BRB No. 01-335

RICHARD A. WAKELEY	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
EASTERN SHIPBUILDING, INCORPORATED	)	DATE ISSUED: Dec. 17, 2001
	)	
Self-Insured Employer-Respondent	)	
	)	
and	)	
	)	
MAB, INCORPORATED	)	
	)	
Employer-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Richard D. Mills, Administrative Law Judge, United States Department of Labor.

Tommy Dulin (Dulin & Dulin, Ltd.), Gulfport, Mississippi, for claimant.

Bonnie J. Murdoch, Jacksonville, Florida, for Eastern Shipbuilding, Inc.

Douglas F. Miller (Clark, Partington, Hart, Larry, Bond & Stackhouse), Pensacola, Florida, for MAB, Inc.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2000-LHC-281, 2000-LHC-282, 2000-LHC-283) of Administrative Law Judge Richard D. Mills 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 the Navy as a diver during all times pertinent to this case, and he was assigned to the Naval Coastal Systems Center (dive locker) in Panama City, Florida. In 1998, work at the dive locker was slow. With permission from the Navy, and with the understanding that Navy work took priority, claimant was allowed to hold himself out and to work as a commercial diver, distributing his business card to solicit jobs. Tr. at 130-131, 139, 144.

In late 1997 or early 1998, Eastern Shipbuilding, Inc. (Eastern) sought to have its underwater railway repaired.[1] It "contracted" with MAB, Inc. to complete the repairs.[2] Cl. Ex. 25 at 10. MAB is an underwater construction and repair company, and diving is one of the services it provides, primarily through the labors of its principal and sole stockholder, Mark A. Brooks. Tr. at 46, 62. After inspecting the underwater railway, MAB and Eastern agreed that it was not a one-man job and that additional labor would be needed. Eastern gave MAB the authority to obtain the necessary personnel to get the job done. Tr. at 62-63. MAB contacted claimant and other divers to assist.[3] In addition to the work on the underwater railway, Eastern occasionally assigned the divers to work on other jobs such as cutting barges or inspecting/repairing new ship construction. Tr. at 48, 94, 154-155.

[1]The underwater railway, which is similar to a standard railway, assists in the launching and dry docking of ships. Tr. at 79.

[2]Both Eastern and MAB agree there was no formal written contract. Cl. Ex. 25 at 8-10; Tr. at 47, 63. There was an understanding between the two companies, based on prior dealings, and MAB submitted invoices on a "cost-plus" basis which Eastern paid.

[3]Not all divers worked every day on this project. Many were Navy divers, and their priority was Navy work. MAB recorded hours of all divers for billing purposes. MAB Brief at 3-4.

Claimant filed claims for compensation for three injuries he alleges occurred during the course of his work with MAB at Eastern's facility. Cl. Ex. 1. First, he alleges trauma occurred in August 1998 when he was working on the underwater railway. Claimant avers he was underwater when a railing slipped and pinned his shoulders to a piling. Second, he alleges he injured his ankles, legs and shoulders when he was assigned by Eastern to work on a newly constructed vessel, the *Swath River*. Claimant asserts that this injury occurred when he jumped into water he was told was deep, but hit bottom, sending sharp pains through his ankles, legs and shoulders. Finally, claimant contends he developed carpal tunnel syndrome in his wrists because of the repetitive motion required in using underwater welding and other tools on the Eastern job. Cl. Ex. 1; Tr. at 150, 154-155, 157.

The administrative law judge stated the issue as whether the requisite characteristics of "maritime employer" and "maritime employee" have been met. *See* 33 U.S.C. §§902(3), 902(4), 903(a). He concluded that the employment relationships in this case do not entitle claimant to benefits from either Eastern or MAB. Initially, the administrative law judge found that Eastern is not an employer or a general contractor, *see* 33 U.S.C. §904, but rather is an owner or client/customer. Decision and Order at 5. Relying on *Sketoe v. Exxon Co., USA*, 188 F.3d 596, 33 BRBS 151(CRT) (5th Cir. 1999), *cert. denied*, 120 S.Ct. 1562 (2000); *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 *Dailey v. Edwin H. Troth, t/a EHT Construction Co.*, 20 BRBS 75 (1986), the administrative law judge concluded that Eastern, which was not obligated by contract to perform repairs on the railway, was the "owner" of the property and MAB was the "contractor." Decision and Order at 6.

The administrative law judge then considered the relationship between MAB and claimant. Applying *National Van Lines* and *Sketoe,* the administrative law judge found that claimant was operating an independent business which was contracted by MAB to assist in its repairs for Eastern. He thus concluded that claimant was an independent contractor and not an employee. He based his conclusion on the following facts: claimant held himself out as a specialist; he had business cards; the checks he received noted payment for "contract labor;" he received a Form 1099 from MAB at the end of the tax year instead of a W-2; he filed his 1998 income tax return using the form reserved for profit/loss from a sole proprietorship; and the amount filed matched the amount paid by MAB to claimant in 1998. Decision and Order at 7-8.

The administrative law judge also analyzed this issue by applying the law set forth in *Haynie v. Tideland Welding Service [Haynie I]*, 631 F.2d 1242, 12 BRBS 689 (5th Cir. 1980), and *Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980), which applies in determining whether an individual is an employee or an independent contractor. He concluded that claimant's work is not a regular

part of Eastern's business or MAB's business and that claimant was contracted for his particular speciality. Decision and Order at 8-9. Accordingly, he found that claimant was an independent contractor, and not an employee, of MAB, and, as such, he is not entitled to benefits. Decision and Order at 9-10. Claimant appeals, and Eastern and MAB respond, urging affirmance.

Claimant contends the administrative law judge erred in finding him to be an independent contractor rather than an employee of MAB. Claimant argues that, as he was an employee of MAB, an uninsured subcontractor, Eastern, the contractor, is liable for disability and medical benefits. Both employers deny that claimant is an employee; they argue that the administrative law judge properly found claimant to be an independent contractor.

Although the administrative law first addressed the question of whether a contractor-sub-contractor relationship existed between Eastern and MAB, the issue of whether claimant is an employee of MAB or Eastern or is an independent contractor is potentially dispositive of the claim and shall be addressed first. Independent contractors are not covered by the Act. *Cardillo v. Mockabee*, 102 F.2d 620 (D.C. Cir. 1939); *Gordon v. Commissioned Officers' Mess, Open*, 8 BRBS 441 (1978). The United States Court of Appeals for the Fifth Circuit, in whose jurisdiction this case arises, has held that the proper test for determining whether a claimant is an employee or is an independent contractor is the "relative nature of the work" test.[4] *Haynie I*, 631 F.2d 1242, 12 BRBS 689; *Oilfield Safety*, 625 F.2d 1248, 14 BRBS 356. The test "requires examining the nature of a claimant's work and the relation of that work to an employer's regular business." *Oilfield Safety*, 625 F.2d at 1253, 14 BRBS at 359. The court explained:

> In evaluating the character of a claimant's work, a court should focus on various factors, including the skill required to do the work, the degree to which the work constitutes a separate calling or enterprise, and the extent to which the work might be expected to carry its own accident burden. * * * In analyzing the relationship of the claimant's work to the employer's business the factors to be examined include, among others, whether the claimant's work is a regular part of the employer's regular work, whether the claimant's work is continuous or intermittent, and whether the duration of [the] claimant's work

[4]This test controls the relationship between claimant and MAB, as claimant can only prevail if he can show he is an employee of MAB or Eastern. The decisions in *Sketoe v. Exxon Co., USA*, 188 F.3d 596, 33 BRBS 151(CRT) (5th Cir. 1999), *cert. denied*, 120 S.Ct. 1562 (2000), and related cases apply where a claimant employed by a subcontractor who is uninsured seeks to obtain benefits from the primary contractor under 33 U.S.C. §904(a). *Sketoe* is thus relevant to the relationship between MAB and Eastern.

> is sufficient to amount to the hiring of continuing services as distinguished from the contracting for the completion of a particular job.

Id. (citation omitted).[5]

Initially, we agree with Eastern and MAB that claimant is not an employee of Eastern. The administrative law judge described claimant's work as a diver, and he noted the lack of divers employed by Eastern, as Eastern does not have need for divers on a regular basis. Consequently, when Eastern needed divers, it contracted out for the service, in this instance with MAB, and when the work was completed and the service no longer needed, the relationship ended. Decision and Order at 9. As the "relative nature of the work" test requires a comparison between claimant's work and the regular business of Eastern, and as substantial evidence supports the administrative law judge's determination that claimant is not an employee of Eastern, we affirm his conclusion. *Haynie v. Tideland Welding Service [Haynie II]*, 18 BRBS 17 (1985), *aff'd mem. sub nom. Haynie v. U.S. Dep't of Labor*, 797 F.2d 975 (5th Cir. 1986).

Next, we must consider whether claimant is an employee of MAB. In this regard, the administrative law judge stated:

> The Claimant works as a commercial diver. MAB is also essentially a commercial diver with the additional benefits of working as a marine construction firm. Neither entities (sic) services are significantly related to the

[5]In *Oilfield Safety*, the court held that the claimant, a safety inspector and part owner of Oilfield Safety, was an employee of both Oilfield Safety and of Harman Unlimited. Factors considered in making this determination included: the emblem on the claimant's coveralls, how others logged him in/out of the facility, admissions of the employers, payment of his salary, the claimant's efforts on behalf of the employers, the distribution of business cards, and how the claimant was listed on meal and bunk rosters and on production reports. Accordingly, both employers were held jointly and severally liable for the claimant's benefits. *Oilfield Safety*, 625 F.2d at 1254-1256, 14 BRBS at 359-361.

> activities of the Respondent Eastern. Eastern uses commercial diving services only occasionally and only on a contract basis. The relative nature of the Claimant's work means that . . . he is not an employee of MAB because his services are not an ordinary component of MAB's business. * * * [T]he Court finds that Claimant was an independent contractor of MAB, Inc.

Decision and Order at 9-10. The conclusion that claimant is not an employee of MAB cannot be affirmed, as the administrative law judge's application of the "relative nature of the work" test is flawed. While the administrative law judge identified the nature of MAB's business, he then incorrectly compared claimant's work with *Eastern's* business to conclude that claimant is not an employee of *MAB*. To determine the relationship between MAB and claimant, the comparison must be between claimant's work and MAB's business. *Oilfield Safety*, 625 F.2d at 1253, 14 BRBS at 359. Accordingly, we vacate the administrative law judge's determination that claimant is an independent contractor and is not an employee of MAB, and we remand the case for further consideration of the relationship between claimant and MAB.

On remand, the administrative law judge must apply the "relative nature of the work" test to the relationship between claimant and MAB. *Haynie I*, 631 F.2d 1242, 12 BRBS 689.[6] In addition to the evidence credited by the administrative law judge, *i.e.*, claimant's income tax forms, MAB's checks to claimant and claimant's business card, the administrative law judge also should consider the factors set forth by the Fifth Circuit in *Oilfield Safety* to characterize claimant's work and determine whether he is an employee of MAB or an independent contractor. *See Carle v. Georgetown Builders, Inc.*, 19 BRBS 158 (1986); *Haynie II*, 18 BRBS 17. Specifically, the Fifth Circuit considered the following factors significant: the skill required for the job; whether the claimant's work was a separate calling; whether the claimant's work required him to carry his own accident insurance; whether the claimant's work was a regular part of the employer's business; whether the relationship was continuous or intermittent; and the duration of the relationship. *See Oilfield Safety*, 625 F.2d at 1253, 14 BRBS at 359; *Haynie II*, 18 BRBS 17. If the administrative law judge determines on remand that claimant is an independent contractor, then claimant is not entitled

[6]In *Haynie I*, the Fifth Circuit remanded for the administrative law judge to use the "relative nature of the work" test to determine whether a wirelining specialist in the oil industry was an employee or an independent contractor. *Haynie I*, 631 F.2d at 1242-1244, 12 BRBS at 690-691. On remand, the administrative law judge found that the claimant was not an employee because his work was a specialized skill and it was not an integral part of Tideland's regular business. The Board and the court affirmed. *Haynie v. Tideland Welding Service [Haynie II]*, 18 BRBS 17 (1985), *aff'd mem. sub nom. Haynie v. U.S. Dep't of Labor*, 797 F.2d 975 (5th Cir. 1986).

to any benefits. *Cardillo*, 102 F.2d 620; *Gordon*, 8 BRBS 441. If the administrative law judge determines that claimant is an employee of MAB, then the relationship between MAB and Eastern becomes significant. Therefore, we shall next address that issue.

Claimant contends Eastern is a contractor and MAB is an uninsured subcontractor, and, as an employee of MAB, he is entitled to benefits from Eastern pursuant to Section 4 of the Act. 33 U.S.C. §904. Section 4 states in pertinent part:

> 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.

Under this provision, if Eastern is the "contractor" and claimant is an employee of MAB, an uninsured "subcontractor," then Eastern would be liable for claimant's benefits.

The administrative law judge found that Eastern is not a contractor, but is an owner. Applying the law set forth in *Sketoe*,188 F.3d 596, 33 BRBS 151(CRT); *National Van Lines*, 613 F.2d 972, 11 BRBS 298, and *Dailey*, 20 BRBS 75, he concluded that Eastern was an owner under no contractual obligation to perform repairs on the railway.[7] Decision and Order at 6. In contracting with MAB for services to the property, Eastern was not a general contractor, and claimant was not performing a "subcontracted fraction of a larger project." *Id.* These findings are supported by the evidence of record.

Liability under Section 4 is premised upon whether the principal is bound by a contractual obligation of its own, which it, in turn, passed on to a subcontractor. That principal is liable for benefits only if it is a contractor, and a "contractor" is "one who, for a fixed price, undertakes to procure the performance of works or services on a large scale . . . whether for the public or a company or individual." *Sketoe*, 18 F.3d at 598, 33 BRBS at 152(CRT). The "essential feature," necessary for liability, is that an injured employee must have "worked pursuant to a double set of contractual obligations." *Id.*, 18 F.3d at 598, 33 BRBS at 152-153(CRT); *National Van Lines*, 613 F.2d at 987, 11 BRBS at 317-318(CRT).

[7]Claimant asserts that Eastern did not own the property but that Bay Fabrication did. According to the President of Eastern, Brian D'Isernia, who is also the President of Bay Fabrication, business for both companies is conducted out of the same office. Cl. Ex. 25 at 5.

The "paradigmatic case" where Section 4 would not apply is where "a property owner contracts with a contractor for services to the property." *Id.* at n.58. Under those circumstances, there is no "double set of contractual obligations."

The situation involving MAB's work for Eastern on the underwater railway is analogous to the situation in *Dailey*. In *Dailey*, the Board held that the owners of real estate, who contracted for repairs to their property, were not liable as general contractors because they did not have an obligation to perform such repairs. Consequently, the injured employee was not performing "a subcontracted fraction of a larger project." *Dailey*, 20 BRBS at 77. Here, Eastern was under no contractual obligation to a third party to perform repairs to the railway. Its contract with MAB was to repair the railway, with the understanding that it would pay for labor and supplies. MAB, the contractor, recruited the labor needed to perform the repairs and billed Eastern accordingly. Consequently, we affirm the administrative law judge's conclusion that as the "owner" with regard to the underwater railway project regardless of whether claimant is found to be an employee of MAB on remand, Eastern is not liable for benefits to claimant for any injury sustained during the course of claimant's work on the underwater railway. *Sketoe*, 18 F.3d 596, 33 BRBS 151(CRT); *Dailey*, 20 BRBS at 77. If the administrative law judge finds that claimant is an employee of MAB, then MAB alone is liable for the benefits due to injuries sustained on that project. *Id.*

Nevertheless, Eastern may be liable to claimant for some benefits. Claimant alleges he sustained three injuries while working on Eastern's property. We have already concluded that Eastern is not liable to claimant for any injury sustained while working on the underwater railway; however, claimant's allegations include an injury to his legs and knees while working on the vessel *Swath River* and the development of carpal tunnel syndrome from using vibratory tools during the course of his work on Eastern's property. If these injuries occurred on projects for which Eastern was a contractor and MAB was, therefore, a subcontractor, then Eastern would be liable for claimant's benefits under Section 4 due to the uninsured status of MAB. 33 U.S.C. §904. Specifically, if Eastern contracted with a third party to build and/or repair the *Swath River*, *see, e.g.*, Cl. Ex. 25 at 31, then it was obliged to do so. Pulling its contractor, MAB, off the railway project and assigning it work on the *Swath River* placed Eastern in the position of contractor and MAB in the position of subcontractor with regard to that job.[8] As MAB was uninsured, Eastern, the contractor, would be liable for compensation for the injuries claimant sustained while working on the

[8]MAB asserts in its brief that it had nothing to do with the *Swath River* job and that Eastern, of its own accord, pulled the divers from the railway project and instructed them to work on the vessel. MAB Brief at 7. On remand, if this issue is addressed, the administrative law judge may consider MAB's assertion.

Swath River. *See National Van Lines*, 613 F.2d at 987, 11 BRBS at 317-318(CRT). Depending on the cause of claimant's alleged carpal tunnel syndrome, the same analysis may be used. The administrative law judge, however, did not discuss this issue, so he must do so on remand only if he concludes claimant is an employee of MAB.

Accordingly, the administrative law judge's determination that claimant is not an employee of MAB and his denial of benefits are vacated, and the case is remanded for further consideration in accordance with this opinion. In all other respects, the Decision and Order is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge