureka was the alter ego of National.

As with Section 4(a) of the Longshore Act, the Fifth Circuit observed that the purpose of the statutory employer provision is to assure complete compensation coverage and held that the core inquiry in *Chavers* was whether the employees of the principal or employees of other employers engaged in similar operations customarily perform the work at issue. *Chavers*, 716 F.2d at 317. Furthermore, the court held that a statutory employment relationship will be found only in those instances where the injured employee's employer has contracted to perform work which is so closely allied to that of the principal employer that it is in fact either an extension or component of the principal's commonly relied upon resources. *Id.*; *Penton v. Crown Zellerbach Corp.*, 699 F.2d 737 (5th Cir. 1983).

In *Chavers*, the plaintiff, who had been employed as a roustabout by Diamond M. Company (Diamond) was fatally injured while working as a member of a drilling crew on a self-contained platform rig owned and operated by Diamond on location in state waters off the coast of Louisiana. At the time of plaintiff's injury, Diamond was under contract with Exxon to drill and complete wells in the Gulf of Mexico. Exxon moved for summary judgment claiming that it was a statutory employer under the Louisiana Workmen's Compensation Act with its consequential tort immunity. In concluding that the United States District Court for the Eastern District of Louisiana erred in granting summary judgment, the court noted that the statement of undisputed facts referred to an attached affidavit declaring that "Exxon's trade business and occupation is the location, production and sale of oil and gas." The court further noted that the referenced affidavit merely attested that "Exxon Corporation and its division Exxon Company, U.S.A. are engaged in the exploration, drilling and production of oil, gas and natural resources from the Gulf of Mexico..." and that Diamond M had contracted "to drill and complete wells" in certain areas of the Gulf of Mexico. The court held that it was not clear from the evidence whether Exxon, and other like oil companies, customarily undertake drilling operations with their own employees or whether they customarily contract for such services. *Id.* at 318. The court concluded that if in fact both Exxon and the industry as a whole customarily contract with others for drilling operations, then such operations are not part of Exxon's "trade, business, or occupation" within the meaning of La.R.S. 23:1061. *Id.* The consolidated cases were remanded for further factual findings. It would appear that the same result would have been reached by the *National Van Lines* court, which held that an appropriate inquiry is whether the work is normally conducted by the general employer's own employees. The fact that this test upheld in *National Van Lines* was expressly rejected by the Louisiana legislature when it revised the law on statutory employers in 1989 demonstrates that the revised law is irrelevant to the meaning of statutory employer under the Longshore Act. Accordingly, our dissenting colleague's reliance on the new statute - which he concedes is not retroactive - is misplaced.

The United States Court of Appeals for the Fifth Circuit has subsequently applied the *Chavers* test in similar cases to determine whether the evidence establishes that a company was a statutory employer. In *Seeney v. Citgo Petroleum Corp.*, 848 F.2d 664 (5th Cir. 1988), the court held Citgo to be a statutory employer where the evidence showed that its employees performed turnaround work at other Citgo units, although this work was contracted out at the refinery where the employees were injured. Likewise, in *Hodges v. Exxon Corp.*, 727 F.2d 450, 454 (5th Cir. 1984), Exxon was held liable on application of the *Chavers* test: "Whether the particular principal involved in the case customarily does the type of work performed by the contractor." *Chavers*, 716 F.2d at 317, quoted in *Hodges*, 727 F.2d at 454. In *Hodges*, the evidence established that Exxon often used

its employees to perform similar maintenance work at other reactors.

The administrative law judge in the present case cited the court's opinion in *Chavers*, and pointed to an affidavit in evidence in that case that stated Exxon was engaged in exploration, drilling and production of oil. He omitted to mention that the Fifth Circuit went on to say in *Chavers* that the affidavit submitted in that case offered no enlightenment as to whether Exxon and other companies customarily did the drilling with their own employees or customarily contracted out this work. Since this information was not in the record, the *Chavers* court held that a determination could not be made as to whether Exxon was a statutory employer.

