BRB Nos. 93-1390
and 93-1390A

WAYNE A. ARABIE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
C.P.S. STAFF LEASING	)	
	)	
and	)	
	)	
EMPLOYER'S CASUALTY INSURANCE COMPANY	)	
	)	
Employer/Carrier Petitioners Cross-Respondents	)	
	)	
TOTAL MARINE SERVICES, INCORPORATED	)	
	)	
and	)	
	)	
AETNA CASUALTY AND SURETY COMPANY	)	
	)	
Employer/Carrier-Respondents Cross-Respondents	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	Date Issued: _____
	)	
Respondent	)	DECISION and ORDER

Appeal of the Order Dismissing Total Marine Services and Final Judgment of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

William D. Dyess (New Orleans, Louisiana), for claimant.

Thomas W. Thorne, Jr. (Lemle & Kelleher), New Orleans, Louisiana, for C.P.S. Staff Leasing and Employer's Casualty Insurance Company.

V. William Farrington, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for Total Marine Services, Inc. and Aetna Casualty and Surety Co.

LuAnn Kressley and Joshua 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.

PER CURIAM:

C.P.S. Staff Leasing (CPS), and its insurer, Employer's Casualty Insurance Company, appeal, and claimant cross-appeals, the Order Dismissing Total Marine Services and Final Judgment (93-LHC-143) of Administrative Law Judge James W. Kerr, Jr. 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).

The facts in this case are undisputed. CPS, a labor contractor, furnished claimant, a welder, to Total Marine Services, Inc. (Total Marine) to perform work at its marine repair facility. Claimant was working under the direction and control of Total Marine when he injured his neck on August 23, 1990. Claimant brought suit under the Act against CPS for his work related injuries, and Employer's Casualty, CPS's insurer, paid him medical expenses and compensation benefits. CPS, in turn, however, asserted a reimbursement claim against Total Marine on the basis that Total Marine was the claimant's borrowing employer and therefore liable for all or some proportionate share of the claim. Total Marine filed a Motion for Summary Judgment before the Office of Administrative Law Judges, in which it conceded that it was claimant's borrowing employer but sought dismissal on the grounds that application of Section 4(a) of the Act, 33 U.S.C. §904 (1988), precluded it from being held liable for the claim. On February 26, 1993, the administrative law judge issued an Order Dismissing Total Marine Services. The administrative law judge found that even conceding that Total Marine was claimant's "borrowing employer", this fact was irrelevant to the liability issue, inasmuch as Total Marine, who was a the general contractor, could only be held liable for injuries sustained by an employee of its subcontractor under Section 4(a) if both the subcontractor and its insurer had become insolvent. On March 31, 1993, the administrative law judge entered his order of Final Judgment, denying claimant and CPS's claim against Total Marine.

On appeal, CPS contends that the administrative law judge's Order and Final Judgment dismissing Total Marine should be reversed as Total Marine was claimant's borrowing employer, and accordingly was liable for his benefits. Total Marine responds, that as it was a general contractor, the administrative law judge properly determined that it could not be held liable for claimant's benefits under Section 4(a) inasmuch as CPS and its insurer were not insolvent. The Director, Office of Workers' Compensation Programs (the Director), also responds, urging that the order of dismissal be reversed. The Board heard oral argument on this case in New Orleans, Louisiana, on January 13, 1994.[1]

This case presents an issue of first impression for the Board, *i.e.*, whether a borrowing employer remains liable to claimant for benefits under the Act in light of the application of Section 4(a), which was added to the Act by the 1984.[2] Although the Board has not previously considered

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[1]In its brief, the Director initially contended that no contractor/subcontractor relationship existed between Total Marine and CPS under Section 4(a) of the Act, 33 U.S.C. §904(a)(1988), and that accordingly Total Marine, was liable in light of its status as the borrowing employer. At the oral argument before the Board, however, the Director modified his position, contending that although Total Marine could not be held liable for claimant's benefits under Section 4(a) because CPS was insured, the contractor-subcontractor relationship is irrelevant, where, as here, the borrowed employee doctrine applies.

At oral argument, Total Marine also asserted that it was the 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) because CPS's employees were performing the work normally performed by Total Marine's employees. A question also arose as to whether Total Marine provided insurance coverage for claimant or whether CPS's insurance policy covered him while he was working for Total Marine. We need not resolve these issues, however, as neither Total Marine's status as a general contractor, nor CPS's coverage of claimant is determinative of liability for the claim on the facts presented. *See discussion, infra*.

