BRB Nos. 97-623
and 97-623A

DONALD SKETOE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DOLPHIN TITAN INTERNATIONAL	)	DATE ISSUED:_____
	)	
Employer-Respondent	)	
	)	
EXXON COMPANY, U.S.A.	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of David W. Di Nardi, Administrative Law Judge, United States Department of Labor.

Chris J. Roy, Sr., Alexandria, Louisiana, and Michael H. Schwartzberg, (McHale Schwartzberg), Lake Charles, Louisiana, for claimant.

Patrick E. O'Keefe (Montgomery, Barnett, Brown, Read, Hammond & Mintz), New Orleans, Louisiana, for self-insured employer.

Joshua T. Gillelan II (Marvin Krislov, Deputy Solicitor for National Operations; Carol A. DeDeo, Associate Solicitor); Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor).

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

BROWN, Administrative Appeals Judge:

Claimant and the Director, Office of Workers' Compensation Programs (the Director), appeal the Decision and Order (89-LHC-3195) of Administrative Law Judge David W. Di Nardi 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.*, as extended by the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 *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).

This is the second time this case has come before the Board. The facts are undisputed, and the case is presently before the Board on the sole issue of whether Exxon Company, U.S.A. (Exxon) is a general contractor under Section 4(a) of the Act, 33 U.S.C. §904(a).[1] To recount briefly, claimant injured his right hand on July 15, 1984, while working as a derrick man for Dolphin Titan.[2] Dolphin Titan, which obtained workers' compensation coverage with a carrier not authorized by the district director, assumed liability for workers' compensation benefits after its carrier went bankrupt. Just over one year later, Dolphin Titan also became insolvent. Thereafter, claimant filed a claim against Exxon seeking to hold it liable as the general contractor. *Sketoe v. Dolphin Titan International*, 28 BRBS 212 (1994) (Smith, J., concurring and dissenting). Administrative Law Judge A.A. Simpson, Jr. found that Exxon is a contractor under the Act because the business of both Exxon and Dolphin is "energy related" and "[b]oth companies were part of a larger project as defined by *National Van Lines." See Director, OWCP v. National Van Lines,* 613 F.2d 972, 11

[1]Section 4(a) provides:

> 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.

[2]Exxon entered into a lease with the United States Government, giving it the "exclusive right and privilege" to drill for and extract oil, gas and natural resources from a portion of the Outer Continental Shelf off the coast of Louisiana. Emp. Ex. 1. Exxon and Dolphin Titan subsequently entered into a day rate contract with Dolphin Titan in which Exxon agreed to pay on a *per diem* basis regardless of the number of days Dolphin worked. Exxon neither retained the right to supervise the contract, nor did it in fact supervise the contract. Decision and Order on Remand at 12-13.

BRBS 298 (D.C. Cir. 1979), *cert. denied,* 448 U.S. 907 (1980); Decision and Order at 4. Hence, Exxon was held liable for claimant's disability and medical benefits. Decision and Order at 8. Exxon appealed this decision to the Board.

In its initial decision, the Board held that the administrative law judge erred in holding Exxon liable. Specifically, the Board stated it would utilize the test developed by the United States Court of Appeals for the Fifth Circuit in *Chavers v. Exxon Corp.*, 716 F.2d 315 (5th Cir. 1983), rather than that stated by the United States Court of Appeals for the District of Columbia Circuit in *National Van Lines*, because the rule in *Chavers* has more specific application to the oil industry yet is "entirely consistent" with the thrust of *National Van Lines*.[3] *Sketoe*, 28 BRBS at 218. Therefore, the majority held that the administrative law

[3]The issue in *Chavers* was whether Exxon was a statutory employer and therefore immune from suit in tort filed by the widow of a man fatally injured while employed by another company as a member of a drilling crew. The worker's employer was under contract with Exxon to drill wells at the site of injury. The issue in *National Van Lines* was whether National Van Lines was a statutory employer and therefore secondarily liable under the Longshore Act for payment of benefits to an employee of a moving company, because the employee was injured while the company was under contract with National Van Lines as its agent. The Fifth Circuit held that a principal is a statutory employer under the statutory employer provision of the Louisiana Workmen's Compensation Act if the employees of the principal or employees of other employers engaged in similar operations customarily perform the work at issue. In either instance, the principal would be deemed a statutory employer. *Chavers,* 716 F.2d at 318. The D.C. Circuit stated that the appropriate

judge erred in holding Exxon liable for compensation based on his finding that Exxon and Dolphin Titan are both in the petrochemical business. The Board vacated the administrative law judge's finding that Exxon is liable under Section 4(a) and remanded the case for consideration of evidence which had not been discussed previously and for resolution of the issue using the *Chavers* test.[4] *Sketoe*, 28 BRBS at 219-221. Specifically, the Board stated:

