BRB Nos. 06-0729
and 06-0729A

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| ARTHUR J. PRESTENBACH<br><br>Claimant-Petitioner<br>Cross-Respondent<br><br>v.<br><br>GLOBAL INTERNATIONAL MARINE, INCORPORATED<br><br>and<br><br>LOUISIANA WORKERS' COMPENSATION CORPORATION<br><br>Employer/Carrier-Respondents<br>Cross-Petitioners | ) | DATE ISSUED: 05/31/2007<br><br>DECISION and ORDER |

Appeals of the Decision and Order Denying Benefits and Order Denying Motion to Amend Decision of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Charles M. Raymond (Taggart, Morton, Ogden, Staub, Rougelot & O'Brien, LLC), New Orleans, Louisiana, for claimant.

Travis R. LeBleu (Johnson, Stiltner & Rahman), Baton Rouge, Louisiana, for employer/carrier.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, and employer cross-appeals, the Decision and Order Denying Benefits and Order Denying Motion to Amend Decision (2005-LHC-2169) of Administrative Law Judge Clement J. Kennington 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 administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are 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 injured his back on November 10, 2004, in the course of floating a submerged barge on Little Lake. In early November 2004, at the request of Steve Hebert,[1] claimant agreed to float the submerged barge utilizing a crane leased by employer from claimant's son's company, A & A Leasing. The crane was leased with the understanding that claimant would operate all equipment on the barge. On November 8, 2004, Gil Hebert piloted the push boat *Little Mike* to claimant's house on Bayou Barriere. The following day, the *Little Mike* was coupled with the crane barge and taken to the job site in Little Lake. Once at the jobsite, claimant informed Gil Hebert that concrete had to be busted and holes cut in the submerged barge to allow for the insertion of suction hoses. Gil Hebert relayed those instructions to two laborers who were hired to perform manual labor on this project. Once the concrete was busted, claimant used a torch to cut the necessary holes and shortly thereafter the pumping operations commenced. On November 10, 2004, claimant cut additional holes in the submerged barge to allow for better pumping. Ultimately, claimant, with the assistance of Gil Herbert and the laborers, was able to float the barge. Claimant alleges that he injured his back on November 10, 2004 in the course of this work.

Claimant was diagnosed with a lumbosacral strain with degenerative disc disease and was restricted from prolonged standing, bending, lifting, climbing, stooping, and squatting, which precluded him from returning to his former work. He subsequently sought benefits under the Act, alleging that his injury occurred while he was engaged in barge salvage operations on navigable waters as a borrowed servant of employer. Employer contested the claim, arguing that claimant was an independent contractor and thus, it could not be liable for any benefits under the Act.

In his decision, the administrative law judge determined that claimant's capacity in performing the salvage work was that of an independent contractor and not an employee, or borrowed employee, of employer. He therefore concluded that claimant is not entitled to coverage under the Act. Accordingly, benefits were denied. Employer thereafter sought to have the administrative law judge amend his decision to reflect that although claimant was not its employee, he nevertheless satisfied the Act's coverage provisions. 33 U.S.C. §§902(3), 903(a). In his Order Denying [employer's] Motion to Amend

[1] The administrative law judge refers to Steve Hebert as a part-owner of employer; however, the record reflects that Steve Hebert formerly owned the company and is the father of the company's current owner, Thomas Hebert. HT at 25, 96, 100, 103.

Decision, the administrative law judge concluded that since there was no employer/employee relationship in this case, there was no basis for employer to assert coverage under the Act.

On appeal, claimant argues that he is a borrowed servant of employer, or alternatively a subcontractor to employer's general contractor, on the barge salvage operation, and thus, he challenges the administrative law judge's finding that he is not entitled to coverage or benefits under the Act. Employer responds, urging affirmance. In its cross-appeal, employer challenges the administrative law judge's finding that claimant has not, as an independent contractor, established coverage under the Act. Claimant responds, reasserting his position that he is entitled to benefits under the Act payable by employer.