We hold that the administrative law judge erred in holding Exxon liable for claimant's compensation based on his finding that simply because Exxon was in the business of petrochemicals in general and Dolphin Titan was an energy-related company, they both were part of a larger project as defined by *National Van Lines*.[7] Decision and Order at 4. In order to hold Exxon liable for compensation in this case, consistent with the approach of the Fifth Circuit in *Chavers*, the administrative law judge must make a finding of whether Exxon customarily and regularly engages in offshore drilling on its own as part of its regular trade, business or occupation, or, if not, whether the oil and gas industry as a whole operates in this manner. *See Chavers*, 716 F.2d at 318; *see also Darville v. Texaco Inc.*, 674 F.2d 443 (5th Cir. 1982), *cert. denied*, 459 U.S. 969 (1982); *Williams v. Shell Oil Co.*, 677 F.2d 506 (5th Cir. 1982), *cert. denied*, 459 U.S. 1087 (1982).

The record contains evidence that Exxon had not drilled on its own for many years due to the complicated and sophisticated equipment and methods used. As the administrative law judge noted, Warren LeJeune, the Contract Administrator of Exxon, stated that Exxon does not have any drilling equipment or drilling rigs and they do not provide services or labor. Mr. LeJeune added that Exxon has no employees involved in drilling. He stated that in the late 1950's and early 1960's they did have drilling rigs as well as the personnel to operate them but a change was made and, after those early days, all that work was contracted out. *See* Cl. Ex. 19, LeJeune Depo. at 14, 15, 48, 52, 57, 59. In particular, it is noted that, to solve a disagreement over terminology, claimant's counsel indicated his belief that Exxon is involved in drilling for the production of oil, meaning it seeks to have oil produced, and that he would accept Mr. LeJeune's word that Exxon had no drilling rigs, and no

[7]Exxon relies upon the decision of the United States Court of Appeals for the Eleventh Circuit in *Roach v. M/V Aqua Grace*, 857 F.2d 1575 (11th Cir. 1988). In *Roach*, the court noted that the term "contractor" is not defined by the Act or under federal common law. Thus, the court applied Florida law in determining the general contractor status of the owner of the vessel. Under Florida law, a general contractor is one who has a contractual obligation, a portion of which he sublets to another. As the owner of the vessel was under no contractual obligation to undertake repairs to the vessel, the court concluded he could not be held liable for benefits as a "general contractor" under Section 4(a). *Id.* at 1580. Unlike the law espoused in *Chavers*, *see* discussion, *infra*, the Florida law quoted in *Roach* does not extend the definition of "contractor" to include an employer that contracts for work normally conducted by the general employer. Thus, *Roach*, although it illustrates a non-general contractor-subcontractor situation, is not controlling in the instant case.

roughnecks out there actually doing the drilling. *Id.* at 48. The administrative law judge noted that claimant had no reason to question Mr. LeJeune's statement. Decision and Order at 5.

In addition to Mr. LeJeune's affidavit, the record contains the testimony of Clyde Baldwin, the operation superintendent for Exxon's drilling group, which the administrative law judge did not address. Mr. Baldwin testified that Exxon engineers design the specifications on how they want the wells drilled and what they are supposed to look like when they are finished. However, he noted, the personnel of the drilling company actually operates the machinery, Tr. at 168, as the people who work for Exxon do not have the skills or expertise to operate the machinery, Tr. at 169-170. Mr. Baldwin testified that drilling requires specialized equipment and that there are companies, such as Dolphin Titan, that specialize in drilling. Tr. at 176.

Mr. Baldwin stated that it was about 1972 when the last drilling rig was actually manned and operated by Exxon. Although Exxon currently has five rigs operating, this is all done by contract drillers. Tr. at 169-170. He related that at one time the rigs were steam powered, then converted to diesel engines and, in the last ten years, there was the evolution to SCR or electric-drilling rigs. He indicated that Exxon did not have any people with experience in electric-driven rigs. Tr. at 170. He further related that this whole function of offshore drilling is a highly specialized business with many sub-specialties. The actual drilling takes specialists and special equipment. There is then the process known as acidizing which takes another set of specialists. There is gravel packing which requires its own experts. Cementing again takes specialists. Wire line logging takes another set of specialists. Baldwin stated that Exxon does not do any drilling, gravel-packing, acidizing, cementing or wire line work. According to Mr. Baldwin all of this work, from the drilling to all of the sub-specialties, is arranged through contracts between Exxon and the various contractors. Tr. at 179. He further indicated that the major oil companies operate in the same manner, naming Mobil, Texaco and Chevron. Tr. at 190.

