

BRB Nos. 97-382, 97-382A
97-1142, 97-1142A

PETE P. PILIPOVICH)	
)	
Claimant)	
)	
v.)	
)	
CPS STAFF LEASING, INCORPORATED)	DATE ISSUED:
)	
and)	
)	
EMPLOYER'S INSURANCE OF WAUSAU)	
A MUTUAL COMPANY)	
)	
Employer/Carrier-)	
Respondent)	
Cross-Petitioner)	
)	
AVONDALE INDUSTRIES,)	
INCORPORATED)	
)	
Self-Insured)	
Employer-Petitioner)	
Cross-Respondent)	DECISION and ORDER

Appeals of the Decision and Order and the Supplemental Decision and Order Awarding Attorney's Fees of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Wayne G. Zeringue, Jr. and Brett Bollinger (Jones, Walker, Waechter, Poitevent, Carrere & Denegre, L.L.P.), New Orleans, Louisiana, for employer Avondale Industries, Incorporated.

Joseph B. Guilbeau and Charles W. Farr (Juge, Napolitano, Leyva, Guilbeau & Ruli), Metairie, Louisiana, for employer CPS Staff Leasing, Incorporated and carrier Employer Insurance of Wausau A Mutual Company.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

CPS Staff Leasing, Incorporated (CPS) and its carrier, Employer's Insurance of Wausau (Wausau) appeal, and Avondale Industries, Incorporated (Avondale) cross-appeals, the Decision and Order and the Supplemental Decision and Order Awarding Attorney's Fees (95 -LHC-368) of Administrative Law Judge C. Richard Avery 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).¹ 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).

Claimant was employed by CPS, a temporary employment company which provides labor to shipyards. Claimant worked as a shipfitter at the Avondale shipyard. On May 24, 1991, claimant injured his back when squatting and pulling a "come-along." He was diagnosed with a large central disc herniation at L4-5 and eventually sought treatment with Dr. Russo, an orthopedic surgeon, who performed a lumbar laminectomy at L4-5. As claimant did not get any relief from his pain and swelling, a second surgery was performed in April 1994. Dr. Russo released claimant for light/sedentary part-time work with restrictions on February 16, 1996. Claimant sought benefits under the Act.

In his Decision and Order, the administrative law judge found that claimant was entitled to temporary total disability benefits for the period from May 24, 1991 until February 16, 1996, and permanent partial disability benefits from February 16, 1996 and continuing. In addition, the administrative law judge found that Avondale is liable for claimant's benefits as the borrowing employer. The administrative law judge declined to address the question of whether there is a valid indemnification agreement between the parties in this case, as he concluded that issue must be decided by state law and is not necessary to the determination of claimant's claim for benefits under the Act. However, the administrative law judge found that Wausau's contract with CPS to provide longshore insurance extended to Avondale, pursuant to the contracts between Avondale and CPS and between CPS and Wausau. Thus, the administrative law judge found that Wausau is responsible for the payment of claimant's benefits, and any contractual rights of reimbursement are outside his jurisdiction to decide. In conclusion, the administrative law judge ordered "Avondale and Wausau" to pay claimant's benefits. In a Supplemental Decision and Order, "Avondale and Wausau" were held liable for a fee to claimant's counsel.

¹We hereby consolidate for purposes of decision the appeal and cross-appeal of the administrative law judge's Decision and Order, BRB Nos. 97-382/A, with the appeal and cross-appeal of the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees, BRB Nos. 97-1142/A. 20 C.F.R. §802.104.

On appeal, Avondale contends that the administrative law judge erred in finding that it was claimant's borrowing employer and thus liable for benefits. Alternatively, Avondale contends that the administrative law judge erred in failing to resolve the indemnification and reimbursement issues, as they were properly before him. Wausau responds, urging affirmance of the administrative law judge's finding that Avondale was the borrowing employer. BRB No. 97-0382A. However, in its appeal, Wausau contends that the administrative law judge erred in finding Wausau liable to claimant notwithstanding that Avondale was the responsible employer and that Wausau did not insure Avondale for claimant's injuries. In addition, Wausau contends that the administrative law judge erred in refusing to award reimbursement to Wausau on the grounds that he had no authority to do so. Avondale responds, urging affirmance of the administrative law judge's finding that Wausau is the responsible carrier pursuant to the contractual obligations of CPS and Wausau. BRB No. 97-0382. In essence, Avondale and Wausau each contend the other is solely liable to claimant. Avondale and Wausau also appeal the administrative law judge's fee award, each contending that the other is solely liable for the fees based on the decision on the merits. BRB Nos. 97-1142/A.