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test for assessing liability in a claim involving Section 4(a) of the Act is to determine whether the employee is engaged in work that is a subcontracted portion of a larger project or that is normally conducted by the employer's own employees rather than by independent contractors. *National Van Lines*, 613 F.2d at 986-987, 11 BRBS at 316.

[4]The Board unanimously affirmed the administrative law judge's determination that claimant's condition reached maximum medical improvement on June 4, 1991, and that he is entitled to benefits under the schedule at Section 8(c)(3) for a 60 percent impairment to his hand. *Sketoe*, 28 BRBS at 222, 224-225.

> In order to hold Exxon liable for compensation in this case, consistent with the approach of the Fifth Circuit in *Chavers*, the administrative law judge must make a finding of whether Exxon customarily and regularly engages in offshore drilling on its own as part of its regular trade, business or occupation, or, if not, whether the oil and gas industry as a whole operates in this manner.

Sketoe, 28 BRBS at 220. Judge Smith dissented on this issue, stating that he would have affirmed the application of *National Van Lines* as well as the administrative law judge's finding that Exxon is liable for benefits. *Sketoe*, 28 BRBS at 226-227.

On remand, Administrative Law Judge Di Nardi determined that the only issue before him was whether Exxon is a general contractor under Section 4(a) of the Act.[5] Under the Board's remand order, the administrative law judge considered the previously undiscussed evidence and found that it was uncontroverted and conclusively established that Exxon does not regularly and customarily engage in offshore drilling on its own. Decision and Order on Remand at 9. Moreover, citing numerous oil industry cases, he found that Exxon's practice of hiring another company to perform the actual drilling is representative of the industry practice. *Id.* at 9, 11. The administrative law judge concluded that Exxon did not control Dolphin Titan by virtue of their contract, as it did not have the right to supervise performance of the contract, nor did it in fact supervise Dolphin Titan's performance. *Id.* at 12-13. After discussing the law set forth by the courts of appeals in *Chavers* and *National Van Lines*, Judge Di Nardi found that Exxon is not responsible for claimant's benefits under Section 4(a). Applying the principles of *National Van Lines,* the administrative law judge held that Exxon could not be a "contractor" because it was not contractually obligated to any other party and, therefore, Exxon was not contractually obligated to perform the duties claimant was performing at the time of his injury. Decision and Order on Remand at 16-17. Consequently, he denied, with prejudice, the claim filed by claimant against Exxon.[6] *Id.* at 19. Both the Director and claimant appeal

[5]The case was assigned to a different administrative law judge because Judge Simpson no longer worked for the Office of Administrative Law Judges. ALJ Exs. A-B.

[6]The administrative law judge noted that the only remedy available to Exxon for the prior, erroneous determination of liability is to relieve it of its liability for future medical benefits and an attorney's fee, as it paid claimant's scheduled benefits in full before the

the administrative law judge's decision. Exxon responds, urging affirmance.

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.

Board vacated Judge Simpson's Order. Decision and Order at 19. The administrative law judge stated that pursuant to Section 18(b) of the Act, 33 U.S.C. §918(b), claimant may seek benefits from the Special Fund due to the insolvency of Dolphin Titan and its carrier.

33 U.S.C. §904(a) (1994).[7] Its purpose is threefold: to protect injured employees from the irresponsible failure of their immediate employers to insure; to deter those unscrupulous employers from dividing their work among a number of smaller uninsured entities; and to create an incentive for the general employer to require its subcontractors to be adequately insured. *See National Van Lines*, 613 F.2d at 986, 11 BRBS at 316.

Both claimant and the Director first aver that under *National Van Lines*, which they contend is the correct law to apply, Exxon is liable for benefits as the contractor pursuant to Section 4(a) of the Act. Specifically, the Director and claimant contend the majority erred in substituting the Fifth Circuit's opinion in *Chavers* for the D.C. Circuit's opinion in *National Van Lines*, because at issue in *Chavers* was whether the employer was immune from suit in tort as a statutory employer, and the issue in *National Van Lines* was whether employer was secondarily liable for compensation as a statutory employer. This contention is without merit since the issue in both cases was what constitutes a statutory employer and the statutes construed, Section 4(a) of the Act and LSA-R.S. 23 :1061, are both intended to assure complete compensation coverage. *Chavers*, 716 F.2d at 318; *National Van Lines*, 613 F.2d at 986, 11 BRBS at 316. Moreover, the Fifth Circuit declared in *Chavers* that the fact this statutory provision "affects tort liability is incidental." *Chavers*, 716 F.2d at 318. Employer argues that the Board should apply the law of the case rule, as the issue of the applicable law has been decided.

[7]We quote the version of Section 4(a) as amended in 1984. In our initial decision, we stated that we need not decide whether the 1972 or 1984 version of Section 4(a) applies inasmuch as the obligations of a "contractor" are the same in both versions. *Sketoe*, 28 BRBS at 216 n.3.

Initially, we reiterate that *Chavers* is not inconsistent with *National Van Lines*. We held in our initial decision, however, that *Chavers* better addresses the statutory employer issue as it is presented in the petroleum industry, and that the case at bar should be decided by using the *Chavers* test. *Sketoe*, 28 BRBS at 217, 220. As employer maintains, this holding is the law of the case, and we need not revisit it.[8] *See Doe v. Jarka Corp. of New England*, 21 BRBS 142 (1988).

Next, claimant contends the administrative law judge erred in failing to find Exxon liable under the *Chavers* test because the Board's order of remand was too confining. That is, claimant believes the administrative law judge erred in failing to address and apply the "integral relationship" test set forth in *Chavers*, as it is self-evident that extracting oil and gas by drilling into the Outer Continental Shelf is integral to Exxon's business. Contrary to claimant's argument, we believe the administrative law judge properly applied the facts to the *Chavers* test as required by the Board's first *Sketoe* decision.

The test for determining whether an employer is a "statutory employer," as announced by the Fifth Circuit, is:

> whether the activity done by the injured employee or his actual immediate employer is part of the usual or customary practice of the principal or others in the same operational business.

Chavers, 716 F.2d at 316-317, *quoting Blanchard v. Engine & Gas Compressor Services, Inc.*, 613 F.2d 65 (5th Cir. 1980). If the answer is positive, the employer is a statutory employer and is only liable for workers' compensation benefits and not tort damages. To explain the test, the court stated that the first consideration should be whether "the particular principal involved in the case customarily does the type of work performed by the contractor[,]" and if not, the second consideration is whether "others engaged in businesses similar to that of the principal customarily do this type of work or if it is an integral part of their businesses." *Chavers*, 716 F.2d at 317; *Blanchard*, 613 F.2d at 71; *see also Thibodaux v. Sun Oil Co.*, 218 La. 453, 49 So.2d 852 (1950). Thus, the integral relationship "test" is not a separate test to which the facts may be applied to determine an employer's status. Rather, the "integral relationship test" is merely descriptive of the way in

[8]The Director and claimant further contend that the administrative law judge erred in his application of *National Van Lines*, specifically in determining that Exxon was not a contractor because it was not contractually obligated to drill oil and therefore was not a statutory employer because it was not obligated to perform claimant's duties at the time of the injury. Contrary to the argument from the Director and claimant, the administrative law judge's interpretation of the lease agreement as not requiring Exxon to drill oil is entirely reasonable and necessarily leads to the conclusion under *National Van Lines* that Exxon is not a statutory employer. We do not affirm that holding because we do not consider the *National Van Lines* test to be well-suited to determine a statutory employer in the petrochemical industry.

which to assess the industry custom. In fact, pursuant to the holding in *Blanchard*, 613 F.2d at 69, 71, the *Chavers* court itself did not separately use the integral relationship test, but instead summarized the "core inquiry" as:

> whether the employees of the principal or employees of other employers engaged in similar operations customarily perform the work at issue.

Chavers, 716 F.2d at 317. This test was restated by the court in several other instances at p. 318 and, in part, in its holding at p. 319. In our first decision, the Board ordered the administrative law judge to consider the evidence in this case in light of the *Chavers* test. Specifically, we stated:

> In order to hold Exxon liable for compensation in this case, consistent with the approach of the Fifth Circuit in *Chavers*, the administrative law judge must make a finding of whether Exxon customarily and regularly engages in offshore drilling on its own as part of its regular trade, business or occupation, or, if not, whether the oil and gas industry as a whole operates in this manner.

