U.S. Department of Labor

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

BRB No. 14-0325

FIRAS MIKHA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
THEODOR WILLE INTERTRADE, GESELLSCHAFT MIT BESCHRÄNKTER HAFTUNG, d/b/a SERVCO SOLUTIONS, LIMITED LIABILITY COMPANY	)	DATE ISSUED: Apr. 20, 2015
	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Claim of Paul C. Johnson, Jr., Administrative Law Judge, United States Department of Labor.

Jeffrey M. Winter, San Diego, California, for claimant.

Steven H. Trent and Christie M. Hayes (Baker, Donelson, Bearman, Caldwell & Berkowitz, P.C.), Johnson City, Tennessee, for employer.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Claim (2012-LDA-00244) of Administrative Law Judge Paul C. Johnson, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 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 findings of fact and conclusions of law of the administrative law judge which 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, an Iraqi citizen, filed a claim in 2010 for injuries he sustained on September 2, 2005, from the explosion of an improvised explosive device in Iraq.[1]

[1] Claimant obtained asylum in the United States in 2010, and has a permanent resident green card. CX 12 at 7-8; CX 27 at 8-9.

Claimant sustained injuries to his head, face, and left shoulder, the loss of his left eye, a hearing loss, and post-traumatic stress disorder. Claimant alleged that this injury occurred in the course of his employment as a truck driver for Theodor Wille Intertrade (TWI), Servco Solutions (Servco), or one of its subsidiaries or subcontractors.[2] Employer contested liability on several grounds; however, the initial issue presented for the administrative law judge's consideration was the existence of an employer-employee relationship.

The administrative law judge concluded that claimant was not an employee of TWI or any of its affiliates, subsidiaries, or contractors on the date of his injuries. Further, the administrative law judge found that claimant was not a borrowed employee of TWI or any of its affiliates, subsidiaries, or contractors on the date of his injuries. The administrative law judge found the only evidence that claimant directly worked for TWI or Servco, or any subsidiary or affiliate of those companies, is his own testimony and the declaration of his friend, Mr. Sami.[3] The administrative law judge found claimant lacking in credibility and gave no weight to Mr. Sami's declaration. In so finding, the administrative law judge observed that claimant's testimony is full of factual discrepancies and that Mr. Sami did not identify the basis of his understanding that claimant worked for TWI/Servco.[4] Decision and Order at 9. In contrast, the

[2] TWI is a multinational corporation with headquarters in the United States and Germany. Servco is a wholly owned subsidiary of TWI with offices in Kuwait. TWI would occasionally conduct its direct sales business as Servco. "Fourth Creek" is a subsidiary of TWI. "Big Apple" is a business entity independent of TWI, but TWI and Fourth Creek did conduct business with Big Apple. EX 2 at 1-4.

[3] Mr. Sami signed a declaration under penalty of perjury in Baghdad, Iraq, on February 28, 2013. CX 24. Mr. Sami stated that he and claimant worked for Mohammed Salem as a driver of Servco trucks. Mr. Sami stated that Mr. Salem worked for Servco. *Id.* at 1.

[4] Specifically, the administrative law judge noted that claimant gave conflicting testimony as to: 1) how he and other truck drivers were paid for their work; 2) how much he was paid; 3) the length of his employment with Servco; and 4) who gave him his daily assignments. The administrative law judge further noted that claimant testified he had signed an employment contract, but he did not have a copy of it, and that he gave names of people with whom he worked, stating that they are Servco employees, but there is no record of them in TWI's records. Decision and Order at 9. Further, with respect to Mr. Sami, the administrative law judge noted that his declaration was signed overseas where United States perjury laws do not apply and that it was unclear whether he understood his declaration, which was prepared in English by claimant's counsel.

administrative law judge credited the affidavit of Mr. Hoffman, Managing Director of TWI, and found that claimant was not an employee or borrowed employee of TWI or any of its affiliates, subsidiaries, or contractors on the date of his injuries.[5] Thus, the administrative law judge denied the claim for benefits. Claimant appeals the finding that he was not a borrowed employee of TWI/Servco or one of its subsidiaries or subcontractors.[6] Employer responds, urging affirmance of the administrative law judge's decision. Claimant filed a reply brief.