It is fundamental that the existence of an employer-employee relationship is required for a claim to fall under the coverage of the Act. *Crowell v. Bensen*, 285 U.S. 22, 54 (1932) (the Act "has limited application, being confined to the relation of master and servant"); *see also Fitzgerald v. Stevedoring Services of America,* 34 BRBS 202 (2001) (an employer-employee relationship between the employer and claimant necessarily must exist at the time of the injury); *Holmes v. Seafood Specialist Boat Works*, 14 BRBS 141, 147 (1981) (determination that there is "an employee-employer relationship with employer is necessary in order to exercise subject matter jurisdiction over a case"). Moreover, the Act does not cover claimants who are independent contractors rather than employees. *See, e.g., Gordon v. Commissioned Officers' Mess,* 8 BRBS 441 (1978); *see also Cardillo v. Mockabee*, 102 F.2d 620 (D.C. Cir. 1939).

The United States Court of Appeals for the Fifth Circuit, in whose jurisdiction the instant case arises, has applied the borrowed employee doctrine in the context of the Act.[2] *Total Marine Services, Inc. v. Director, OWCP*, 87 F.3d 774, 30 BRBS 62(CRT) (5th Cir. 1996); *West v. Kerr-McGee Corp*., 765 F.2d 526 (5th Cir. 1985). If a claimant is deemed a borrowed employee, "a borrowing employer is required to pay the compensation benefits of its borrowed employee." *See Total Marine,* 87 F.3d at 779, 30 BRBS at 66(CRT); *see also Pilipovich v. CPS Staff Leasing, Inc.*, 31 BRBS 169 (1997). 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 *Gaudet v. Exxon*

[2] We note that the tests applied to discern whether a claimant is a borrowed employee and as to whether a claimant is an employee or an independent contractor are comparatively the same. *See generally Herold v. Stevedoring Services of America*, 31 BRBS 127 (1997); *Eckhoff v. Dog River Marina*, 28 BRBS 51 (1994); *Brien v. Precision Valve/Bailey Marine*, 23 BRBS 207 (1990); *Tanis v. Rainbow Skylights*, 19 BRBS 153 (1986).

*Corp.*, 562 F.2d 351 (5th Cir. 1977), *cert. denied,* 436 U.S. 913 (1978).[3] Subsequently, the Fifth Circuit held that the proper test for determining whether a claimant is an employee or an independent contractor is the "relative nature of the work" test, *Haynie v. Tideland Welding Service*, 631 F.2d 1242, 12 BRBS 689 (5th Cir. 1980); *see also Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited,* 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980); *Fitzgerald,* 34 BRBS 202; *Pilipovich*, 31 BRBS 169, with the question of who has control over claimant and his work serving as the central issue of the borrowed employee doctrine, though not necessarily the determinative factor. *See Melancon v. Amoco Production Co.*, 834 F.2d 1238, 1244-1245 (5th Cir. 1988).

Claimant argues that the administrative law judge did not adequately consider all of the relevant factors for determining borrowed employee status pursuant to the decisions of the Fifth Circuit in *Ruiz*, 413 F.2d 310 and *Oilfield Safety,* 625 F.2d 1248, 14 BRBS 356. In particular, claimant contends that the administrative law judge focused too narrowly upon claimant's relationship with the laborers instead of on his relationship with employer.

In the instant case, the administrative law judge's finding that claimant had exclusive control over himself and the re-floating project "once floating or salvage operations began," Decision and Order at 10, is supported by the testimony of claimant and Gil Hebert. Claimant acknowledged that he was the one who determined where the holes were to be cut in the submerged barge and the pumps would go during the course of the project. HT at 70. Claimant also admitted that Gil Hebert was "sent out [to the project] to help" him, *id.*, and that he had instructed Gil at the beginning as to what needed to be done. *Id.* at 70-72. Gil Hebert testified that his "job" on the project "was to

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[3] The nine part *Ruiz-Gaudet* test involves consideration of the following factors:

(1) Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?
(2) Whose work is being performed?
(3) Was there an agreement, understanding or meeting of the minds between the original and the 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?
(9) Who had the obligation to pay the employee?

go out there and move this barge around and let [claimant] do what he's got to do," *id.* at 110, 124; JX 18 at 11-12, 19, 28, 30, as well as to translate to the laborers "what [claimant] needed to be done." HT at 106. Mr. Hebert further stated that he did not have any supervisory role over claimant or say over the positioning of the pumps, as claimant was entirely responsible for determining what, if any, kind of work was required for raising the barge. *Id.* at 115-116, 128; JX 18 at 70. Mr. Hebert also indicated that the laborers too would "look at [claimant] to see where he wanted the pumps," HT at 124, and that he was telling the laborers to do the things claimant indicated that he wanted done. *Id.* at 124-125. In short, Mr. Hebert stated that claimant was the boss on the job.[4] *Id.* at 116.

The record also supports the administrative law judge's finding, pertinent to the second factor and third *Ruiz-Gaudet* factors as to whose work was being performed and whether there was an understanding between the parties regarding their work relationship, that the "floating operation was claimant's work." Decision and Order at 10. It is undisputed that claimant submitted an invoice for services rendered in the floating project as a "consultant, crane operator, and welder." JX 3. In addition, the testimony of Anthony Authement indicates, as the administrative law judge found, that claimant was hired as an independent contractor to perform the floating operation. In this regard, Mr. Authement testified that employer had a "verbal agreement" with claimant, and that it was claimant's job to raise the submerged barge. HT at 94. Moreover, Mr. Authement stated that originally claimant was supposed to "turnkey" the job himself but because his tugboat was inoperable at the time in question, he informed Steve Hebert as to the equipment that was necessary for the job which was thereafter provided. *Id.* at 95, 127. The evidence also indicates that at the time in question, 2004, claimant was regularly conducting business in his own name as a consultant, crane operator and welder. *Id.* at 66-67. Moreover, claimant testified that Steve Hebert "had several *other contractors* go out there and try to do what they could to float [the submerged barge]," and that Mr. Hebert "asked me if I thought that I could go out there and float it, or if I could just get it off the site and into the scrap yard," to which claimant replied "yes." *Id.*

[4] Anthony Authement's testimony further bolsters the administrative law judge's finding that claimant had control over the salvage operation. In particular, Mr. Authement indicated that no one from employer exercised day-to-day control over claimant and the job, and that he had no knowledge as to whether any instructions were given to claimant on how to salvage the barge. HT at 128. This pertinent testimony by claimant, Gil Hebert and Mr. Authement is also relevant to the fourth *Ruiz-Gaudet* factor as it establishes that claimant did not acquiesce to employer or its representatives in the work situation.

at 23 (emphasis added). This evidence thus supports the administrative law judge's finding that claimant was hired as an independent contractor, thus making the work of floating the sunken barge exclusively his to perform.

A review of the record in terms of the remaining *Ruiz-Gaudet* factors, as well as the "relative nature of the work test" espoused in *Haynie*, 631 F.2d 1242, 12 BRBS 689, and *Oilfield Safety*, 625 F.2d 1248, 14 BRBS 356, further supports the administrative law judge's finding that claimant did not have an employee-type relationship with employer. As noted, claimant was regularly conducting business as a consultant, crane operator and welder under his own name in 2004, HT at 66-67, and thus was, for purposes of the fifth factor, his own employer. As such, he certainly did not terminate his relationship with his own business as an independent contractor but rather worked in that capacity in performing the salvage operation in this case. Additionally, while employer provided the tools and the jobsite, the testimony indicates that this was done entirely at claimant's direction, *id.* at 69, and that claimant, himself, provided significant assistance in procuring the necessary equipment for the project. Claimant stated that at Steve Hebert's behest, he asked "his son if he would consider leasing the barge to Mr. Hebert to go and retrieve the sunken barge," to which his son replied "yes" so long as claimant "was the one who was going to operate the crane and the equipment on board." *Id.* at 24. Claimant also procured, as evidenced by an entry on his invoice, pumps for the project. *Id.* at 27; JX 3. Furthermore, as the administrative law judge noted, "[c]laimant's work was intermittent being limited to 54 hours necessary to float and transport a submerged barge," Decision and Order at 10, and thus was not for an extended period of time.

Employer, arguably, had the right to terminate its relationship with claimant[5] and was obligated to pay him in this case but these facts too are more akin to the relationship involved in the hiring of an independent contractor than to establishing an employee/employer relationship. The record establishes that claimant was engaged by employer because of his expertise in re-floating barges, HT at 126, 130, particularly since, as the administrative law judge found, employer "never engaged in any" salvage operations, except for this one instance. Decision and Order at 10. Thus, employer's termination of its relationship with claimant would result in a termination of the overall project. The manner of payment in this case also indicates that claimant was not an employee of employer. In this regard, claimant submitted to employer an invoice for services rendered to employer, between November 8, 2004, and November 11, 2004, as a "consultant, crane operator and welder."[6] JX 3. Employer, in turn, issued a check

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[5] Mr. Authement testified, however, that employer did not have "the authority to run [claimant] off if he was doing something inappropriate." HT at 93.

[6] The invoice totaled $1,547 which represented a labor charge of $810 plus a "weekly pump rental" fee of $737, which claimant had separately arranged for in

directly to claimant "in payment of [his] invoice as a consultant," JX 1, 2, without making any deductions, a service, Mr. Authement said, that employer provides for all of its full time employees. HT at 50-51, 55-56, 88-90.

In contrast to claimant's assertion, the administrative law judge did not "too narrowly" focus on claimant's relationship with the laborers but rather evaluated the overall relationship between claimant and employer in terms of the relevant standard. *See Oilfield Safety,* 625 F.2d 1248, 14 BRBS 356; *Haynie*, 631 F.2d 1242, 12 BRBS 689; *Gaudet*, 562 F.2d 351; *Ruiz*, 413 F.2d 310. In this regard, the administrative law judge examined employer's purposes for engaging claimant, the manner of their relationship, as well as the specific aspects as to how the job was accomplished, in terms of "the relative nature of work," "the right to control details of work," and "the extent of control, kind of occupation and method of payment" tests. *Id.; see also* Restatement (Second) of Agency, §220(2)(a). While the administrative law judge did note that claimant "had the authority to direct and control the . . . laborers," Decision and Order at 10, his analysis did not stop there. He further found, based on a review of the testimony provided by claimant and Gil Hebert, that "once floating or salvage operations began" claimant was in charge of the operation, that the floating operation was claimant's work for which he submitted an invoice for consulting services, and that employer paid for those services without making any payroll deductions. *Id.* Moreover, contrary to claimant's contention, the administrative law judge found that the activities performed in the work project were not a part of employer's regular business. Rather, the administrative law judge found that employer had "never engaged in any of these operations except for this one instance in which it agreed to float and remove the barge," *id.*, which thus prompted employer to seek out and engage claimant, as an independent contractor, to do this salvage work. As the administrative law judge's finding that claimant was an independent contractor and not an employee of employer is in accordance with law and supported by substantial evidence, it is affirmed. *See Oilfield Safety,* 625 F.2d 1248, 14 BRBS 356; *Haynie*, 631 F.2d 1242, 12 BRBS 689; *Gaudet*, 562 F.2d 351; *Ruiz*, 413 F.2d 310.

Claimant alternatively argues that the administrative law judge erred by not determining whether claimant would be entitled to benefits pursuant to Section 4(a) of the Act, 33 U.S.C. §904(a), by virtue of the fact that he was an independent subcontractor of employer which, claimant contends, is the general contractor on the project. Claimant maintains that under *Total Marine*, 87 F.3d 774, 30 BRBS 62(CRT), he should be considered employer's subcontractor because he was working for, and was paid by,

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furtherance of the project. The record establishes that claimant received payment in full for the labor charges.

employer, to do work which it wanted done. Moreover, claimant maintains that as a subcontractor of employer who failed to secure the payment of compensation, as evidenced by claimant's alleged request for insurance coverage by employer, employer, as the general contractor, would be liable for benefits under Section 4(a) of the Act.

Initially, we note that claimant did not assert before the administrative law judge that he was a subcontractor for purposes of Section 4(a), as his argument in that proceeding was limited to the question of whether he "is an employee within the meaning of the Act." Claimant's Post Hearing Brief at 9. As he did not raise the issue below, he may not now raise it for the first time on appeal. *See generally Turk v. Eastern Shore Railroad, Inc.*, 34 BRBS 27, 32 (2000); *Boyd v. Ceres Terminals*, 30 BRBS 218, 223 (1997). Nevertheless, his contention may be rejected as a matter of law as the record does not establish that claimant was a subcontractor of employer.

Section 4(a) of the Act states:

> 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 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).[7] In *Director, OWCP v. National Van Lines, Inc.*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979), the United States Court of Appeals for the D.C. Circuit stated that an employer would be deemed a "contractor" under Section 4(a) where "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."[8] *National Van Lines*, 613 F.2d at 986-87, 11 BRBS at

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[7] In *Total Marine,* the Fifth Circuit held that claimant was entitled to benefits under the first sentence of Section 4(a) as the borrowed employee of *Total Marine.* Claimant's argument here concerns the second sentence of Section 4(a). In *Total Marine,* the court acknowledged that the second sentence could apply if claimant were not a employee, but stated that Total Marine could not be held liable under that provision because CPS, the lending employer/subcontractor, had secured payment of compensation.

[8] National Van Lines contracted with various shippers to carry cargo interstate; it then delegated a portion of its contracts to Eureka. The D.C. Circuit held that Eureka employees performed work that would normally be performed by National Van Lines'

316; *see Sketoe v. Exxon Co., U.S.A,* 188 F.3d 596, 33 BRBS 151(CRT) (5th Cir. 1999), *cert. denied,* 529 U.S. 1057 (2000).

In the instant case, there is no direct evidence that claimant's work in floating the submerged barge was "a subcontracted fraction of a larger project,"[9] or, as the administrative law judge found, that salvage work, like that involved in the instant case, is the type of work normally conducted by the general employer's own employees.[10] Consequently, as the record does not support a finding that claimant was a "subcontractor" of employer, employer cannot be liable for any benefits due claimant based on Section 4(a) of the Act. *See Boyd v. Hodges & Bryant*, 39 BRBS 17 (2005); *Dailey v. Edwin H. Troth*, 20 BRBS 75 (1986).

In its appeal, employer contends that the administrative law judge erred in finding that since claimant was neither an employee nor a borrowed employee of employer, he was not entitled to coverage under the Act. As previously noted, the existence of an employer-employee relationship is required for a claim to fall under the coverage of the Act, *Crowell*, 285 U.S. at 54; *Fitzgerald*, 34 BRBS at 206; *Holmes,* 14 BRBS at 147, and it is well settled that claimants who are independent contractors rather than employees are

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own employees, and therefore National Van Lines was liable for workers' compensation benefits due to Eureka's failure to carry insurance. *National Van Lines*, 613 F.2d at 987, 11 BRBS at 317.

[9] While, in the instant case, there is some evidence to suggest that employer was, perhaps, an intermediary in the salvage operation between claimant and a third unknown party, represented by Steve Hebert, HT at 94, there is no evidence to suggest that the re-floating of the submerged barge was "a subcontracted fraction of a larger project" in which employer was involved. Rather, claimant, Gil Hebert, Steve Hebert and Mr. Authement all testified that claimant was hired for the sole purpose of floating the sunken barge, *id.* at 23, 94-96, 116, and that employer's tenuous involvement, through Steve Hebert, which was limited to providing some equipment, *i.e.*, leasing the crane barge, providing for use of its boat, *Little Mike*, and labor, did not go beyond that specific endeavor. *Id.* at 94-97.

[10] In this regard, Mr. Authement testified that employer has no expertise in this area, HT at 126, that it has not, with this one exception, been involved with any salvage work or wreck removal, JX 17 at 37, 38, 40, and instead is in the business to provide ocean towing, ship docking and barge bunkering operations. *Id.* at 11, 12. In fact, employer's lack of experience in salvage operations is what prompted Steve Hebert to contact claimant, who in his own testimony, acknowledged that he had done this type of work before and knew how to do this specific job. HT at 69; *see also id.* at 126, 130.

not covered under the Act. *See Gordon*, 8 BRBS 441; *see also Cardillo*, 102 F.2d 620. Consequently, in light of the administrative law judge's rational conclusion that under the facts as presented "there is clearly no employer/employee employment relationship in this case," Order at 2, and finding, instead, that substantial evidence establishes that claimant's capacity, in performing his work at the time of his injury, was that of an independent contractor, we reject employer's contention that claimant is entitled to coverage under the Act. *See Holmes*, 14 BRBS at 147; *Gordon*, 8 BRBS 441; *see also Cardillo*, 102 F.2d 620.

Accordingly, the administrative law judge's Decision and Order Denying Benefits and Order Denying Motion to Amend Decision are affirmed.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge