

BRB Nos. 96-1696
and 96-1696S

JOHN POWELL)
)
 Claimant)
)
 v.)
)
 BUILDING MAINTENANCE PERSONNEL) DATE ISSUED:
)
 and)
)
 FIDELITY & CASUALTY COMPANY OF)
 NEW YORK)
)
 Employer/Carrier-)
 Petitioners)
)
 COASTAL CARGO COMPANY)
)
 and)
)
 CIGNA INSURANCE COMPANY)
)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Quentin P. McColgin, Administrative Law Judge, and the Supplemental Decision and Order Awarding Attorney Fees of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

V. William Farrington, Jr. (Cornelius, Sartin & Murphy), New Orleans, Louisiana, for Building Maintenance Personnel and Fidelity & Casualty Company of New York.

Robert J. Young, III (Young, Richaud & Myers), New Orleans, Louisiana, for Cargo Coastal Company and Cigna Insurance Company.

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

PER CURIAM:

Building Maintenance Personnel (BMP) appeals the Decision and Order Awarding Benefits of Administrative Law Judge Quentin P. McColgin and the Supplemental Decision and Order Awarding Attorney Fees of Administrative Law Judge Richard D. Mills (95-LHC-2631) 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 was injured on March 16, 1992, as he was loading bales of cotton in a ship's hold. The wire holding the bales together became stuck at the top of the ship's hold, and when claimant tried to dislodge it, the bales became loose and fell on claimant. As a result, claimant injured his neck, shoulders, back, fingers, breastbone, collarbone and dislocated his elbow. After treatment, claimant's physician opined that claimant reached maximum medical improvement as of November 29, 1994, and could not return to his former employment because of his injury. Claimant sought benefits under the Act. BMP is a manpower service which supplies laborers to various companies. BMP hired claimant to work at Coastal Cargo Company (Coastal), and it was during this employment that claimant was injured.

In his Decision and Order, Administrative Law Judge McColgin (the administrative law judge) determined that BMP is liable for claimant's benefits inasmuch as there is a valid maritime contract which contains a clause indemnifying Coastal against claims resulting from injury to any person provided by BMP. The administrative law judge also found that claimant is entitled to an award under the schedule for a 17.5 percent permanent partial disability to claimant's leg pursuant to Section 8(c)(2) of the Act, 33 U.S.C. §908(c)(2), and an award of permanent partial disability benefits for a loss of wage-earning capacity due to claimant's back injury pursuant to Section 8(c)(21), 33 U.S.C. §908(c)(21). The administrative law judge also found that BMP is entitled to a credit for claimant's 1993 earnings. In a Supplemental Decision and Order Awarding Attorney Fees, Administrative Law Judge Mills awarded claimant's attorney a fee in the amount of \$11,178.75 representing 74.525 hours of legal services at \$150 per hour, plus expenses in the amount of \$496.50, to be paid by BMP.

On appeal, BMP contends that the administrative law judge erred in failing to resolve the issue of whether Coastal is a borrowing employer, and thus in relying solely on the indemnification clause to determine liability. In a supplemental appeal, BMP contends that as Coastal is the responsible employer, claimant's attorney's fee should be assessed against Coastal. Coastal responds, urging affirmance of the administrative law judge's decision awarding benefits.

BMP contends on appeal that Coastal, as the borrowing employer, is liable for this claim as a matter of law. A borrowing employer may be held liable if application of the tests for employment status so indicate. *See Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969).

“The principal focus...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.” *Arabie v. C.P.S. Staff Leasing*, 28 BRBS 66 (1994), *aff’d sub nom. Total Marine Services, Inc. v. Director, OWCP, (Arabie)*, 87 F.3d 774, 30 BRBS 62 (CRT)(5th Cir 1996), citing *Gaudet v. Exxon Corp.*, 562 F.2d 351, 357 (5th Cir. 1977). The United States Court of Appeals for the Fifth Circuit, the jurisdiction in which this case arises, has held that in the absence of a valid and enforceable indemnification agreement, the borrowing employer is required to pay the compensation benefits of its borrowed employee and to reimburse an injured worker’s formal employer for any compensation benefits it has paid to the injured worker.¹ *Arabie*, 87 F.3d at 778, 30 BRBS at 66 (CRT). The general rule requires an indemnitee to show actual liability on his part to recover against an indemnitor, *see, e.g., Wisconsin Barge Line, Inc. v. Barge Chem 300*, 546 F.2d 1125 (5th Cir. 1977), but the Fifth Circuit has held that a defendant need only show potential, rather than actual, liability to recover indemnity where the defendant’s claim is based on a written contract of insurance or indemnification. *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1216-1217 (5th Cir. 1986); *see also Tankrederei Gefion AIS v. Hyman Michaels Co.*, 406 F.2d 1039 (6th Cir. 1969).

The administrative law judge in the instant case found that the contract between BMP and Coastal is a maritime contract, and thus must be construed according to federal maritime law. *See generally Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993)(administrative law judge has the power to resolve insurance issues necessary to the resolution of a claim under the Act). The administrative law judge also noted that under federal maritime law, indemnity agreements are generally valid. Decision and Order at 9. The indemnification clause between BMP and Coastal in the instant case reads:

BMP agrees to indemnify, to hold safe and harmless, and to defend Coastal Cargo Company, Inc. (CLIENT) against any and all losses, damages and liability claims, demands, suits, causes of action, cost or expenses (including attorney’s fees)

¹As the Fifth Circuit has held that the borrowing employer is required to pay compensation benefits and reimburse an injured worker’s formal employer for any compensation benefits paid in the absence of a valid and enforceable indemnification agreement, we reject BMP’s contention that the court’s decision in *Arabie* mandates a finding that Coastal is liable in the instant case where it is undisputed that there is an indemnification clause. *Arabie*, 87 F.3d at 778, 30 BRBS at 66 (CRT).

resulting from injury, death, harm or loss to any person provided by BMP at CLIENT's work location.

EX. B-8, 5. Although Coastal is potentially liable to claimant in this case as the borrowing employer, BMP specifically contracted with Coastal to accept liability for any claims resulting from injury to any person provided by BMP. Thus, the administrative law judge found that, as the indemnity clause in the instant case is unambiguous and legally permissible, the clause is valid and enforceable and he need not resolve the question of whether Coastal Cargo would have been liable as the borrowing employer. BMP does not contest the administrative law judge's interpretation of the indemnification clause or challenge its practical application.² Rather, BMP insists that the administrative law judge erred by failing to first apply the "borrowed employee doctrine." As BMP contractually agreed to accept liability, and the administrative law judge has the power to resolve contractual issues necessary to resolve the claim under the Act, *see, e.g., Rodman v. Bethlehem Steel Corp.*, 16 BRBS 123 (1984), we hold that the administrative law judge did not err in finding that "it is of no moment whether or not [claimant] was actually a borrowed employee of Coastal..." and thus affirm the administrative law judge's finding that BMP is responsible for the claims arising from claimant's injury.³

Accordingly, the Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorney Fees are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

²That is, either BMP is liable as claimant's formal employer, or it is liable pursuant to the indemnification contract if Coastal is the borrowing employer.

³Moreover, as we affirm the administrative law judge's finding that BMP is liable for claimant's benefits under the Act, we also affirm the administrative law judge's finding that BMP is liable for claimant's attorney's fee.

NANCY S. DOLDER
Administrative Appeals Judge