BRB No. 00-0383

QUENTIN H. TAHARA	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
MATSON TERMINALS, INCORPORATED	)	DATE ISSUED: Oct. 13, 2000
	)	
and	)	
	)	
JOHN MULLEN AND COMPANY, INCORPORATED	)	
	)	
Employer/Carrier-Respondents	)	
	)	
McCABE, HAMILTON AND RENNY, COMPANY	)	
	)	
and	)	
	)	
EAGLE PACIFIC INSURANCE, COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order - Granting Summary Judgment of John C. Holmes, Administrative Law Judge, United States Department of Labor.

Jay Lawrence Friedheim, Honolulu, Hawaii, for claimant.

Scott G. Leong and Normand R. Lezy (Leong, Kunihiro & Leong), Honolulu, Hawaii, for Matson Terminals, Incorporated and John Mullen and Company, Incorporated.

Robert C. Kessner and Muriel M. Taira (Kessner, Duca, Umebayashi, Bain &

Matsunaga), Honolulu, Hawaii, for McCabe, Hamilton and Renny Company and Eagle Pacific Insurance Company.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Claimant appeals the Decision and Order - Granting Summary Judgment (97-LHC-0232) of Administrative Law Judge John C. Holmes 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 worked for ten years as a longshoreman, winch operator and substitute crane operator for McCabe, Hamilton & Renny Company (McCabe), whose business involves providing labor loans to shipping companies in and around Honolulu, Hawaii, pursuant to Labor Loan Agreements. Claimant was on a labor loan from McCabe to Matson Terminals, Incorporated (Matson), on March 30, 1994, when he was attacked and severely beaten by a co-worker, Bruce Perry. As a result of that incident, claimant sustained four broken ribs and a crushed skull which permanently severed his optic nerve causing blindness in his left eye.

Claimant filed a claim under the Act against both Matson and McCabe. Matson ultimately accepted liability for the March 30, 1994, incident,[1] and accordingly, paid claimant compensation under the Act totaling $125,300.06. On August 24, 1995, the district director issued an "Order Memo" recognizing Matson as claimant's employer and releasing

[1]Matson initially denied the claim because it did not believe that claimant's injuries were work-related. On November 15, 1994, Matson conditionally accepted responsibility for the payment of claimant's benefits under the Act, reserving the right to further investigate and litigate the issue as to whether it was claimant's employer at the time of the altercation. On August 23, 1995, Matson unconditionally accepted full responsibility for claimant's benefits under the Act.

McCabe from any responsibility under the Act. In May 1995 claimant was placed in protective police custody and shortly thereafter moved to the mainland as part of the witness protection program, pending the trial of his assailant.

Meanwhile, claimant filed lawsuits against Matson, McCabe, the ILWU, Perry and another co-worker, Henry Kreutz, in the United States District Court for the District of Hawaii and in the Circuit Court for the state of Hawaii. The United States District Court did not address the employer issue, but dismissed claimant's federal lawsuit on other grounds. Its decision was upheld by the United States Court of Appeals for the Ninth Circuit.[2] *Tahara v. Matson Terminals, Inc.*, 152 F.3d 929 (9th Cir. 1998)(table). Claimant's action in state court is still pending.

Following its payment of benefits to claimant in June 1999, Matson submitted a motion for summary judgment to the Office of Administrative Law Judges, wherein it sought to conclusively resolve the responsible employer issue. In response, claimant filed his own motion for summary judgment seeking to have McCabe named as the responsible employer. Additionally, both parties raised, as an issue for resolution, claimant's entitlement to temporary total disability benefits while he was in "protective" custody in a witness protection program, commencing in September 1995.

In his decision, the administrative law judge initially bifurcated the case at the parties' urging, proceeding only on the responsible employer issue. On that issue, the administrative law judge determined that Matson was claimant's borrowing employer at the time of the accident, and therefore liable for benefits under the Act. Accordingly, he granted Matson's motion for summary judgment.

On appeal, claimant challenges the administrative law judge's finding that Matson is the responsible employer in this case. Matson and McCabe each respond, urging affirmance.

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[2]The Ninth Circuit held that the district court properly granted the defendants' motion for summary judgment on claimant's claim under the Racketeer Influenced and Corrupt Organization Act, and held claimant's action against Local 142 of the Longshoreman's and Warehouseman's Union pre-empted by the Labor Management Relations Act. Lastly, the court held that the district court properly declined jurisdiction over claimant's state law claims.

Claimant argues that contrary to the administrative law judge's finding, McCabe is the responsible employer in this case as the borrowed employee doctrine upon which the administrative law judge relied to find Matson is the responsible employer, was abolished by the 1984 Amendments to the Act. Alternatively, claimant asserts that application of the borrowed servant doctrine to the facts in this case results in a finding that McCabe is the responsible employer.

Section 2(2) of the Act defines the term "injury" as follows:

> The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

33 U.S.C. §902(2). Thus, for a claim to be compensable under the Act, the injury must arise out of and in the course of employment; therefore, an employer-employee relationship between the employer and claimant necessarily must exist at the time of the injury. *See Clauss v. Washington Post Co.*, 13 BRBS 525 (1981), *aff'd mem.*, 684 F.2d 1032 (D.C. Cir. 1982). Relevant to the instant case, the borrowed employee doctrine recognizes that "[o]ne may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third person, with all the legal consequences of the new relation." *Standard Oil v. Anderson*, 212 U.S. 215, at 220 (1909). With regard to compensation liability under the Act, 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 United States Court of Appeals for 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 Corp.*, 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913 (1978), and the Board has applied this test in cases arising under the Act.[3] *See e.g.*,

[3]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

Vodanovich v. Fishing Vessel Owners Marine Ways, Inc., 27 BRBS 286 (1994).

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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. The instant case arises within the jurisdiction of the United States Court of Appeals for the Ninth Circuit which, contrary to claimant's contention, has recognized the borrowed servant doctrine. *Parker v. Lujan Enterprises, Inc.*, 848 F.2d 118 (9th Cir. 1987); *United States v. Bissett-Berman Corp.*, 481 F.2d 764, 772 (9th Cir. 1973); *McCollum v. Smith*, 339 F.2d 348 (9th Cir. 1964). The Ninth Circuit has acknowledged that authoritative direction and control are the critical factors by which the borrowed servant issue is to be determined. *Id.* Moreover, in *Vodanvich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994), a case arising within the Ninth Circuit, the Board applied the *Ruiz-Gaudet* test.

Additionally, the case law shows that although the borrowed employee doctrine evolved in the tort context under the concept of *respondeat superior*, the Fifth Circuit has applied this doctrine, as espoused by the Supreme Court in *Standard Oil*, in the context of the Act. *See, e.g., Total Marine*, 87 F.3d at 774, 30 BRBS at 62 (CRT); *West v. Kerr-McGee Corp.*, 765 F.2d 526 (5th Cir. 1985). In *Total Marine*, the court explained that the primary focus of the application of this doctrine to the Act is the tort immunity provision contained in Section 5(a) of the Act, 33 U.S.C. §905(a), which makes compensation benefits the exclusive remedy available to an injured worker from his employer.[4] The court "has extended this tort immunity provision by means of the borrowed employee doctrine to encompass a worker's borrowing employer." *Total Marine*, 87 F.3d at 777, 30 BRBS at 64-65 (CRT); *see also Hebron v. Union Oil Co. of California*, 634 F.2d 245 (5th Cir. 1981). Moreover, the Fifth Circuit has held that the contractor/subcontractor provisions of Section 4(a) of the Act, 33 U.S.C. §904(a)(1994), as amended in 1984, do not preclude the use of the borrowed employee doctrine. *Total Marine*, 87 F.3d at 776-779, 30 BRBS at 64-66 (CRT); *Capps v. N.L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986); *see also Peter v. Hess Oil Virgin Islands Corp.*, 903 F.2d 935 (3d Cir.1990), *cert. denied*, 498 U.S. 1067 (1991). Thus, contrary to claimant's initial contention, the 1984 amendments to the Act did not abolish the borrowed employee doctrine. *Id.* The administrative law judge therefore properly applied the borrowed employee doctrine to the issue at hand in this case, *i.e.*, whether Matson was claimant's borrowing employer at the time of the accident, and he did not err in applying the *Ruiz-Gaudet* test to resolve that issue. Furthermore, as the administrative law judge's finding that Matson is liable as the borrowing employer is supported by substantial evidence, we affirm it.

The administrative law judge first determined that Matson had control over the work performed by claimant. The work in question was performed at Matson's terminals, specifically unloading automobiles from Matson's ship, and, as the Labor Loan Agreement articulated, Matson "has the responsibility for overseeing the entire operations at [its facility]." Claimant's Exhibit 11, Labor Loan Agreement at p. 3. Thus, while claimant

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[4]Section 5(a) of the Act provides in pertinent part:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . . For purposes of this subsection, a contractor shall be deemed the employer of a subcontractor'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).

might have a McCabe employee give him direct orders on work assignments, the overall supervision of the work site in general and of claimant's work specifically was done entirely at Matson's direction and ultimate control. Additionally, the administrative law judge concluded that at the time of his injury claimant's work was being performed for Matson. This is confirmed by the Labor Loan Agreement which identifies claimant's work as the loading and unloading of cargo from Matson's ships, and the handling of cargo in Matson's terminal, as well as by the fact that McCabe owns no vessels and has no business concerns of its own which require longshore work.

The administrative law judge next found that by reporting to work at Matson, claimant acquiesced to McCabe's arrangement and agreement to loan out its employees. Claimant, in fact, never questioned or objected to the labor loan situation over the ten years that he worked for McCabe. In considering the next factor, the administrative law judge determined that McCabe "terminates" its relationship with its employees as to work control on every assignment and then reinstates it after the work effort is completed. Thus, the administrative law judge concluded that McCabe maintains those employees it wishes to employ on a permanent basis, but loses temporary control to the company to whom the employee is loaned. In *Capps*, the Fifth Circuit held that this factor does not require a lending employer to completely sever its relationship with the employee, as such a requirement would effectively eliminate the borrowed employee doctrine.[5] *Capps*, 784 F.2d at 617-618; *see also Melancon v. Amoco Production Co.*, 834 F.2d 1238, 1246 (5th Cir. 1988). Rather, the court held that when considering this factor, the emphasis should be on the lending employer's relationship with the employee while the borrowing occurs. In that case, the court ruled that since the lending employer exercised no control over the employee during the borrowing period, it had temporarily terminated its relationship with the employee. *See Capps*, 784 F.2d at 618. As the administrative law judge found, this is the situation in the instant case, as McCabe exercised minimal control over claimant when it leased claimant's services to Matson.

Moreover, the administrative law judge found that, as indicated by the Labor Loan Agreement, all of the tools and equipment for performing the longshoring work for Matson were provided by Matson.[6] In addition, as the administrative law judge found, the

[5]In *Capps*, an employee who was assigned by a temporary employment company to work for Baroid and was injured on his first day of the job brought a personal injury suit against Baroid. The Fifth Circuit affirmed the district court's grant of summary judgment in favor of Baroid, ruling that the employee was a borrowed employee of Baroid and therefore his exclusive remedy was compensation pursuant to the Longshore Act.

[6]Specifically, the Labor Loan Agreement indicates that Matson "shall provide and operate cranes" to assist McCabe's loaned workers in performing their services under the

stevedoring work performed by claimant occurred onboard Matson's ships at its terminal.

contract. Claimant's Exhibit 11, Labor Loan Agreement at p. 3.

Furthermore, in resolving the factor as to whether the new employment occurred over a considerable length of time, the administrative law judge looked to the overall circumstances surrounding the long-standing relationship between McCabe and Matson. Specifically, he found that although claimant's work at Matson's terminal may have been for one day at a time, the McCabe/Matson relationship, and for that matter claimant's work for Matson over the ten years that he was employed by McCabe, tends to establish that the new employment was over a considerable length of time.[7] The administrative law judge also found that while McCabe had the right to discharge claimant, Matson had the right to reject any worker sent by McCabe, including claimant.[8] As such, the administrative law judge rationally concluded that, at the time of injury, Matson's authority to reject a worker is equivalent to the right to discharge.

Lastly, the administrative law judge found that pursuant to the Labor Loan Agreement, Matson pays salaries, social security taxes, group insurance premiums, pension contributions, medical plan contributions and other fringe benefits to the borrowed employees. While the administrative law judge's finding is incorrect in that the agreement in question places the burden of paying claimant directly on McCabe and not Matson, it is Matson which provided the funds from which McCabe paid claimant, via the Labor Loan Agreement. *See Melancon*, 834 F.2d at 1246; *Capps*, 784 F.2d at 618. The record shows that Matson kept the "loaned" employees' time sheets, reimbursed McCabe for the employees' pay, taxes, and benefits, and was obligated to provide workers' compensation insurance coverage for the loaned labor. Employer's Exhibit C at p. 3.

Overall, the administrative law judge explicitly analyzed claimant's borrowed employee status under the nine factor *Ruiz-Gaudet* test, and his findings are rational, supported by substantial evidence and are in accordance with law. *Parker v. Lujan Enterprises, Inc.*, 848 F.2d 118 (9th Cir. 1987); *Gaudet*, 562 F.2d at 351; *Ruiz*, 413 F.2d at

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[7]Contrary to claimant's contention, the evidence in the instant case regarding this factor does not support a finding that McCabe is the responsible employer. At best, it is a neutral factor. In *Capps*, the employee's injury occurred on his first day of work with the borrowing employer. With regard to the seventh *Ruiz-Gaudet* factor, the *Capps* court stated: "In the case where the length of employment is considerable, this factor supports a finding that the employee is a borrowed employee; however, the converse is not true. When the employee's injury occurs on the first day, it does not follow that the employee is not a borrowed employee; therefore, the factor provides a neutral assessment in the instant case." *Capps*, 784 F.2d at 618.

[8]The Fifth Circuit has held that the proper focus in considering this factor is whether the borrowing employer had the right to terminate the employee's services with itself. *See Hebron*, 634 F.2d at 247; *Capps*, 784 F.2d at 618; *Melancon*, 834 F.2d at 1246. The administrative law judge's finding necessarily incorporates this query into his analysis of this factor.

310. Specifically, his findings establish that Matson had the requisite direction and control over claimant such that it was claimant's borrowed employer. *Id.* Thus, the administrative law judge's determination that Matson is the responsible employer is affirmed.

Accordingly, the administrative law judge's Decision and Order - Granting Summary Judgment is affirmed. The case is remanded to the administrative law judge for further proceedings necessary to a final decision on claimant's claim in this case.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge