BRB Nos. 86-2529 and
85-2529A

KURT CHRISTIANSEN	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
MARINE TERMINALS CORPORATION	)	DATE ISSUED:
	)	
Self-Insured Employer-Petitioner Cross-Respondent	)	
	)	
and	)	
	)	
CRESCENT WHARF AND WAREHOUSE COMPANY	)	
	)	
Self-Insured Employer-Respondent Cross-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-interest	)	DECISION AND ORDER

Appeal of the Decision and Order Awarding Benefits of Thomas Schneider, Administrative Law Judge, United States Department of Labor.

Jack Williams, Glendale, California, for Marine Terminals Corporation.

James J. Wood, Long Beach, California, for Crescent Wharf and Warehouse Company.

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

PER CURIAM:

Marine Terminals Corporation (Marine) appeals and Crescent Wharf and Warehouse Company (Crescent) cross-appeals the Decision and Order Awarding Benefits (84-LHC-2461) of Administrative Law Judge Thomas Schneider rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the 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 injured his back and shoulder on April 27, 1983 when the utility vehicle he was driving struck lumber on the floor causing the steering wheel to spin sharply and suddenly. The parties stipulated that claimant was temporarily totally disabled until November 15, 1983; that he reached maximum medical improvement on November 16, 1983 and was entitled to permanent total disability benefits until October 20, 1985; and that commencing October 21, 1985 claimant has a post-injury wage-earning capacity that entitled him to compensation at the rate of $400 per week. *See* 33 U.S.C. §908(c)(21).

The administrative law judge found that Marine, as claimant's employer at the time of injury, is liable for his benefits under the Act, notwithstanding that evidence revealed that Crescent paid claimant's wages on the day he was injured. In addition, the administrative law judge found that Crescent was not brought into the case without reasonable grounds and therefore he denied Crescent's motion for assessment of fees and costs against Marine under Section 26 of the Act, 33 U.S.C. §926. The administrative law judge found Marine entitled to relief from continuing compensation liability pursuant to Section 8(f) of the Act, 33 U.S.C. §908(f), and awarded claimant's attorney a fee in the amount of $8,100 to be paid by Marine.

On appeal, Marine contends that the administrative law judge erred in finding that Crescent was not the responsible employer, or, in the alternative, that Marine and Crescent were not joint employers. Crescent responds, urging affirmance of the administrative law judge's finding that Marine is the responsible employer. On cross-appeal, Crescent contends that the administrative law judge erred in refusing to assess Crescent's fees and costs against Marine pursuant to Section 26 as Marine's inclusion of Crescent in the case was without reasonable grounds.

We reject Marine's contention that because a time card indicates that Crescent paid claimant for the day of the injury, it is the responsible employer.[1] Claimant was dispatched from the union hall at the request of Marine. It is undisputed that on the day of the injury Crescent was working on Pier B and Marine was working on Pier C. The administrative law judge credited claimant's testimony that he was working on Pier C using equipment owned by Marine. Following the injury, claimant reported the accident to a supervisor working for Marine. The workers' compensation administrator for Marine investigated the accident and processed the claim for compensation and medical benefits in the usual way for Marine.

Furthermore, the administrative law judge found that when employees were "swapped" between Marine and Crescent, the proper procedure was for one stevedore line to bill the other one for the services, and not to alter a time card. Decision and Order at 3. The administrative law judge found it significant that Marine did not produce any witness to testify as to why claimant belonged on Crescent's payroll instead of Marine's, but relied solely on the Crescent time card which notes claimant worked on a Crescent account the day of the injury.[2] Thus, after weighing the evidence of record, the administrative law judge concluded the evidence establishes that Marine is the responsible employer. Although Crescent paid claimant's wages for the day of the injury, the administrative law judge found that the evidence establishes that claimant actually worked for Marine that day, based on the events, common practice, and claimant's testimony. Therefore, although the administrative law judge did not specifically apply any of the tests in determining whether an employer-employee relationship existed within the meaning of the Act, *see* n.1, *supra*, we affirm his finding that an employer-employee relationship between Marine and claimant existed

[1]The Board has applied three tests to determine whether an employer-employee relationship exists within the meaning of the Act; the Board has allowed the administrative law judge to apply whichever test is best suited to the facts of the particular case. *Reilly v. Washington Metropolitan Area Transit Authority*, 20 BRBS 8 (1987). The tests are: (1) the relative nature of the work; (2) the right to control details of the work; and (3) the factors listed in the Restatement (Second) of Agency, Section 220, Subsection 2. *Id.*, 20 BRBS at 10 n.2. Contrary to Marine's contention, the "right to control details of work" test is an appropriate method to determine whether an employer-employee relationship exists. *See generally Tanis v. Rainbow Skylights*, 19 BRBS 153 (1986). The United States Court of Appeals for the Fifth Circuit has held that the relative nature of the work test, which is generally more liberal than the right to control test, is the most appropriate test in workmen's compensation cases in accordance with the Act's expansive view of coverage. *See Oilfield Safety and Machine Specialties, Inc. v. Harmon Unlimited, Inc.*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980). However, this holding is not controlling in the instant case as this claim arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit. In any event, the same result is reached in this case regardless of which test is applied.