[2]Section 4(a) states as follows:

> Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under section 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 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).

this issue, the United States Court of Appeals for the Fifth Circuit, within whose appellate jurisdiction this case arises, addressed it in *West v. Kerr-McGee Corp.*, 765 F.2d 526 (5th Cir. 1985), and concluded that Section 4(a) as amended in 1984 has no bearing on the borrowed employee doctrine. *Accord Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935 (3d Cir. 1990). The court's decision in *West* controls the outcome in the present case.

The issue in *West* concerned whether a borrowing employer, Kerr-McGee, who received the employee's services through a contract with a labor contractor was the employee's employer and thus immune from tort liability under Section 5(a) of the Act.[3] The court found that two lines of cases were relevant to the issue. The first, the borrowed servant situation, occurs when a defendant who is not a plaintiff's formal employer asserts that plaintiff is in fact acting as defendant's employee. In such cases, the borrowing employer may be the employer liable for compensation under the Act and will benefit from the tort immunity provided by Section 5. By virtue of its status as a borrowing employer, it becomes the employer for purposes of the Act.

A second line of cases concerns the circumstances under which a contractor whose subcontractor is the true employer of an injured employee may be considered an "employer" for purposes of tort immunity and compensation liability. In these cases, employees of subcontractors sued the general contractors in tort and the general contractors asserted immunity under pre-amendment Section 5(a), 33 U.S.C. §905(a)(1982)(amended 1984), not because the plaintiff was a borrowed or *de facto* employee of the general contractor but because of the general contractor's duty under pre-1984 Section 4(a) to guarantee the payment of compensation to subcontractors' employees. The *West* court noted that prior to the 1984 Amendments, most courts held that a general contractor's statutory duty under the Act was secondary and guaranty-like; thus, the general contractor was considered an employer so that tort immunity attached only where a subcontractor failed to secure compensation and the general contractor was forced to pay it. In June 1984, however, the United States Supreme Court rejected this position in *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925 (1984) (*WMATA*), and adopted the general contractors argument that they enjoyed immunity under the Act from subcontractors' employees' tort suits

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Prior to 1984, the second sentence stated that where the employer was a subcontractor 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]Section 5(a) states:

> For purposes of this subsection, a contractor shall be deemed the employer of a sub-contractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

33 U.S.C. §905(a)(1988).

except where they neglected to secure workers' compensation coverage after the subcontractor failed to do so. Accordingly under *WMATA* tort immunity for general contractors became the rule rather than the exception.

Three months later, however, Congress responded by approving the 1984 Amendments, including amending Sections 4(a) and 5(a) for the purpose of overturning *WMATA*. *See Louviere v. Marathon Oil Co.*, 755 F.2d 428, 429-30 (5th Cir. 1985). The *West* court found that the legislative history of the 1984 amendments unambiguously demonstrates that Congress's sole purpose in amending Sections 4(a) and 5(a) was to overrule *WMATA*, and not to amend the borrowed servant doctrine or otherwise modify existing law. 765 F.2d at 530. The court noted that the report of the Conference Committee which added the Sections 4(a) and 5(a) amendments, states that *WMATA* "changed key components of what had widely been regarded as the proper rules governing contractor and subcontractor liability under the [Longshore Act]," and that the amendments "disapprov[e]" *WMATA*. *See* H. Rep. Conf. Rep. No. 98-1027, 98th Cong., 2d Sess. 24, *reprinted in*, 1984 U.S. Code Cong. & Admn. News 2734, 2771, 2774. The court further noted that Congress had characterized *WMATA* as an unwanted deviation from 56 years of precedent and that this precedent includes the borrowed employee doctrine, *see Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969), as well as the general contractor rule rejected by *WMATA, see Probst v. Southern Stevedoring Co.*, 379 F.2d 763 (5th Cir. 1967).

The *West* court explicitly recognized that *Probst*, whose rule is codified by the 1984 Amendments, does not foreclose the possibility that a general contractor may be an employer under the borrowed servant doctrine. *See Champagne v. Penrod Drilling Co.*, 462 F.2d 1372 (5th Cir. 1972), *cert. denied*, 409 U.S. 1113 (1973). Moreover, the court indicated that the 1984 amendments to Section 4(a) and 5(a) of the Act do not provide that an employer can be a borrowing employer only in those instances where the subcontractor fails to secure worker's compensation coverage. Rather *West* holds that if the general] contractor is the employee's true employer under the borrowed employer doctrine, the contractor is liable for the employee's compensation under Section 4(a) and has tort immunity under Section 5(a) regardless of whether its behavior as a general contractor or insurance guarantor would otherwise cause it to be "deemed" an employer under the amended statutory scheme. *West*, 765 F.2d at 530; *see generally Perron v. Bell Maintenance and Fabricators, Inc.*, 970 F.2d 1409 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 1264 (1993); *Melancon v. Amoco Production Co.*, 834 F.2d 1238 (5th Cir. 1988); *Alexander v. Chevron, U.S.A.*, 806 F.2d 526, 529 (5th Cir. 1987), *cert. denied*, 483 U.S. 1005 (1987); *Capps v. N.L. Baroid - NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986). Thus, the court held that the 1984 Amendments have no bearing on the borrowed employee issue. A borrowing employer may be held liable if application of the tests for employment status so indicate. Section 4(a) provides an alternate for means of liability for a contractor where the subcontractor is the true employer but fails to secure the payment of compensation. Accordingly, if Total Marine is the borrowing employer, it is liable without regard to Section 4(a).

