BRB No. 96-777

ORMAN G. MOORE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LEVINGSTON SHIPBUILDERS	)	
	)	DATE ISSUED:_____
and	)	
	)	
HIGHLANDS INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Petitioners	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of C. Richard Avery, Administrative Law Judge, United States Department of Labor.

Rebecca J. Ainsworth (Maples & Lomax, P.A.), Pascagoula, Mississippi, for claimant.

Douglass M. Moragas, Harahan, Louisiana, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (94-LHC-3348) of Administrative Law Judge C. Richard Avery 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).

Between August 1973 and April 1974, claimant was employed by Consolidated Technical Services (CTS) as a contract engineer.[1] During this period, he worked at Levingston Shipyard as a piping and mechanical checker, inspecting the mechanical and piping systems on semi-submersible drill rigs and ships. Tr. at 14-15, 24. Claimant was exposed to noise at the shipyard, and although he worked in subsequent engineering positions, this was his last maritime employment. Tr. at 17, 36. Claimant underwent an audiometric evaluation on May 23, 1987, and received a report shortly thereafter which revealed a 9.9 percent binaural impairment. Cl. Ex. 1; Jt. Ex. 1. Based on this report, he filed a claim for benefits under the Act.[2] Cl. Exs. 2-3, 11. Levingston's insurer[3] voluntarily paid claimant permanent partial disability benefits for a 9.9 percent binaural impairment based on the maximum compensation rate applicable in 1974. It also paid $1,100 for hearing aids. Cl. Exs. 20-24. Claimant then filed a pre-hearing statement seeking interest, an attorney's fee and future medical benefits. Cl. Ex. 25; Tr. at 6-7.

The administrative law judge determined that Levingston is the responsible employer under the borrowed employee doctrine. Accordingly, he held Levingston liable for permanent partial disability benefits for 19.8 weeks for a 9.9 percent binaural impairment based on an average weekly wage of $405.33, interest accruing from the date of injury, April 13, 1974, and medical benefits. Levingston appeals the administrative law judge's decision, and claimant responds, urging affirmance.

Initially, Levingston contends the administrative law judge erred in finding it to be the borrowing employer. It argues it is a contractor and that under Section 4(a) of the Act, 33 U.S.C. §904(a) (1988), it is only liable if CTS, the subcontractor, was not properly insured. As there is no evidence CTS was not insured, it asserts it is not liable secondarily. Alternatively, Levingston contends that if the borrowed employee doctrine applies, it is not a borrowing employer. We reject Levingston's arguments and hold that the administrative law judge correctly held Levingston liable as claimant's borrowing employer.

[1]Consolidated Technical Services was a temporary agency or placement office. Claimant testified CTS assigned people to work at businesses which needed additional help but did not want to increase their numbers of employees. Tr. at 14.

[2]Claimant initially filed a claim against CTS, Cl. Exs. 2-3, but he was unable to locate CTS or its executives. According to claimant's counsel, a hearing was set for sometime in 1990, but no CTS representative appeared. Tr. at 5. Consequently, claimant moved to join Levingston as the responsible employer. Cl. Exs. 5, 10, 11.

[3]Levingston is no longer in business. Cl. Ex. 12.

Although the administrative law judge did not discuss Levingston's Section 4(a) argument, his failure to do so is harmless.[4] The United States Court of Appeals for the Fifth Circuit has held that Section 4(a) as amended in 1984 has no bearing on the borrowed employee doctrine. *West v. Kerr-McGee Corp.*, 765 F.2d 526 (5th Cir. 1985). More recently, in a case involving circumstances similar to those in the instant case, the court rejected the same statutory argument. *Total Marine Services, Inc. v. Director, OWCP*, 87 F.2d 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). In *Total Marine*, a labor contractor furnished the claimant to Total Marine to perform services as a welder. While working under the direction and control of Total Marine, the claimant injured his neck. Total Marine stipulated it was the claimant's borrowing employer. The Fifth Circuit held that Total Marine, as the borrowing employer, was the claimant's employer for purposes of providing compensation. Thus, the contractor/subcontractor provisions of Section 4(a) did not apply and did not preclude use of the borrowed employee doctrine. *Total Marine*, 87 F.3d at 776-779, 30 BRBS at 64-66 (CRT); *see also West*, 765 F.2d at 526.

The borrowed employee doctrine provides that a borrowing employer may be held liable for benefits if application of the tests for employment status so indicates. *Arabie*, 28 BRBS at 71. Thus, if Levingston is found to be the borrowing employer, it is liable for claimant's benefits. 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 in *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977). It has indicated that the first of the nine factors often receives the most emphasis. *Capps v. N.L Baroid-NL Industries, Inc.*, 784 F.2d 615, 617 (5th Cir. 1986). In assessing claimant's employment status in this case, the administrative law judge applied the nine factors and determined that: 1) Levingston had control over claimant and his work; 2) Levingston's work was being performed; 3) Levingston contracted for claimant's services; 4) claimant acquiesced to the work situation; 5) CTS did not terminate its relationship with claimant; 6) Levingston furnished the work place and the few tools that were necessary; 7) the employment was over a period of eight months; 8) Levingston had the right to discharge claimant from its facility; and 9) Levingston was obliged to pay CTS and CTS paid claimant. Decision and Order at 4-5. These findings are supported by the evidence of record. Tr. at 14-16, 18-20, 29, 46-47. Because the administrative law judge used the applicable law and his findings are supported by substantial evidence, we conclude he rationally determined that Levingston is the borrowing employer and is liable for claimant's benefits. *Total Marine*, 87 F.3d at 779, 30 BRBS at 66 (CRT); *Gaudet*, 562 F.2d at 357-259; *see also Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994).

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[4]Section 4(a) provides, in pertinent part:

> 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.

33 U.S.C. §904(a) (1988).

Levingston also contends the administrative law judge erred in awarding claimant interest from the date of injury, April 13, 1974.[5] Claimant responds, urging affirmance of the administrative law judge's conclusion. Alternatively, claimant argues that he is entitled to interest from the date he first demanded payment from Levingston. In awarding interest from the date of injury, the administrative law judge relied on the unpublished Board decision in *Renfroe v. Ingalls Shipbuilding, Inc.*, BRB Nos. 91-170/A (April 25, 1995). Since the administrative law judge issued his decision, however, the Board reconsidered and modified its *Renfroe* decision. *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101 (1996) (on recon. *en banc*). On reconsideration, the Board held that interest on benefits in hearing loss cases accrues from the date unpaid benefits are due under Section 14(b) of the Act, 33 U.S.C. §914(b).[6] In *Renfroe*, the Board modified the award of interest to reflect the claimant's entitlement to interest from the date employer received notice of the injury. *Renfroe*, 30 BRBS at 108.

The parties stipulated that Levingston received official notice of claimant's injury on July 3, 1993.[7] Jt. Ex. 1. However, there is evidence from which an administrative law judge could infer that Levingston may have obtained knowledge of claimant's injury at an earlier date. For example, on June 16, 1990, the administrative law judge issued an Order of Remand which permitted discovery against Levingston to be conducted while the case was before the district director. Cl. Ex. 9. On June 6, 1990, claimant filed a response to a show cause order requesting he be permitted to undertake discovery against Levingston, and on April 30, 1990, claimant moved to join Levingston as a party to the case. Cl. Exs. 5, 8. As the case on which the administrative law judge relied to compute interest was subsequently overturned, we vacate the award of interest from the date of injury. The case is remanded

[5]The administrative law judge properly determined that the date of injury is April 13, 1974, pursuant to *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151 (CRT) (1993), as that is the date claimant was last exposed to injurious noise in maritime employment.

[6]Pursuant to Section 14(b), compensation is due on the fourteenth day after the employer is notified of the injury pursuant to Section 12, 33 U.S.C. §912, or has knowledge of the injury.

[7]Claimant filed an amended claim for compensation on March 14, 1991, naming Commco, CTS's new name, as the responsible employer. After investigating the claim, the district director formally notified Levingston of the claim pending against it on July 1, 1993. Emp. Exs. 1-2.

to the administrative law judge for further findings concerning the date Levingston had knowledge or was notified of claimant's injury, consistent with *Renfroe*, 30 BRBS at 108. Interest is to be awarded from that date.

Accordingly, the administrative law judge's award of interest is vacated, and the case is remanded for further consideration of that issue. In all other respects, the administrative law judge's decision awarding benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JAMES F. BROWN
Administrative Appeals Judge

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NANCY S. DOLDER
Administrative Appeals Judge