[2]The back of the Crescent time card states "Transferred from M.T.C. clean B - dock - constrs. left on dock to be hauled to empty yard - ex Allunga Charge to C.C.W. per T. Murphy." Marine Ex. 5. The record establishes that the *Allunga* is a ship belonging to a client of Crescent's, and that T. Murphy was the Crescent Superintendent.

on the day of the injury and that Marine is the responsible employer as it is rational and supported by substantial evidence. *See generally Meagher v. B.S. Costello, Inc.*, 20 BRBS 151 (1987), *aff'd*, 867 F.2d 722, 22 BRBS 24 (CRT) (1st Cir. 1989); *Tanis*, 19 BRBS at 155.

We also reject Marine's contention that Crescent should be found liable as the responsible employer because the California Insurance Code states the responsible employer is the one that paid the employee. The administrative law judge is not bound by a state law in proceedings under the Act. *See generally Bouchard v. General Dynamics Corp.*, 963 F.2d 541, 25 BRBS 152 (CRT)(2d Cir. 1992). Moreover, we reject Marine's contention that Marine and Crescent should be jointly and severally liable as joint employers. In *Oilfield Safety and Machine Specialties, Inc. v. Harmon Unlimited, Inc.*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980), the United States Court of Appeals for the Fifth Circuit affirmed the finding that the claimant was the employee of two companies, and that these companies were jointly and severally liable for the claimant's benefits. The court did not hold that where there are indicia of employment with more than one employer, the employers must be found jointly liable. Rather, the court determined that although there was conflicting evidence as to the claimant's status as an employee of two companies, it was bound to affirm the administrative law judge's finding as it was supported by substantial evidence. *Id.*, 625 F.2d at 629, 14 BRBS at 360-361. In this case, as the administrative law judge rationally found that claimant had an employment relationship with only one employer, Marine, despite the indicia of employment with Crescent, we reject the contention that the two employers should be jointly liable.

Lastly, we reject Marine's contention that Crescent is the responsible employer because it "ratified" claimant's employment with it by paying his wages on the day of the injury. Marine contends that Mr. Murphy knew of claimant's injury and did not object to the placing of claimant on its payroll, thereby impliedly ratifying claimant's employment retroactively. "Ratification" is applicable to the law of agency, and it refers to the adoption or affirmance by a person of a prior act which did not bind him, but which was done or professed to done on his account, thus giving effect to the act as if it were originally authorized. *See 3 Am Jur 2d, Agency §180.* Under this doctrine, Marine would have to allege that an agent of Crescent put claimant on its payroll without approval, for whatever reason, and that thereafter this action was ratified by the principal. *See generally id. at §182.* Marine, however, cannot use this theory to allege that claimant actually was an employee of Crescent's and that he was properly on its payroll. As the administrative law judge rationally found that claimant was an employee of Marine, this finding is affirmed.

On cross-appeal, Crescent contends that the administrative law judge erred in refusing to assess its fees and costs against Marine pursuant to Section 26, 33 U.S.C. §926, of the Act. An attorney's fee cannot be assessed against any party pursuant to Section 26. *Toscano v. Sun Ship, Inc.*, 24 BRBS 207 (1991). However, Section 26 does provide for the imposition of costs where a claim is instituted or continued without reasonable ground.[3] If there is a basis for the claim, Section

[3]Section 26 of the Act states:

If the court having jurisdiction of proceedings in respect of any claim or

26 is not applicable. *Freiwillig v. Triple A South*, 23 BRBS 371 (1990).

Although we affirm the administrative law judge's finding that the evidence establishes that Marine is the responsible employer, the existence of the questionable time card as evidence of the fact that Crescent was potentially liable because it paid claimant on the day of the injury provided reasonable grounds on which to include Crescent in the case. We, therefore, affirm the administrative law judge's denial of Crescent's motion for fees and costs against Marine pursuant to Section 26.

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

> compensation order determines that the proceedings in respect of such claim or order have been instituted or continued without reasonable ground, the costs of such proceedings shall be assessed against the party who has so instituted or continued such proceedings.

33 U.S.C. §926.