Inasmuch as there is evidence that may be sufficient to establish that Exxon did not, and could not, perform the work in question, as part of its regular trade, business or occupation, and the administrative law judge failed to discuss this evidence, we vacate the administrative law judge's finding that Exxon is liable for the payment of benefits under Section 4(a) of the Act, and remand the case to the administrative law judge to further consider the evidence in accordance with *Chavers*, or to reopen the record if necessary.[8] *See Swain v. Bath Iron Works Corp.*, 14 BRBS 657 (1982). If, on remand, the administrative law judge finds that Exxon is not secondarily liable for the payment of benefits under Section 4(a) of the Act, claimant may seek benefits from the Special Fund pursuant to Section 18(b) of the Act, 33 U.S.C. §918(b), which provides that "[i]n cases where judgment cannot be satisfied by reason of the employer's insolvency. . ." the Secretary of Labor may, in his discretion and to the extent he deems advisable, make payments from the Special Fund. *See Shaller v. Cramp*

[8]Given this resolution, we need not address the Director's contention that Exxon is liable under *National Van Lines* because it was contractually obligated, under the terms of its lease from the United States Government, to develop the oil field, and it subcontracted the drilling to Dolphin Titan. The Director can present her argument to the administrative law judge.

Shipbuilding and Dry Dock Co., 23 BRBS 140, 144 n.2 (1989).

On cross-appeal, claimant initially contends that the administrative law judge erred in finding that he had reached maximum medical improvement, as he remains in considerable pain and still requires additional surgery to remove the wires in his fingers and should not be required to return to work before the necessary surgery. The administrative law judge found that further surgery would have no effect on the extent of claimant's impairment and found that claimant reached maximum medical improvement as of June 4, 1991 based on Dr. Stokes' 60 percent permanent impairment rating on that date.

An employee is considered permanently disabled when he has any residual disability following maximum medical improvement, *see Devine v. Atlantic Container Lines, G.I.E.*, 23 BRBS 279 (1990) (Lawrence, J., dissenting on other grounds), the date of which is determined solely by medical evidence. *See Trask v. Lockheed Shipbuilding and Construction Co.*, 17 BRBS 56, 61 (1985). A condition is permanent if the employee is no longer undergoing treatment with a view towards improving his condition. *Abbott v. Louisiana Insurance Guaranty Association*, 27 BRBS 192 (1993); *Leech v. Service Engineering Co.*, 15 BRBS 18 (1992). After careful review of the record, we affirm the administrative law judge's permanency determination. Contrary to claimant's contention, the administrative law judge is not required to accord the opinion of claimant's treating physician dispositive weight. *Avondale Shipyards, Inc. v. Kennel*, 914 F.2d 88, 24 BRBS 46(CRT) (5th Cir. 1990).

In concluding that maximum medical improvement was reached as of June 4, 1991, the administrative law judge considered the relevant medical opinions of Drs. Stokes and Sozen. Dr. Stokes opined in a medical report dated June 4, 1991, and in his hearing testimony that claimant reached maximum medical improvement as of that date and had a 60 percent permanent physical impairment of his right hand. Dr. Stokes further noted that if the pain in the metacarpophalangeal joints of claimant's ring and little fingers was significant, further surgery could be entertained. However, at the time of his examination, Dr. Stokes noted that claimant did not indicate that there was significant pain. Emp. Ex. 4; Tr. at 117. Dr. Stokes also testified that the wire sutures in claimant's hand were designed to stay there. Tr. at 143. Dr. Sozen testified that he agreed with Dr. Stokes' assessment that although surgery might serve to alleviate claimant's discomfort, it would not decrease his level of impairment nor increase the level of function of the hand and agreed with his June 4, 1991 permanent disability assessment.[9] Cl. Ex. 1 at 28, 30, 31, 37. Inasmuch as the Board has previously recognized that the date that a physician assesses claimant with a disability rating will suffice to determine the date of permanency, and as both doctors rendering relevant opinions are in agreement that further surgery will not improve claimant's opinion, we affirm the administrative law judge's finding that maximum medical improvement was reached as of June 4, 1991 based on Dr.

[9]Dr. Sozen opined in a medical report dated September 1, 1988 and in a deposition that claimant is going to require arthrodesis, which is fusion of the metacarpal-phalangeal joint of the ring finger, as well as removal of the painful wires from the little finger which were applied during the previous surgery. Cl. Ex. 11.

Stokes' 60 percent permanent disability assessment.[10] *Abbott*, 27 BRBS at 200-201; *Jones v. Genco, Inc.,* 21 BRBS 12 (1988).

Inasmuch as we affirm the administrative law judge's finding that claimant reached maximum medical improvement as of June 4, 1991, we reject his assertion that his post-injury wage-earning capacity cannot be determined. As the administrative law judge correctly noted, in the event of an injury to a scheduled member, a claimant's permanent partial disability under Section 8(c) is confined to the schedule, and wage-earning capacity is irrelevant. *Potomac Electric Power Company (PEPCO) v. Director, OWCP*, 449 U.S. 268, 14 BRBS 363 (1980). If claimant establishes that he is permanently or temporarily totally disabled however, he may receive benefits under Section 8(a) or (b). *Id.* at n.17; 33 U.S.C. §908(a), (b).

In the present case, the administrative law judge found, and the parties do not dispute, that claimant is not capable of returning to his former employment. Claimant thus established a *prima facie* case of total disability. Once claimant establishes that he is unable to perform his usual employment, the burden shifts to employer to demonstrate the availability of suitable alternate employment. *See New Orleans (Gulfwide) Stevedores, Inc. v. Turner*, 661 F.2d 1031, 1042-1043, 14 BRBS 156, 164-165 (5th Cir. 1981). In order to meet this burden, employer must show the general availability of job opportunities within the geographical areas where claimant resides, which claimant, by virtue of his age, education, work experience, and physical restrictions, is capable of performing. *See Avondale Shipyards, Inc. v. Guidry*, 967 F.2d 1039, 26 BRBS 30 (CRT)(5th Cir. 1991); *P & M Crane Co. v. Hayes*, 930 F.2d 424, 24 BRBS 116 (CRT)(5th Cir. 1991).

In concluding that employer met its burden of establishing the availability of suitable alternate employment in this case, the administrative law judge credited the testimony of Nancy Favaloro, employer's vocational expert, and Dr. Stokes' opinion approving the jobs identified by Ms. Favaloro as suitable over the contrary opinion of claimant's vocational expert, Dr. George Hearn. After evaluating claimant and considering the restrictions imposed by Dr. Stokes, Ms. Favaloro concluded that claimant was capable of performing semi-skilled work of a light sedentary nature which did not involve writing for extended periods of time such as pest control technician, dispatcher, inside sales clerk, desk clerk, service advisor, parts clerk, or bridge operator. After conducting a labor market survey in August 1991 and contacting prospective employers, Ms. Favaloro identified specific available jobs within these categories including food service, housekeeping, security, and purchasing positions at the Rapids Regional Medical Center, food service and security positions at St. Francis Cabrini Hospital, a weigh station monitor position with the Louisiana Department of Transportation, a delivery driver position with the Alexandria Town Talk newspaper, and pest control technician positions with Orkin and Blair Laboratory. Based on a subsequent survey conducted about a week prior to the June 19, 1992 hearing, Ms. Favaloro

[10]Claimant and the Director are correct that employer remains liable for claimant's medical expenses relating to the work injury despite the finding of maximum medical improvement. *See generally Siler v. Dillingham Ship Repair*, 28 BRBS 38 (1994)(decision on reconsideration *en banc*).

indicated that a security guard position was available at Rapids Regional Medical Center, a food service worker position was available at St. Francis Cabrini Hospital, and several delivery driver positions were available with the Alexandria Town Talk newspaper. Based on the later survey, Ms. Favaloro also identified two available desk clerk positions with the Best Western and Holiday Inn Convention Center.[11] After reviewing multiple detailed job descriptions of the alternate work identified, Dr. Stokes, a board-certified expert in hand surgery and disorders of the hand, indicated that the jobs which Ms. Favaloro identified were suitable for the claimant and that he could reasonably be expected to compete for such employment.[12] *See* Emp. Ex. 4; Tr. at 121.

Dr. Hearn, claimant's vocational expert, opined that claimant would not be able to perform the alternate jobs identified by Ms. Favaloro, and that he was, for all practical purposes, unemployable in the competitive labor market. While claimant urges reversal of the administrative law judge's finding of suitable alternate employment based on Dr. Hearn's opinion, the administrative law judge reasonably rejected Dr. Hearn's disability assessment, finding that Dr. Hearn's opinion was based on a faulty knowledge or misunderstanding of the requirements of the alternate jobs. As the administrative law judge's finding that employer established the availability of suitable alternate employment based on the testimony of Ms. Favaloro and Dr. Stokes is rational, supported by substantial evidence, and in accordance with applicable law, we affirm his determination that claimant is only partially disabled and thus limited to an award under the schedule.[13] *See generally Dove v. Southwest Marine of San Francisco, Inc.*, 18 BRBS 139 (1986).

We reject the Director's contention that the case should be remanded for the administrative law judge to "independently evaluate" whether claimant could "realistically compete" for the jobs identified as medically appropriate. The Director argues that suitable alternate employment is not established merely by demonstrating that claimant is medically capable of performing the alternate job, that there are actual openings to compete for, and that the employers are willing to take applications from someone with claimant's impairment. We disagree. Consistent with the Fifth Circuit's opinion in *P & M Crane*, an employer need only demonstrate that a number of jobs exist in the local economy which claimant is qualified to fill and which he has a reasonable opportunity to secure to meet its suitable alternate employment burden. Employer clearly exceeded the minimum

[11]While the administrative law judge found that claimant could perform the jobs found by Ms. Favaloro including positions such as a food service operator in hospitals, hospital security guard and hotel desk clerk, he found that the positions of exterminator and weigh station monitor would not be appropriate given claimant's physician limitations and experience.

[12]The administrative law judge also found that the opinion of Dr. Sozen was entitled to less weight than Dr. Stokes' opinion because Dr. Sozen had yet to obtain his certificate of specialization. Dr. Sozen, however, did not offer an opinion regarding whether claimant could perform the jobs identified by Ms. Favaloro. Decision and Order at 9, 11.

[13]Claimant does not challenge the administrative law judge's finding that he did not make a diligent attempt to find alternate work.

requirements set forth in that decision in this case. *Id.*, 930 F.2d at 430 n.10, 24 BRBS at 121 n.10 (CRT); *see also Turner*, 661 F.2d at 1042-1043, 14 BRBS at 164-165.

The Director's alternate argument that the case should be remanded for the administrative law judge to reconsider the extent of claimant's loss of use of his hand imposed by the pain still attendant in his hand condition is similarly rejected; the administrative law judge acted within his discretion in determining the extent of claimant's disability based on Dr. Stokes' and Dr. Sozen's findings of a 60 percent permanent physical impairment. *See generally Pimpinella v. Universal Maritime Services, Inc.*, 27 BRBS 154 (1993); *Thompson v. Northwest Enviro Services, Inc.*, 26 BRBS 53 (1992). As neither claimant nor the Director has raised any reversible error committed by the administrative law judge in weighing the conflicting evidence and making credibility determinations, his finding that claimant is limited to an award for a 60 percent permanent physical impairment of the hand pursuant to Section 8(c)(3) of the Act is affirmed. *Pimpinella*, 27 BRBS at 157.

Accordingly, the Decision and Order of the administrative law judge finding Exxon Company, U.S.A. liable for compensation benefits is vacated and the case is remanded to the administrative law judge for further consideration consistent with this decision. However, the administrative law judge's finding that claimant has reached maximum medical improvement and is entitled to an award for a 60 percent permanent physical impairment of the hand pursuant to Section 8(c)(3) of the Act is affirmed.

SO ORDERED.

JAMES F. BROWN
Administrative Appeals Judge

I concur:

REGINA C. McGRANERY
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring and dissenting:

Although I concur in the majority's decision with respect to the finding that claimant has reached maximum medical improvement and is entitled to benefits under the schedule for a 60 percent impairment of the right hand under Section 8(c)(3), 33 U.S.C. §908(c)(3), I respectfully dissent from my colleagues' decision to vacate the administrative law judge's finding that Exxon is liable for compensation benefits under Section 4(a) of the Act, 33 U.S.C. §904(a).

Initially, I would note that the administrative law judge properly relied on the decision in *Director, OWCP v. National Van Lines*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979), as it is the leading case regarding contractor liability under Section 4(a) of the Act. Given the existence of case law interpreting specific provisions of the Act, I am perplexed by my colleagues' resort to a case arising under Louisiana state law as controlling precedent in this case. *See generally St. John Stevedoring Co., Inc. v. Wilfred*, 818 F.2d 397 (5th Cir. 1987), *cert. denied,* 108 S.Ct. 485 (1987) (Fifth Circuit holds that application of state law to determine paternity for purposes of determining who is a "child" under the Act is improper). The case which my colleagues hold controlling, *Chavers v. Exxon Corp.*, 716 F.2d 315 (5th Cir. 1983), interprets a specific provision of the Louisiana statute. As such, while it may provide guidance, it is not controlling precedent for this case involving Section 4(a) of the Act.

In the instant case, the administrative law judge correctly set forth the applicable law from *Director, OWCP v. National Van Lines, Inc.*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979), that:

> A general employer will be held secondarily liable for workmen's compensation when the injured employee was engaged in work either that is a subcontracted fraction of a larger project or that is normally conducted by the general employer's own employees rather than by independent contractors.

613 F.2d at 986-987, 11 BRBS at 316. After examination of the evidence, the administrative law judge rejected Exxon's argument that it was merely an "end user" of a product provided by Dolphin Titan, finding that Exxon is in the business of the petrochemical industry in general and that both companies are part of the chain producing petrochemical products for end users. As Exxon contracted with Dolphin Titan to perform a portion of this work, the administrative law judge found Exxon is a general contractor under Section 4(a).

In *Dailey v. Edwin H. Troth*, 20 BRBS 75 (1986), the Board reviewed a case in which claimant was employed by a construction company (EHT) that had agreed to perform carpentry work on property owned by an investment partnership (Starlit). Since the construction company was uninsured for workers' compensation, the question before the Board was whether the investment partnership was liable for such payments through the existence of a subcontractor-contractor relationship. The Board applied the *National Van Lines* test and held:

> In contrast to the *National Van Lines* situation, here Starlit had not been contractually obligated to perform the duties which claimant was executing at the time of his injury; the work performed by Mr. Troth and claimant thus did not constitute "a subcontracted fraction of a larger project." Moreover, since Starlit's members operated the partnership only as an investment activity and thus did not retain any regular workers, the duties performed by claimant were not "normally conducted by the general employer's own employees."

Dailey, 20 BRBS at 77. The Board concluded that as neither part of the *National Van Lines* test was met, Starlit was liable for benefits under Section 4(a). *Dailey*, 20 BRBS at 78.

In his decision, the administrative law judge in the present case found that Exxon is in the business of petrochemicals in general as part of the chain which produces petrochemical products for end users. Thus, the administrative law judge concluded that both Exxon and Dolphin Titan were part of a larger project as defined by *National Van Lines.* Exxon, unlike the investment partnership in *Dailey*, is not engaged in a wholly different activity than the subcontractor which it employed to do a project. Moreover, the terminology used in the agreement between Exxon and Dolphin Titan is not dispositive, *see National Van Lines*, 613 F.2d at 985, 11 BRBS at 315; rather, it is the actual relationship of the parties which must be addressed. The administrative law judge noted that Exxon has retained extensive control in the contract and through its own employee, a drilling superintendent, supervised or had the right to supervise, in detail every facet of Dolphin Titan's drilling operation. Mr. LeJeune stated that this person was on the rig to see that Exxon's objectives

are met. Cl. Ex. 19, LeJeune Depo. at 15. As the administrative law judge's findings are supported by substantial evidence, I would affirm the administrative law judge's finding that Exxon is not merely an "end user."[14] Where the administrative law judge's findings are supported by substantial evidence, we are required to affirm the decision; the majority has engaged in impermissible fact-finding in its *de novo* review of the contract here. In addition, the goal of Section 4(a), as espoused in *National Van Lines*, 613 F.2d at 986, 11 BRBS at 316, of deterring unscrupulous employers from dividing their work among a number of smaller, uninsured entities is served by holding Exxon secondarily liable on the facts presented herein. Consequently, I would affirm the administrative law judge's finding that Exxon is liable for the payment of benefits to claimant under Section 4(a) of the Act, 33 U.S.C. §904(a).

Even if I were to use state law as guidance in this case, I would affirm the finding that Exxon is liable for claimant's benefits. Initially, I note that *Chavers* does not state a new test from that in *National Van Lines; National Van Lines* provides for liability as a contractor where either the employer subcontracts a fraction of a larger project *or* where work is normally performed by the contractor's own employees. My colleagues use *Chavers* to adopt a test which excludes the first test established by the *National Van Lines* court, despite the fact that *National Van Lines* is a decision under the Longshore Act while *Chavers* interprets the law of the state of Louisiana. As a case interpreting state law, the administrative law judge, moreover, properly cited it as secondary support for his decision. To remand for findings based on *Chavers* is thus totally unwarranted. If we are to rely on state law as guidance, then we should consult current law, and the decision in *Chavers* relies upon a statutory provision subsequently amended to reject a focus on whether work is normally done by the principal's employees or by contract.

Prior to 1986, the test for determining whether a principal was a statutory employer under La.R.S. 23:1061 was the "integral relationship" test set forth in *Thibodaux v. Sun Oil Co.*, 218 La. 453, 49 So.2d 852 (1950). Under this test, the principal was considered a statutory employer if the contractor was engaged in work that was an integral part of the trade, business, or occupation of the employer. *See generally Thompson v. Georgia Pacific Corp.*, 993 F.2d 1166 (5th Cir. 1993). The *Chavers* court did not apply this test, but instead stated that the prime inquiry is whether the employees of the principal or employees of other employers engaged in similar operations customarily perform the work at issue. *Chavers*, 716 F.2d at 317. *See also Penton v. Crown Zellerbach Corp.*, 699 F.2d 737 (5th Cir.1983) (rejecting the "essential to business" test). There can be no question but that claimant's work for Dolphin Titan satisfies the "integral relationship" test as

[14]The majority's emphasis on the fact that much of the specialized work of drilling is subcontracted for is misplaced. The evidence regarding the extent of control is relevant to the employment relationship and there is no question but that Dolphin Titan was an independent contractor and that claimant was its employee and not Exxon's. *See generally Carle v. Georgetown Builders, Inc.*, 19 BRBS 158 (1986); *Tanis v. Rainbow Skylights*, 19 BRBS 153 (1986). The pertinent inquiry involves Exxon's control over Dolphin Titan so that it can be held primarily liable under Section 4(a) as a contractor in the face of the insolvency of Dolphin Titan and its insurer.

oil production is one of Exxon's primary business operations and without drilling no oil can be produced. The "integral relationship" test is also consistent with both tests enunciated in *National Van Lines*.

In 1986, the Louisiana Supreme Court rejected the "integral relationship" test in favor of a more restrictive three-part analysis. *Berry v. Holsten Well Serv., Inc.*, 488 So.2d 934 (La. 1986):

(1) Is the contract work specialized? Specialized work is, as a matter of law, not a part of the principal's trade, business or occupation, and the principal is not the statutory employer of the specialized contractor's employees.

(2) Where the contract work is non-specialized, the court must compare the contract work with the principal's trade, business or occupation. At this second step, the court should make the following inquiries:

(i) Is the contract work routine and customary? That is, is it regular and predictable?

(ii) Does the principal have the equipment and personnel capable of performing the work?

(iii) What is the practice in the industry? Do industry participants normally contract out this type of work or do they have their own employees perform the work?

(3) Was the principal engaged in the work at the time of the alleged accident?

Berry, 488 So.2d at 938. All three factors had to be satisfied for a principal to be characterized as a statutory employer. *Salisbury v. Hood Industries, Inc.*, 982 F.2d 912 (5th Cir. 1993). It appears that the Fifth Circuit, in *Chavers*, anticipated at least part of this test in that it inquired as to whether Exxon and others in the industry customarily perform the drilling work at issue. In *Berry*, the court held that work performed by an employee of a company engaged to perform wireline work on an oil rig was engaged in "specialized" work so that the principal was not the statutory employer. *Berry*, 488 So.2d at 940 ("wireline work is specialized *per se*").

The Louisiana legislature subsequently amended the statutory provision, La.R.S. 23:1061, specifically to overrule *Berry*. *See Thompson*, 993 F.2d at 1168. The amended version reads

When any person, in this section referred to as the "principal," undertakes to execute any work, which is a part of his trade, business, or occupation or which he had contracted to perform, and contracts with any person, in this section referred to as the "contractor," for the execution by or under the contractor of the whole or any part of the work undertaken by the principal, the principal shall be liable to pay to any employee employed in the execution of the work or to his dependent, any

> compensation under the Chapter which he would have been liable to pay if the employee had been immediately employed by him...*The fact that the work is specialized or nonspecialized, is extraordinary construction or simple maintenance, is work that is usually done by contract or by the principal's direct employee, or is routine or unpredictable, shall not prevent the work undertaken by the principal from being considered part of the principal's trade, business, or occupation, regardless of whether the principal has the equipment or manpower capable of performing the work.*

La.R.S. 23:1061 (1992) (new language emphasized). The United States Court of Appeals for the Fifth Circuit has held that the amended version is not to be applied retroactively to injuries occurring before January 1, 1990, *Pierce v. Hobart Corp.*, 939 F.2d 1305 (5th Cir. 1991), and that the amendment returns the law to the "integral relationship" test. *Becker v. Chevron Chemical Co.*, 983 F.2d 44 (5th Cir. 1993).

If it were appropriate to examine state law for guidance in this case, I believe the Board would have to analyze the facts herein in light of the history of the Louisiana statute, including the re-introduction of the "integral relationship" test.[15] It is particularly noteworthy that factors relied on by my colleagues, including whether work is usually performed by the principal's own employees or is specialized are specifically not determinative under the current provision. Exxon's relationship with Dolphin Titan is clearly covered within the "integral relationship" test. As I stated earlier, it is clear, based on the administrative law judge's findings, that Dolphin Titan's work is integrally related to Exxon's and that Exxon should be liable given Dolphin Titan's insolvency. Drilling is essential to Exxon's production of oil and gas, and the administrative law judge correctly determined that Exxon was not engaged in a wholly different activity than are Dolphin Titan and the petrochemical industry in general.

[15]Given that the Louisiana law would be mere guidance, it is irrelevant that the amended version of Section 23:1061 is not to be applied retroactively.

In sum, under any test that is applied, the facts support the finding that Exxon and Dolphin Titan had a contractor/subcontractor relationship in the classic sense: Exxon needed drilling services and hired another company to perform this work. Exxon should not be able to avoid liability for claimant's compensation when it benefited from his services.

ROY P. SMITH
Administrative Appeals Judge