Initially, Avondale contends that claimant was free of control and supervision by Avondale, and thus, that the administrative law judge erred in finding that claimant was a borrowed employee of Avondale. The borrowed employee doctrine provides that a borrowing employer may be held liable for benefits if application of the tests for employment so indicates. *Total Marine Services, Inc. v. Director, OWCP*, 87 F.3d 774, 30 BRBS 62 (CRT)(5th Cir. 1996), *reh'g en banc denied*, 99 F.3d 1137 (5th Cir. 1996), *aff'g Arabie v. C.P.S. Staff Leasing*, 28 BRBS 66 (1994). The Fifth Circuit set forth a nine-part test to determine the responsible employer in a borrowed employee situation in *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969), and in *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977), and the Board has applied this test.² *Vodanovich v. Fishing Vessel Owners Marine*

²The *Ruiz-Gaudet* test lists the following questions for determining if employee is a borrowed servant: (1) who has control over the employee and the work he is performing,

Ways, Inc., 27 BRBS 286 (1994).

other than mere suggestions of details or cooperation; (2) did the employee acquiesce in the new work situation; (3) who furnished tools and place for performance; (4) who had the right to discharge the employee; (5) who had the obligation to pay the employee; (6) did the original employer terminate his relationship with the employee; (7) whose work was being performed; (8) was there an agreement or meeting of the minds between the original and borrowing employer; and (9) was the new employment over a considerable length of time. The Fifth Circuit has held that the principal focus of the *Ruiz-Gaudet* test should be whether the second employer itself was responsible for the working conditions experienced by the employee and the risks inherent therein, and whether the employment with the new employer was of sufficient duration that the employee could reasonably be presumed to have evaluated the risks of the work situation and acquiesced thereto. *Gaudet*, 562 F.2d at 357.

In the present case, the administrative law judge relied on the Board's decision in *Arabie* and on the *Ruiz-Gaudet* factors, and found that claimant was injured at Avondale's facility while working on Avondale projects and that Avondale provided the tools and equipment used by claimant, with the exception of claimant's personal tool box. The administrative law judge also noted that claimant testified that his instructions came from foremen, most of whom were from Avondale.³ In addition, as in *Arabie*, although Avondale could not discharge claimant from the employment of CPS, it was free to discharge him from its employ. By the nature of claimant's agreement with CPS, CPS served as a temporary agency, and claimant agreed to do work for its clients. Although claimant was paid by CPS, Avondale paid CPS for claimant's services. See *Arabie*, 28 BRBS at 72. Because the administrative law judge used the applicable law and his findings are supported by substantial evidence, we conclude he rationally determined that Avondale is the borrowing employer and is liable for claimant's benefits absent a valid contractual obligation on the part of another entity.⁴ *Total Marine*, 87 F.3d at 779, 30 BRBS at 66 (CRT); *Gaudet*, 562 F.2d at 357-359; see also *Vodanovich*, 27 BRBS at 286.

Avondale contends in the alternative that the administrative law judge erred in declining to resolve the contractual indemnity and insurance issues between CPS, Wausau and Avondale. In its appeal, Wausau also contends on appeal that the administrative law judge erred in finding it liable for claimant's benefits, as it did not have an insurance contract with Avondale. The administrative law judge stated that he has no obligation to decide the indemnification and reimbursement disputes, as it is not necessary to the resolution of claimant's claim, as no party is seeking reimbursement from claimant. He

³Although the administrative law judge found that none of the foremen were CPS employees and there is evidence that Mr. Haywood and Mr. Breaux were supervisors in the employ of CPS, we hold that this error does not require a reversal of the administrative law judge's finding. Avondale was actively involved in the control and direction of the work, including providing the blueprints of the work to be done in addition to the participation of Avondale supervisors.

⁴As we affirm the administrative law judge's application of the *Ruiz-Gaudet* factors, we need not address Avondale's contentions regarding "the relative nature of the work test."

stated that he heard no argument about which state law would apply to the issues, and that the issue should be resolved “another day in another forum.” Decision and Order at 12, 14.

As the administrative law judge properly stated, he has the power to hear and resolve insurance issues which are necessary to the resolution of a claim under the Act. *Schaubert v. Omega Services Industries, Inc.*, 31 BRBS 24 (1997); *Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993). He erred, however, in stating he was refusing to address them in this case, as the arguments raised by Avondale and Wausau are ancillary to the responsible employer issue which was properly before the administrative law judge, *Schaubert*, 31 BRBS at 24, and it is not in the interest of judicial economy to defer adjudication of all related issues to another place and time. *Brady v. Hall Brothers Marine Corp. of Gloucester*, 13 BRBS 854 (1981). Nevertheless, the administrative law judge sufficiently reviewed the contractual provisions of record, and, for the reasons that follow, we affirm his conclusions regarding the contracts and modify the administrative law judge’s decision to hold Wausau solely liable to claimant.

The administrative law judge addressed the insurance contract that CPS obtained from Wausau in finding that Wausau is liable for claimant’s benefits on the basis of its contract with CPS. The administrative law judge found that the fact that CPS has a defense as to its liability to claimant under the borrowed employee doctrine does not relieve Wausau of its liability, as the contract between Avondale and CPS required CPS to provide workers’ compensation insurance, including longshore coverage, Avondale Ex. 1 at 8, and CPS contracted with and paid Wausau to provide this insurance.⁵ Avondale Ex. 5. Indeed, consistent with this finding and the Avondale/CPS contract, the record reveals that CPS purchased workers’ compensation insurance from Wausau. This certificate of insurance was held by Avondale and it states that “worker’s compensation coverage contains USL & H (longshore) endorsement and waiver of subrogation in favor of Avondale Boat Division.” Avondale Exs. 1, 5. The administrative law judge found that as CPS has no longshore workers itself, but merely provides workers to longshore employers, Wausau was on the risk not for CPS itself, but for those other employers to whom CPS loaned employees. Decision and Order at 13. In addition, the administrative law judge found and the record shows that Wausau was paid an extra premium by CPS to provide a waiver of its right of recovery from anyone liable for an injury covered by the policy.⁶ *Id.* Thus, the

⁵The contract between CPS and Avondale also states that CPS agrees to indemnify and hold harmless Avondale from any claims resulting in injury to a CPS employee working for Avondale. Avondale Ex. 1.

⁶The “Waiver of Our Right to Recover from Others Endorsement” states the following:

We have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against the person or organization named in the Schedule. This agreement applies only to the extent that you perform work under a written contract that requires you to obtain this agreement from us.

administrative law judge reviewed the contracts between CPS and Avondale and between CPS and Wausau and concluded that the contract between CPS and Avondale required that CPS obtain insurance for Avondale, the certificate of insurance held by Avondale states that Wausau provides the required longshore workers' compensation insurance, and CPS is not engaged in longshore work itself. These findings are supported by substantial evidence and are affirmed.

The administrative law judge erred in concluding from these findings, however, that both Wausau and Avondale are liable for claimant's benefits and attorney's fee. By virtue of the contractual agreements, Wausau is solely liable to claimant as the insurance carrier, as its policy insures Avondale for injuries covered under the Longshore Act and as it waived its right to seek reimbursement from Avondale.⁷ Therefore, we modify the administrative law judge's award to reflect Wausau's sole liability to claimant for benefits owed and for claimant's attorney's fee.

Accordingly, the Decision and Order and the Supplemental Decision and Order of the administrative law judge are modified to hold Wausau solely liable for the benefits owed claimant and for claimant's attorney's fee. In all other respects, the administrative law judge's decisions are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

Avondale Ex. 5. The contract between Avondale and CPS requires a waiver of subrogation in favor of Avondale. Avondale Ex. 1 at 8.

⁷Thus, there are no remaining indemnification and reimbursement issues to be decided. See n. 5, 6, *supra*.