Sketoe, 28 BRBS at 220. Thus, the Board spelled out the precise test the administrative law judge was to apply in accordance with the "core inquiry" in *Chavers*.

Moreover, claimant and our dissenting colleague interpret the "integral relationship" test as if it were the "essential to business" test. That particular test was wisely rejected by the Fifth Circuit prior to *Chavers,* and we decline to resurrect it. *Penton v. Crown Zellerbach Corp.*, 699 F.2d 737 (5th Cir. 1983); *Blanchard*, 613 F.2d at 71. We also reject application of the current integral relationship test, as it is premised on the amended version of the Louisiana statute, and the Louisiana Court of Appeal has held that the amended provision is not to be given retroactive effect. *Fuselier v. Amoco Production Co.*, 607 So.2d 1044 (La. 1992); *see also Sketoe*, 28 BRBS at 217 n.5.

In properly applying the *Chavers* test, the administrative law judge found that Exxon does not customarily or regularly engage in offshore drilling. Mr. LeJeune, Exxon's contracts administrator, testified that Exxon does not own drilling equipment or rigs and does not provide services or labor for drilling. Emp. Ex. 8 at 5, 14. He stated his belief that Exxon last owned and operated drilling rigs in the 1960s and that, currently, no Exxon employee physically drills wells. Emp. Ex. 8 at 50-51, 53-54, 60. Mr. Baldwin, an operation superintendent, corroborated these facts, stating that Exxon employees do not drill wells, as Exxon determined it was more efficient to contract with other companies who perform specialized tasks such as drilling, acidizing, packing and cementing. Tr. at 160, 177, 179. He testified that Exxon last operated a drilling rig in early 1972. Tr. at 204. The testimony credited by the administrative law judge, therefore, supports Exxon's claim that its employees have not physically drilled a well since the 1960's or early 1970s.[9] Thus, there

[9]Our dissenting colleague's reference to Exxon's page on the world wide web is irrelevant since that was not in evidence below. Our statutory mandate is to determine

is substantial evidence to support the administrative law judge's conclusion that drilling is not part of Exxon's "regular trade, business or occupation," Decision and Order on Remand at 8-9, 17, and we affirm that conclusion. *Chavers*, 716 F.2d at 318.

After the administrative law judge found that drilling is not a part of Exxon's regular business, he properly addressed whether other employers, engaged in similar operations, customarily perform this work. He first discussed several other cases involving oil production companies, including *Ainsworth v. Shell Offshore, Inc.*, 829 F.2d 548 (5th Cir. 1987); *Wallace v. Oceaneering International*, 727 F.2d 427 (5th Cir. 1984); *Doucet v. Diamond M Drilling Co.*, 683 F.2d 886 (5th Cir. 1982); *McCormack v. Noble Drilling Corp.*, 608 F.2d 169 (5th Cir. 1979), all of which described the practice of hiring specialized drilling companies to perform the actual drilling operations. Decision and Order on Remand at 9-11. On this basis, he found that the cases "demonstrate the now familiar pattern" whereby major oil companies "routinely and regularly contract with professional drilling companies to drill their wells." Decision and Order on Remand at 11. Thus, he concluded, the usual practice in the industry is to contract with independent contractors for drilling services. *Id.* Again, the administrative law judge's finding is supported by substantial evidence. Consequently, as the administrative law judge followed the Board's remand order by first addressing whether drilling is performed by employer Exxon, then by addressing the industry standard, and finally, by finding that Exxon's practice comports with the industry as a whole, we affirm his conclusion that Exxon is not a statutory employer and cannot be held liable for claimant's workers' compensation benefits.[10] *Chavers*, 716 F.2d at 318.

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whether the decision below is "support by substantial evidence in the record...." 33 U.S.C. §921(b)(3).

[10]The Director analogizes this case to *Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925 (1984), stating that an entity created for the purpose of building a

subway system is a "contractor" as it relates to the "subcontractors" it hires to perform the actual work, regardless of whether any of its own employees perform that type of work. Dir. Brief at 4. The issue in *Johnson* was not the definition of "contractor" but rather whether WMATA was entitled to the tort immunity of Section 5 of the Act, 33 U.S.C. §905 (1982), as a contractor who had secured insurance for its subcontractors but who was not liable to the injured employee. This case was overruled on this point by the 1984 Amendments. 33 U.S.C. §905 (1994); *Arabie v. C.P.S. Staff Leasing*, 28 BRBS 66 (1994), *aff'd sub nom. Total Marine Servs., Inc. v. Director, OWCP*, 87 F.3d 774, 30 BRBS 62 (CRT), *reh'g en banc denied*, 99 F.3d 1137 (5th Cir. 1996). Moreover, *Johnson* is distinguishable in that WMATA, burdened with the chore of keeping track of all its subcontractors' subcontractors and their respective workers' compensation insurance policies, chose to purchase workers' compensation insurance in its own right.

For the reasons stated herein, and in our initial decision in this case, we reject our dissenting colleague's continued reliance on *National Van Lines*. Moreover, we note that our dissenting colleague disagrees with the administrative law judge's definition of "drilling." However, we conclude that the administrative law judge has not defined the term too narrowly by limiting it to the physical act of drilling a well. Indeed, he described the scope of drilling operations and he properly applied relevant case law in this regard. Furthermore, as we have already stated in rejecting the petitioners' contentions, the "integral relationship" test is not a separate inquiry but is merely a method of determining whether an activity is customarily performed by the principal. Therefore, as the evidence supports the administrative law judge's conclusion that Exxon has neither the equipment nor the manpower to perform the actual drilling operation without the employment of a specialized company, we see no reason to disturb this finding.

Accordingly, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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JAMES F. BROWN
Administrative Appeals Judge

I concur:

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REGINA C. McGRANERY
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, dissenting:

I respectfully dissent from the decision of my colleagues in this case. For the reasons stated herein, as well as those expressed in my dissenting opinion in the Board's original decision, *Sketoe v. Dolphin Titan International*, 28 BRBS 212 (1994) (Smith, J., concurring and dissenting), I would hold that Exxon is a "contractor" within the meaning of Section 4(a) in light of the standard set forth in *Director, OWCP v. National Van Lines, Inc.*, 613 F.2d 972, 11 BRBS 298 (D.C. Cir. 1979), *cert. denied,* 448 U.S. 907 (1980), and thus is liable to claimant.

Initially, I believe the Board erred in disturbing the original administrative law judge's decision in this case, wherein he applied the appropriate controlling law of *National Van Lines*.[11] In so doing, the Board completely ignored the terms of the Act and long-standing

[11]*National Van Lines* provides that a general employer will be held liable as a contractor

controlling precedent. Section 4(a) of the Act specifically mandates:

> 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) (1994); *see* n.7, *supra*. In this case, Exxon definitively subcontracted to Dolphin Titan the drilling portion of its larger project of locating, extracting, processing and selling oil and gas products. As Dolphin Titan and its insurer have failed to secure the payment of compensation, it falls to Exxon to protect the injured employee. *National Van Lines, Inc.*, 613 F.2d at 986, 11 BRBS at 316.

This simple, common sense approach to the issue has been complicated and confused by the majority's election to change the law. Under the majority's test, Section 4(a) is rendered nearly useless. By using the Fifth Circuit's decision in *Chavers v. Exxon Corp.*, 716 F.2d 315 (5th Cir. 1983), and excluding the "integral relationship" portion of it, which I shall address in due course, the majority has restricted the applicability of Section 4(a) to those occasions when an employer, or an industry, subcontracts out work which the employer, or employers in the industry, customarily perform themselves. That is, under the majority's interpretation Section 4(a) would never apply unless the contractor and the subcontractor regularly perform the exact same work. This logic defeats the purpose of hiring a specialized subcontractor.

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under Section 4(a) "when 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." *National Van Lines*, 613 F.2d at 986, 11 BRBS at 316.

Take, for example, the housing industry. When a general contractor who is a builder hires the services of a plumbing subcontractor, it is doing so because it needs the services the plumber provides. If an individual plumber suffers an injury and the plumbing company is unable to compensate him, the majority's test would deny him his entitlement because the general contractor does not customarily perform plumbing services. Or, more pertinent to the Act, consider a worker injured while constructing the subway system in Washington, D.C. If he was an employee of a subcontractor hired to dig the tunnel through which the subway would travel, without the security of his company's insurance, he would not be covered under the majority's approach, as the Washington Area Metropolitan Transit Authority is not in the business of digging tunnels. *See generally Washington Metropolitan Area Transit Authority v. Johnson*, 467 U.S. 925 (1984).[12] The same approach that is used to determined the liability of the contractors in the above examples should be used to determined the liability of Exxon in present case. There is no authority or reasonable explanation for creating a special test and treating the petrochemical industry differently from other industries. *See Sketoe*, 28 BRBS at 217 (majority notes that complexities of oil production industry warrant special test). I note that the *Chavers* test, as used in Louisiana, is not limited to the oil industry, but applies to all businesses subject to the Louisiana law. *See, e.g., Penton v. Crown Zellerbach Corp.,* 699 F.2d 737 (1983)(paper mill).

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[12]While it is true the issue in this case involved the applicability of Section 5 of the Act, 33 U.S.C. §905, and the case was specifically overruled by the 1984 amendments to the Act, *Arabie v. C.P.S. Staff Leasing*, 28 BRBS 66 (1994), *aff'd sub nom. Total Marine Servs., Inc. v. Director, OWCP*, 87 F.3d 774, 30 BRBS 62 (CRT), *reh'g en banc denied*, 99 F.3d 1137 (5th Cir. 1996), the Director's analogy is, nevertheless, reasonable and persuasive. WMATA is a multi-jurisdictional government agency charged with the construction and operation of a rapid transit system. During the construction phase, WMATA contracted with hundreds of subcontractors who, in turn, subcontracted with over 1000 sub-subcontractors. Inarguably, WMATA constituted a "contractor" under Section 4(a). *Johnson*, 467 U.S. at 927-928; *see also Keener v. Washington Metropolitan Area Transit Authority,* 800 F.2d 1173 (D.C. Cir. 1986), *cert. denied*, 480 U.S. 918 (1987).

In this regard, I disagree with the use of the *Chavers* test in this case which arises under the Act, as the Fifth Circuit's decision in *Chavers* interprets a specific provision of the Louisiana statute, La.R.S. 23:1061 (1992). While the statute and the case may be intellectually interesting, they are not controlling. *See Sketoe*, 28 BRBS at 225. Specifically, the *Chavers* court was charged with determining whether an employer was a "statutory employer" under state law for purposes of immunity from tort liability.[13] The court stated that the "statutory language vital to the current inquiry" is the phrase: "part of his trade, business or occupation." *Chavers*, 716 F.2d at 316. These terms are not in Section 4(a) of the Act. That the words interpreted by the Fifth Circuit and used by the majority in this case do not appear in the Act greatly undermines the rationale for using the *Chavers* test to determine the status of an employer under Section 4(a) of the Act.

Moreover, I note that the effect of my colleagues' affirmance of the administrative law judge's finding under a state law test that Exxon's "regular trade business or occupation" does not include drilling is two-fold: First, if Exxon is not a "statutory employer" and therefore not a "contractor" liable for worker's compensation under the Longshore Act, it is not immune from tort liability under Section 5(a) of the Act. Second, it directly thwarts the purpose of Section 4(a) by denying the benefits of the law to the injured worker. *National Van Lines,* 613 F.2d at 987, 11 BRBS at 317. For these reasons, I would reverse the Board's decision to use *Chavers*, and consequently, the administrative law judge's finding that Exxon is not liable to claimant.

Even if I believed it was appropriate to rely on *Chavers*, I would not affirm the administrative law judge's conclusion in this case. It is apparent from the court's explanation of the test that the Board, and consequently the administrative law judge, omitted a vital aspect of the method for assessing an employer's contractual status. The Fifth Circuit stated in *Chavers* that the first consideration in determining whether there is a statutory employment relationship should be whether "the particular principal involved in the case customarily does the type of work performed by the contractor[,]" and if not, the second consideration is whether "others engaged in businesses similar to that of the principal customarily do this type of work *or if it is an integral part of their businesses*." *Chavers*, 716 F.2d at 317 (emphasis added). In *Blanchard*, where the court expressly rejected the "essential to business" test, it stated:

> we should first consider whether the particular principal involved in the case customarily does the type of work performed by the contractor and whether the contractor's work is an *integral part* of the work customarily performed by the principal. *If either of these situations exist, then there is a statutory*

[13]This is the terminology used by the Louisiana legislature in La.R.S. 23:1061 as opposed to the term "contractor" used in Section 4(a) of the Act, 33 U.S.C. §904(a).

employment relationship. . . .

Blanchard v. Engine & Gas Compressor Services, Inc., 613 F.2d at 65, 71 (5th Cir. 1980) (emphasis added). The second part of the inquiry addresses whether certain work is customarily done by other businesses in the industry "or if it is an *integral part* of their businesses." *Id.* (emphasis added); *see also Blanchard v. Gulf Oil Corp.*, 696 F.2d 395 (5th Cir. 1983) (appeal after remand). Not only does the Fifth Circuit continue to explain the statutory employer test in terms of whether a certain activity is integral to a business, but in *Penton*, 699 F.2d at 737, the court explained:

> Our reading of *Blanchard* . . . reveals that a statutory employment relationship will be found only in those instances where the injured employee's employer is contracted to perform work which is so closely allied to that of the principal employer that it is in fact either an extension or component of the principal's commonly relied upon resources.

Penton, 699 F.2d at 741. In a footnote the court expressly stated it did "not mean to embrace the 'essential to business' test. . . ." *Id.* at n.5. Thus, contrary to the majority's statement, the integral relationship test is not equivalent to the essential to business test, and in fact is a separate inquiry which must be made in assessing an employer's contractual status.

By rejecting this key inquiry into assessing the standard procedures of a business or an industry, the majority severely limits the scope of Section 4(a).[14] Were my colleagues to

[14]There was a period of time when the integral relationship test did not apply to Louisiana law, *Berry v. Holsten Well Service, Inc.* 488 So.2d 934 (La. 1986), but the Louisiana legislature overruled *Berry* when it amended the statute in 1989, La.R.S. 23:1061 (1992). Although the Fifth Circuit stated that the integral relationship test could not be applied to injuries occurring between the issuance of *Berry* in 1986 and January 1, 1990, the effective date of the amendment, *see Pierce v. Hobart Corp.*, 939 F.2d 1305 (5th Cir. 1991), the court also stated that the amendment returns to the law the integral relationship test. *Becker v. Chevron Chemical Co.*, 983 F.2d 44 (5th Cir. 1993); *Pierce*, 939 F.2d at 1309; *see also Sketoe*, 28 BRBS at 227-229. Thus, at the time of claimant's injury in 1984 and at the time of the Board's first decision in 1994, as well as now, the integral relationship

consider the integral relationship test as part and parcel of the *Chavers* test, then application of said test would require the administrative law judge to consider whether drilling wells is an integral part of Exxon's business. A review of the evidence in its entirety, crediting all uncontroverted testimony, undoubtedly leads to the conclusion that drilling for oil and gas is an integral, essential, portion of Exxon's business.

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test was, and is, part of the law and should have been applied accordingly.

This conclusion is based in part on the definition of "drilling." As the majority opinion noted, both Mr. LeJeune and Mr. Baldwin clearly stated that Exxon employees do not own the equipment necessary or perform the actual labor required to drill a well. However, they also testified that Exxon has a "drilling group" which is based in New Orleans and is comprised of engineers and production people. This drilling group designs the wells, sets the specifications and runs the contracts for the specialized services. Emp. Ex. 8 at 17-18, 58; Tr. at 168-170, 183. Additionally, Exxon places a drilling superintendent on each rig to ensure that Exxon's objectives and specifications are met. Emp. Ex. 7 at 19; Emp. Ex. 8 at 15; Tr. at 186.[15] The record also contains the affidavits of Mr. Hill, an Exxon division drilling manager, and Mr. Hicks, an Exxon drilling superintendent, which originated as evidence in the *Chavers* civil case. Cl. Ex. 18. Mr. Hill stated that Exxon is "engaged in the exploration, drilling and production of oil, gas and natural resources. . . ." Cl. Ex. 18. Mr. Hicks testified that he coordinated drilling operations conducted "by a number of drilling contractors" and that in order for Exxon to successfully complete its objective, it was necessary to "contract for the services of a number of other sub-contractors. . . ." *Id.* Mr. Baldwin agreed with the statements in both depositions, excluding Mr. Hicks' use of the term "sub-contractors." Emp. Ex. 7 at 15-16. The administrative law judge did not address any of this testimony which supports the conclusion that drilling wells is essential to Exxon's continued prosperity.

Additionally, in Exxon's own words "Exxon USA drills offshore wells in the Gulf of Mexico. . . ." This quotation is found on Exxon's page on the world wide web, of which I now, in this age of computer technology and worldwide communication, take official notice. *See* www.exxon.com. Scanning through the pages on drilling and production, it is clear that Exxon considers itself an expert on drilling for oil and employs "Drilling Engineers" who fill "highly technical position[s.]" *Id.* Further review of the web pages reveals a detailed look at the role of facility engineers and informs those interested in a career with Exxon that the Drilling Engineer will be responsible "for coordinating all phases of planning and drilling a well" and will "oversee the actual drilling phase. . . ." *Id.* This information supports the uncontroverted testimony of record that Exxon is involved in drilling, albeit not in the actual operating of the drilling equipment, but certainly in the planning, coordinating and supervising of the physical process of drilling.

Therefore, although it is unnecessary to rely on state law espoused in *Chavers* to determine Exxon's contractor status when there is precedent under the Act, if I were to advise following *Chavers*, I would insist that it be applied in its entirety, including the integral relationship test. Given the uncontroverted evidence of record, I would reverse the

[15]Mr. Baldwin also commented: "if you . . . asked . . . anybody in our drilling group whether we were involved in the drilling of wells . . . [t]hey would say we were." Tr. at 183. With regard to the contract, which Mr. LeJeune testified is a pro forma contract created by Exxon, Emp. Ex. 8 at 11, Mr. Baldwin stated that it is minutely detailed because "we have a lot of experience in drilling oil wells." In that way, past problems or solutions would be accounted for in new contracts. Tr. at 187.

administrative law judge's decision and hold that drilling is integral to Exxon's business of exploring, finding, extracting and producing natural resources from the Outer Continental Shelf. The fact that Exxon had not physically drilled a well in years should not be determinative in assessing whether drilling is integral to its business. The Fifth Circuit stated that all facts which might suggest a statutory relationship must be considered in applying the test, as well as facts which pertain to the actual work itself. However,

> [i]f the only fact which suggests the activity is not part of the principal's trade or business is that the principal has no employees of his own to do the work, this fact alone will not preclude the application of [the Louisiana law], provided all other evidence indicates the activity is an *integral part of the principal's business*.

Blanchard, 613 F.2d at 71. Thus, I would hold that claimant and the Director are correct in asserting that drilling is inherently necessary to Exxon's business. Without drilling, the

process stalls.[16] *Becker*, 983 F.2d at 44. Therefore, I would reinstate Judge Simpson's decision holding Exxon liable for claimant's benefits in the light of the insolvency of Dolphin Titan and its carrier.

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ROY P. SMITH
Administrative Appeals Judge

[16]More support that drilling is essential to Exxon can be found in the lease agreement with the United States government. The lease provides that Exxon is the lessee with the "exclusive right and privilege to drill for, mine, extract, remove and dispose of oil and gas deposits, except helium gas, in or under [the specified area] of the Outer Continental Shelf[.]" Emp. Ex. 1. The lease also set forth Exxon's obligations, including paying rentals and royalties, maintaining the appropriate bonds and diligently drilling and producing "such wells as are necessary to protect the Lessor from loss by reason of production on other properties. . . ." Emp. Ex. 1 at 2. With consent, Exxon could compensate the government for its failure to drill; however, after due notice, Exxon would be required to:

> diligently drill and produce such other wells as the Secretary [of the Interior] may reasonably require in order that the leased area . . . may be properly and timely developed and produced in accordance with good operating practice.

Id. The election to drill additional wells, as authorized by the Secretary, would be within Exxon's control. If Exxon failed to produce, the Lessor could cancel the lease, subject to specific law, or seek penalties or equitable remedies. Emp. Ex. 1 at 4. Further, surrender of the lease by Exxon did not relieve it of the obligation to pay accrued rentals and royalties or to abandon the wells in a satisfactory manner. *Id.* Without discussing the terms of the lease, the administrative law judge found that Exxon was a lease-holder entitled to extract resources from the seabed, but that it became an "owner" upon the construction of a stationary platform from which to drill. As an "owner," Exxon did not have a "master" and was not contractually obligated to another party. Decision and Order at 16-17. In light of the actual terms of the lease, these findings cannot stand.