Claimant contends the administrative law judge erred in finding he was not a borrowed employee of TWI/Servco or an affiliated entity. 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 Herold v. Stevedoring Services of America*, 31 BRBS 127 (1987); *Holmes v. Seafood Specialist Boat Works*, 14 BRBS 141 (1981). The term "employer" includes borrowing employers under the borrowed employee doctrine, and a borrowing employer is liable for compensation benefits of its borrowed employee under the Act. *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 claimant under the Act and therefore immune from tort liability. *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); *American Stevedoring, Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001) (court noted the Board's policy that an administrative law judge may apply the test most appropriate to the facts, discussed the various tests, and found that the "relative nature of the work test" was best suited to the facts); *White*, 222 F.3d 146, 34 BRBS 61(CRT) ("authoritative direction and control" test requires a court to

[5] Although claimant testified that he worked with Servco employees named Rez, Nabel, Wathic Sami, and Mohammed Salem, Mr. Hoffman stated he has access to all contracts, subcontracts, and personnel/employment records for TWI (including its subsidiaries and affiliates) and that a search for all of these names and variations of all these names, including claimant's name, yielded no results for the time period August 1-October 1, 2005. EX 2.

[6] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant was not directly employed by TWI or Servco or any of its subsidiaries at the time of his accident. *See Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007).

determine whose work is being performed by determining who has the power to control and direct the individual in the performance of his work); *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969); *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).[7] The United States Court of Appeals for the Ninth Circuit, within whose jurisdiction this case arises, has not addressed this issue in a case arising under the Act, but has held that "authoritative direction and control" are the critical factors relevant to borrowed employee determinations. *Parker v. Joe Lujan Enterprises, Inc.*, 848 F.2d 118 (9th Cir. 1988) (citing *McCollom v. Smith*, 339 F.2d 348 (9th Cir. 1964)). These tests derive from the Supreme Court's decision in *Standard Oil v. Anderson*, 212 U.S. 215, 221-22 (1909), wherein the Court stated that the borrowing employer inquiry "is usually answered by ascertaining who has the power to control and direct the (servant) in the performance of (his) work."

Claimant alleged he was hired by an Iraqi or a Kuwaiti local labor broker to drive trucks of supplies for and on behalf of TWI or Servco. The administrative law judge fully addressed the evidence of record, as well as the *Ruiz-Gaudet* criteria, to determine if TWI or one of its entities or subcontractors was claimant's borrowing employer.[8] The administrative law judge found that claimant did not provide truck driving services on

[7] The *Ruiz-Gaudet* test lists the following questions for determining if an employee is a borrowed servant: (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 original and borrowing employer; (4) did the employee acquiesce in the new work situation; (5) did the original employer terminate his 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. 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.

[8] Because the first of the *Ruiz-Gaudet* criteria addresses the issue of control, and application of the other criteria aid in this inquiry, the Ninth Circuit's test is encompassed within the factors addressed by the administrative law judge in this case. *See Kirkpatrick v. Shell Oil Co.*, 912 F.2d 469, 1990 WL 126086 (9th Cir. 1990) (table). We note that the various tests are designed to ascertain which of two or more employers is claimant's statutory employer. The tests are less useful, where, as here, the administrative law judge is ascertaining if an entity employed the claimant's services at all.

behalf of, nor was he controlled by, TWI or any of its subsidiaries or affiliates and, therefore, none of the criteria supports a finding that claimant was a borrowed employee of TWI, Servco or Fourth Creek.

The administrative law judge acknowledged the presence of Servco in Iraq at the time of claimant's injury, specifically noting that Eddie Nagel, a contractor for Fourth Creek, was Servco's "Country Manager" for Iraq. Mr. Nagel was responsible for overseeing the construction of 16 life-support systems at two military bases. He did not have truck drivers working for him, nor did he oversee any truck drivers. CX 35 at 16-17. Although claimant initially named Mr. Nagel as his supervisor, the administrative law judge found that claimant subsequently testified that he had spoken to Mr. Nagel only once, and Mr. Nagel testified that he was not claimant's supervisor and did not direct claimant's work in any way.[9] CX 35 at 16; EX 4 at 46. The administrative law judge also found that, given Servco's mission to build life-support facilities, claimant's testimony that he made truck deliveries to other places in Iraq, returning with an empty truck, is inconsistent with Servco's mission. Decision and Order at 10-11.

The administrative law judge also credited the affidavit of Mr. Hoffman. Specifically, Mr. Hoffman stated that TWI/Servco did not do any business in September 2005 in Iraq with any entity, including labor brokers and subcontractors, other than Big Apple, and that the invoices from Big Apple show that it did not provide any truck driving services to TWI. EX 2 at 4. Further, Mr. Hoffman's records show that TWI and its affiliates and subsidiaries did not own or lease any trucks, employ any truck drivers, or contract for any trucks or truck drivers in Iraq in 2005, nor did they employ claimant as an independent contractor. *Id*. Mr. Hoffman stated that his invoice records do not show that TWI paid Big Apple for the salary or expenses of claimant.[10] *Id*. Mr. Hoffman also

[9] Nevertheless, Mr. Nagel wrote a letter of recommendation for claimant on Servco letterhead. Mr. Nagel testified that he had heard about the bombing in which claimant was injured, and sometime later claimant came to him asking for a letter of recommendation because he was going to have difficulty finding employment. Mr. Nagel stated that he felt sorry for claimant and wrote the letter for him on company letterhead because that was the only company Mr. Nagel knew. CX 35 at 21-22, 25.

[10] The administrative law judge found that Servco maintained a computerized system containing all invoices and contracts, including the names of all those paid directly or indirectly by Servco, and that the name of claimant, Mr. Salem, and Mr. Sami do not appear on any of the records. Decision and Order at 9; EX 2 at 2. Although claimant relies on Mr. Nagel's testimony to support his contention that he was hired as a subcontractor to drive a truck on behalf of and for the benefit of Servco, Mr. Nagel's testimony is speculative on this matter. Mr. Nagel stated in his May 22, 2012 declaration that he believed claimant was contracted by an Iraqi company that provided both leased

stated that, as there was no record of TWI's either providing or verifying that claimant had a badge to access Camp Taji, TWI did not provide claimant's housing therein. *Id.* at 5-6. Although claimant alleged TWI exercised control over him because his work was supervised by TWI and he resided at Camp Taji, the administrative law judge found claimant's testimony inconsistent and not credible. Thus, the administrative law judge found that TWI did not exercise any control over claimant, did not provide him with tools, trucks, or instructions, and did not have the obligation to pay him, because claimant was not working on behalf of TWI or its subsidiaries and affiliations, or in furtherance of the work TWI/Servco was doing in Iraq in August and September 2005.[11] Therefore, the administrative law judge found claimant was not TWI's borrowed employee. The administrative law judge further found there was no evidence that TWI contracted for any

---

trucks and drivers for Servco's supply haul mission. CX 23 at 127. However, Mr. Nagel also stated that he was unclear "who 'let' the contract in support of the overall mission; contracting for anything other than construction efforts did not fall under [his] charter or purview." *Id*. At his August 3, 2012 deposition, Mr. Nagel stated that the only way Servco could have employed truck drivers in Iraq in August or September of 2005 "would have been through a subcontract, which he was not privy to." CX 35 at 18. Moreover, when asked whether claimant was working for the benefit of Servco, Mr. Nagel stated, "I would have to deduce . . . . my mission was to put up tentage and life support for the drivers. And so the bottom line to it is if I'm putting up the life support, they're staying in it, there has to be some kind of coordination or marriage. . . but I couldn't be able to swear to say definite – for sure, because I wasn't privy to the contracting." *Id*. at 37. Thus, although Mr. Nagel's statements suggest claimant may have been a Servco subcontractor, the administrative law judge was within his discretion to credit Mr. Hoffman's affidavit based on Servco's business and employment records showing that it did not directly hire or subcontract with claimant or for truck driving services in Iraq in August or September 2005. Decision and Order at 9; EX 2 at 6.

[11] Although claimant claimed that his truck was marked "Servco," the administrative law judge observed that the pictures he provided do not have such markings. Decision and Order at 10 n.3; CX 13. Similarly, the administrative law judge did not credit claimant's testimony that "Servco" appeared on any of the personal protective gear he wore, as there are no pictures to support his claim, and Mr. Hoffman stated credibly there was no such gear. Decision and Order at 10 n.3.

truck driving services, and if claimant was paid, he was paid by someone other than TWI.[12] Decision and Order at 10.

It is well established that the administrative law judge has the prerogative, as the finder of fact, to weigh the conflicting evidence of record and to assess the credibility of a witness's testimony. *Duhagon v. Metropolitan Stevedore Co.*, 169 F.3d 615, 33 BRBS 1(CRT) (9th Cir. 1999); *Goldsmith v. Director, OWCP*, 838 F.2d 1079, 21 BRBS 30(CRT) (9th Cir. 1988); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir. 1978), *cert. denied*, 440 U.S. 911 (1979). The administrative law judge's decision to credit the deposition statements of Mr. Nagel and the affidavit of Mr. Hoffman over claimant's testimony is rational. *Id.* Thus, as it is supported by substantial evidence of record, we affirm the administrative law judge's finding that claimant was not a borrowed employee of TWI, Servco or any affiliated entity, and the consequent denial of benefits under the Act.[13] *See generally Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994).

[12] The administrative law judge surmised that claimant may have been working under a different contract, or had been hired informally by a friend. Decision and Order at 10-11.

[13] In light of our decision, it is unnecessary to address claimant's contention that employer lacked the proper Defense Base Act insurance coverage.

Accordingly, the administrative law judge's Decision and Order Denying Claim is affirmed.

SO ORDERED.

_____
BETTY JEAN HALL, Chief
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge