

LEROY RICKS, SR.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
TEMPORARY EMPLOYMENT	)	DATE ISSUED:
SERVICES, INCORPORATED	)	
	)	
and	)	
	)	
MARYLAND CASUALTY COMPANY	)	
	)	
Employer/Carrier-	)	
Respondents	)	
	)	
TRINITY MARINE GROUP,	)	
INCORPORATED	)	
	)	
Self-Insured	)	
Employer-Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

Peter L. Hilbert, Jr. and Darnell Bludworth (McGlinchey Stafford Lang), New Orleans, Louisiana, for employer Trinity Marine Group, Incorporated.

B. Ralph Bailey (Bailey & Dwyer), Mandeville, Louisiana, for employer Temporary Employment Services, Incorporated, and carrier Maryland Casualty Company.

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

PER CURIAM:

Trinity Marine Group, Incorporated (Trinity) appeals the Decision and Order Awarding Benefits (94-LHC-2213) 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).

Claimant was employed by Temporary Employment Services, Incorporated (TESI), a temporary employment company which provides labor to shipyards. On January 11, 1993, claimant, while working as a laborer at Trinity, hit his head and back on the ground after tripping over a piece of steel. He was treated with medication for his neck and lower back pain and advised by his treating physician, Dr. Reyes, not to return to work. Claimant was later diagnosed by Dr. Steiner with degenerative changes at the L4-5 and L5-S1 levels, consistent with his age group, but no other significant findings. Four months after the accident, claimant sought treatment for blurred vision and difference in color perception. TESI's longshore insurance carrier, Maryland Casualty Company (Maryland), voluntarily paid claimant temporary total disability compensation and medical benefits from January 15, 1993 through April 24, 1994. 33 U.S.C. §§907, 908(b). Thereafter, Maryland controverted the claim on the basis of Dr. Steiner's opinion that claimant could return to work.

In his Decision and Order, the administrative law judge found that claimant was entitled to temporary total disability benefits with regard to his back and neck injuries for the period of January 11, 1993 to January 3, 1996.<sup>1</sup> As the administrative law judge determined that claimant suffered no loss in wage-earning capacity as of January 3, 1996, the administrative law judge found that claimant was entitled to no further compensation benefits as of that date. Next, the administrative law judge concluded that Trinity is liable for claimant's benefits as the borrowing employer. In determining whether Maryland is entitled to reimbursement from Trinity for benefits it paid to claimant, the administrative law judge found that while the insurance policy TESI obtained from Maryland contained a waiver of subrogation endorsement, this clause only applied if required by the Trinity/ TESI contract.<sup>2</sup> As the contract between Trinity and TESI contained no such requirement, the

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<sup>1</sup>The administrative law judge found that claimant was not entitled to invocation of the Section 20(a), 33 U.S.C. §920(a), presumption of causation with regard to an alleged eye injury.

<sup>2</sup>The "Waiver of Our Right to Recover From Others Endorsement" states the following:

We have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against the person or organization named in the Schedule. (This agreement applies only to the extent that you perform work under a written contract that requires you to obtain this agreement from us.)

Trinity Ex. 10. It is noted that the record contains a stipulation signed by the representatives of Trinity and Maryland stating that Trinity was named in the schedule on this endorsement. *Id.*

administrative law judge ordered Trinity to reimburse Maryland for all compensation and medical benefits it paid to claimant.

On appeal, Trinity challenges the administrative law judge's finding that it is liable for claimant's benefits as the borrowing employer. Specifically, Trinity contends that the administrative law judge failed to consider the contractual agreement between Trinity and TESI, wherein, Trinity asserts, TESI agreed that it would be the responsible party for compensation benefits under the Act. TESI and Maryland respond, asserting that since the Trinity/TESI contract did not contain a waiver of subrogation, the administrative law judge's decision should be affirmed in its entirety.

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 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), and the Board has applied this test.<sup>3</sup> *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994). If a

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<sup>3</sup>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) did the employee acquiesce in the new work situation; (3) who furnished tools and place for performance; (4) who had the right to discharge the employee; (5) who had the obligation to pay the employee; (6) did the original employer terminate his relationship with the employee; (7) whose work was being performed; (8) was there an agreement or meeting of the minds between the original and borrowing employer; and (9) was the new employment over a considerable length of time. 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

claimant is deemed a borrowed employee, “a borrowing employer is required to pay the compensation benefits of its borrowed employee, and, in the absence of a valid and enforceable indemnification agreement, the borrowing employer is required to reimburse an injured worker’s formal employer for any compensation benefits it has paid to the injured worker.” *Total Marine*, 87 F.3d at 779, 30 BRBS at 66 (CRT); see also *Pilipovich v. CPS Staff Leasing, Inc.*, BRBS , BRB Nos. 97-382/A, 97-1142/A (Nov. 21, 1997).

Trinity, on appeal, does not challenge the administrative law judge's reliance on the *Ruiz-Gaudet* factors and his ultimate determination that Trinity is the borrowing employer in the instant case; thus, Trinity is liable for claimant's benefits absent a valid contractual obligation on the part of another entity. See *Total Marine*, 87 F.3d at 779, 30 BRBS at 66 (CRT); *Gaudet*, 562 F.2d at 357-359; see also *Pilipovich*, slip op at 4. Rather, in challenging the administrative law judge's finding that it is liable for claimant's benefits, Trinity contends that the administrative law judge erred in failing to discuss the contract for employment services which exists between it and TESI. See Trinity Ex. 1. We agree. It is within the authority of the administrative law judge to hear and resolve insurance issues which are necessary to the resolution of a claim under the Act. See *Schaubert v. Omega Service Industries, Inc.*, 31 BRBS 24 (1997); *Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993). An administrative law judge's failure to analyze and discuss relevant evidence is a violation of the Administrative Procedure Act, 5 U.S.C. §577(c)(3)(A).

In the instant case, the fact that TESI has a defense as to its liability to claimant under the borrowed employee doctrine does not necessarily relieve TESI of its liability, as the record reveals that a contract exists between Trinity and TESI which requires TESI to provide workers' compensation insurance, including longshore coverage.<sup>4</sup> See Trinity Ex. 1. In fact, TESI contracted with and paid Maryland to provide longshore insurance. Trinity Exs. 7, 11.

While the contract between Trinity and TESI does not contain a waiver of subrogation in favor of Trinity, the Trinity/TESI contract does contain a clause requiring TESI to indemnify and hold harmless Trinity from any claims resulting from an injury to a TESI employee working at Trinity's shipyard.<sup>5</sup> Thus, as the administrative law judge's inquiry did not include a review of the contractual provisions of record in order to determine whether there was a valid contractual obligation on the part of an entity other than Trinity to pay for claimant's benefits, as required by *Total Marine*,<sup>6</sup> we vacate the administrative law judge's decision

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<sup>4</sup>Tim Berger, president of TESI, testified that based on TESI's contract with Trinity, he believed that Maryland was liable for claimant's benefits under the Act. See Trinity Ex. 22 at 45-47.

<sup>5</sup>Clause 5 of the contract between TESI (the "Contractor") and Trinity (the "Company"), states:

The Contractor agrees to indemnify the Company against demand or payment of any and all contributions, withholding deductions or taxes measured by the wages, salaries or other compensation paid to persons employed by the Contractor or any Sub-Contractor in performance of the Work. The Contractor agrees to defend, protect, indemnify and save harmless the Company from and against any and all claims, suits, loss, cost, damage or expense, including reasonable attorney's fees and court fees, arising out of injury or death of persons and/or loss of or damage to property (whether of the parties hereto, or of others), including loss of use thereof, occurring in, arising out of or in connection with Work occurring prior to acceptance of the Work caused by the alleged negligence or willful act of the Contractor.

Trinity Ex. 1, clause 5.

<sup>6</sup>In its response brief, TESI asserts that Trinity improperly relies on the indemnity clause contained in the TESI/Trinity contract, as Trinity did not specifically raise this

regarding Trinity's liability for claimant's benefits, and we remand the case for the administrative law judge to fully consider whether a valid and enforceable contract existed between Trinity and TESI which would require TESI to pay any benefits due claimant under the Act. See *Gaudet*, 562 F.2d at 357-359; see also *Vodanovich*, 27 BRBS at 286.

Accordingly, the administrative law judge's determination that Trinity must reimburse Maryland for all benefits paid claimant is vacated, and the case is remanded for further consideration consistent with this opinion. In all other respects, the administrative law judge's Decision and Order Awarding Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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NANCY S. DOLDER  
Administrative Appeals Judge

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contention before the administrative law judge. TESI's contention is without merit. At the hearing and in its post-hearing brief, Trinity argued that the contractual relationship between it and TESI absolved Trinity of liability for claimant's compensation benefits. See Tr. at 20-21. Thus, the issue of whether the administrative law judge should have examined the contractual provisions of record, including the indemnification clause, in order to determine the responsible employer, is properly before the Board.