In the present case, Total Marine stipulated that it was claimant's borrowing employer. The Fifth Circuit set forth a nine part test to determine the responsible employer in a borrowed employee

situation in *Ruiz*, 413 F.2d at 310, and *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977).[4] The applicable criteria for the *Ruiz-Gaudet* test consist of the following:

1. Who had control over the employee and the work he is performing, 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 has the right to discharge employee?

5. Who had the obligation to pay the employee?

6. Did the original employer terminate his relationship with employee?

7. Whose work was being performed?

8. Was there an agreement or meeting of the minds between the original and borrowing employer?

9. Was the new employment over a considerable length of time?

The principal focus of the *Ruiz-Gaudet* test is on 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.

Applying the *Ruiz-Gaudet* factors to the case at hand, it is readily apparent that Total Marine's stipulation that is the borrowing employer is consistent with applicable law. Total Marine was responsible for claimant's working conditions; the work was performed in its shipyard, claimant reported to a person at Total Marine for work, and Total Marine employee told claimant where to weld. In addition, all equipment was supplied by Total Marine, with the exception of claimant's personal welding equipment, and although Total Marine could not discharge claimant from the employment of CPS, it was free to discharge him from its employ. By the nature of claimant's

[4]The Board has approved the *Ruiz-Gaudet* test as one method of determining if an employer is the "borrowing employer", and therefore liable under the Act, even in cases arising outside of the jurisdiction of the United States Court of Appeals for the Fifth Circuit. *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, ___ BRBS ____, No. 89-2118 (Jan. 27, 1984); *see also Edwards v. Willamette Western Corp.*, 13 BRBS 800 (1981).

agreement with CPS, CPS served as a temporary employment agency, and claimant agreed to do work for their clients. Although claimant was paid by CPS, Total Marine paid CPS for claimant's services. Finally, there was a meeting of the minds between the two employers in that Total Marine would request welders from CPS, who would supply the welders who would then work with Total Marine's exclusive control. At the time of his injury, claimant had been working for Total Marine for about 17 days, a not insignificant period of time.[5]

Although Total Marine did not dispute its status as the borrowing employer, the administrative law judge in the present case found that this fact was irrelevant to the liability issue based on his application of Section 4(a). This finding is directly contrary to *West* which explicitly recognizes that a contractor who is the employee's employer under the borrowed servant doctrine is liable for his benefits regardless of its status as a general contractor; application of the borrowed servant doctrine is not limited by Section 4(a) and 5(a) to those instances in which the subcontractor fails to secure compensation payments. As *West* is controlling, Total Marine, claimant's undisputed borrowing employer, is liable for claimant's benefits as a matter of law.[6] The administrative law judge's Order Dismissing Total Marine Services and Final Judgment holding to the contrary are therefore reversed.

Accordingly, the administrative law judge's Order Dismissing Total Marine Services and Final Judgment are reversed. Total Marine is liable for any compensation or medical benefits owed to claimant as a matter of law in light of its undisputed status as claimant's borrowing employer, and the case is remanded for consideration of all remaining issues.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

[5]Furthermore, the factor of time in the test is only significant when employer employs employee for a considerable length of time; the converse is not true. *See Capps*, 784 F.2d at 628.

[6]Total Marine alternatively argues in favor of joint liability with CPS. The Board has previously indicated, although its has never held, that joint liability may be appropriate in the borrowed employee situation where the claimant is under the simultaneous control of two employers at the time of his injury or under contract to two employers and under the separate control of each. *See Edwards*, 13 BRBS at 800. In the present case, however, as Total Marine had exclusive control of claimant's work and work place and claimant was engaged solely in Total Marine's work at the time of the accident, Total Marine is solely liable for any compensation benefits owed to claimant. *See Vodanovich*, slip op at 7.

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge