

MILLIE MAE JOHNSON)
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 Claimant-Petitioner)
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 v.)
)
 ARMY & AIR FORCE EXCHANGE) DATE ISSUED: Dec. 3, 1999
 SERVICE)
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 and)
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 CONTRACT CLAIMS SERVICES)
)
 Employer/Carrier-)
 Respondents) DECISION and ORDER

Appeal of the Order Granting Employer's Motion for Summary Decision and the Order Denying Motion for Reconsideration of Clement J. Kennington, Administrative Law Judge, United States Department of Labor.

Millie Mae Johnson, Columbus, Georgia, *pro se*.

William F. Sayegh (Army & Air Force Exchange Service), Dallas, Texas, for employer/carrier.

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

PER CURIAM:

Claimant, without the assistance of counsel, appeals the Order Granting Employer's Motion for Summary Decision and the Order Denying Motion for Reconsideration (97-LHC-2120) of Administrative Law Judge Clement J. Kennington 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 Nonappropriated Fund Instrumentalities Act, 5 U.S.C. §8171 *et seq.* (the Act). In an appeal by a claimant without a lawyer, we will review the administrative law

judge's decision to determine if the findings of fact and conclusions of law 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 initially sustained injuries to her back and neck on October 18, 1985, while in the course of her employment as a cook with employer, when she fell and hit her head on a mop bucket. Claimant received immediate medical treatment following this incident, and subsequently received treatment for psychiatric problems related to her back pain. On April 7, 1986, claimant underwent a lumbar laminectomy. While being transported home from the hospital by ambulance on May 8, 1986, claimant sustained a cervical contusion when she was dropped from a stretcher by the ambulance attendants. Claimant subsequently filed a third-party suit against the ambulance service for the injuries sustained on May 8, 1986, and, on December 28, 1987, claimant settled this third-party claim for \$15,000, without the prior written approval of employer. On March 22, 1988, employer suspended its payments of temporary total disability benefits that it had been voluntarily paying to claimant pursuant to Section 8(b) of the Act, 33 U.S.C. §908(b), on the basis of claimant's failure to obtain employer's prior written approval of the third-party settlement in accordance with the requirements of Section 33(g) of the Act, 33 U.S.C. §933(g). Following referral of the case to the Office of Administrative Law Judges, employer moved for summary decision on the ground that further compensation was barred by Section 33(g) because claimant entered into a third-party settlement for an amount less than the amount to which she would have been entitled under the Act, without obtaining the prior written approval of employer. In a Decision and Order on Motion for Summary Decision-Denial of Benefits issued on February 27, 1990, Administrative Law Judge Joel R. Williams granted employer's motion for summary decision, ruling that further entitlement to compensation and medical benefits for claimant's October 18, 1985 work-related injury is barred by Section 33(g). Claimant did not timely appeal Administrative Law Judge Williams' Decision and Order, and, thus, his ruling that the provisions of Section 33(g) bar further compensation for the 1985 work-related injury is final.

Claimant, who never returned to work following the October 1985 work-incident, averred that she continued to report to employer's personnel office on a semiannual basis in order to update her employment status. Claimant asserted that when she visited employer's office on April 1, 1994, she was advised that computer records listed her as having been on administrative leave without pay (LWOP), but that effective April 1, 1994, she would be terminated. According to claimant, before leaving employer's building on April 1, 1994, she suffered chest pains, which were

later diagnosed as symptoms of a panic attack.¹ Subsequent to this incident, claimant underwent psychiatric treatment for a panic disorder. On May 5, 1997, claimant filed a claim for compensation under the Act for depression, post-traumatic stress, and chest pain related to the April 1, 1994, incident in employer's personnel office. After referral of the case to the Office of Administrative Law Judges, employer moved for summary decision on the basis that claimant was not an employee at the time of the alleged April 1, 1994 injury, and, thus, her claim is not cognizable under the Act. In support of its motion, employer produced personnel records and the affidavit of employer's human resources manager indicating that claimant was placed on LWOP status on October 19, 1985 because of her workers' compensation injury and was separated from LWOP on June 19, 1987, in accordance with Army regulations restricting LWOP to a period of one year.

In an Order Granting Employer's Motion for Summary Decision, the administrative law judge ruled that the injury allegedly sustained by claimant did not arise out of and in the course of employment pursuant to Section 2(2) of the Act, 33 U.S.C. §902(2), inasmuch as there was no employer-employee relationship between employer and claimant at the time of the alleged April 1, 1994, incident which resulted in claimant's present psychological condition. The administrative law judge found, in this regard, that there was no evidence to indicate a continued employer-employee relationship after June 19, 1987, even assuming that claimant was not notified of the termination of her employment prior to April 1, 1994.² In an Order Denying Motion for Reconsideration issued November 16, 1996, the administrative law judge ruled that the initial Decision and Order issued by Administrative Law Judge Williams on February 27, 1990 is final and, thus, is not subject to attack in this proceeding. In addition, the administrative law judge rejected claimant's contention

¹Claimant's statements regarding these events were made during a telephonic, pre-hearing conference call before the administrative law judge on October 5, 1998.

²The administrative law judge additionally found that receipt of workers' compensation benefits is not tantamount to continued employee status and, even if it were, claimant's compensation ceased on March 22, 1988.

that she remained an employee as of April 1, 1994, that contention having been considered and found to be without merit in his previous October 21, 1998 Order.

On appeal, claimant, without the assistance of counsel, challenges the administrative law judge's denial of her claim. Employer responds, urging affirmance.

As an initial matter, we hold that the administrative law judge properly decided this case in a summary decision. Under the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges, any party may move, with or without supporting affidavits, for summary decision at least twenty days before the hearing. See 29 C.F.R. §18.40(a). Any party opposing the motion may serve opposing affidavits or countermove for a summary decision. *Id.* If the pleadings, affidavits, material obtained through discovery or otherwise, or matters officially noticed show that there is no genuine issue of material fact, the administrative law judge may enter summary judgment for either party. 29 C.F.R. §§18.40(d), 18.41(a).

The purpose of the summary judgment procedure is to promptly dispose of actions in which there is no genuine issue as to any material fact. *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1, 3-4 (1990). Not only must there be no genuine issue as to the evidentiary facts, but there must also be no controversy regarding inferences to be drawn from them. *Id.* In determining if summary judgment is appropriate, the court must draw all reasonable inferences in favor of the party opposing the motion and must look at the record in the light most favorable to the party opposing the motion. See *Brockington v. Certified Electric, Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *Hahn v. Sargent*, 523 F.2d 461, 464 (1st Cir. 1975), *cert. denied*, 425 U.S. 904 (1976). To defeat a motion for summary judgment, the party opposing the motion must establish the existence of a genuine issue of material fact; a fact is material if it affects the outcome of the litigation. See *Hahn*, 523 F.2d at 464; *Hall*, 24 BRBS at 4.

In the instant case, the administrative law judge found that, even accepting claimant's account that she did not receive notification of her termination prior to April 1, 1994, the lack of notice is not dispositive of whether she was an employee as of April 1, 1994, the date of her alleged injury. As will be discussed below, we hold that any dispute as to whether claimant received prior notice of her termination is not material to resolution of the issues raised by this appeal. Therefore, we affirm the administrative law judge's determination that there was no genuine issue as to any material fact, and that the case was appropriate for summary decision.

We will now address the administrative law judge's determination that claimant was not an employee as of April 1, 1994 and, thus, any injury occurring on that date did not arise out of and in the course of employment. Section 2(2) of the Act defines the term "injury" as follows:

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

33 U.S.C. §902(2). Thus, for a claim to be compensable under the Act, the injury must arise out of and in the course of employment; therefore, an employer-employee relationship between the employer and claimant necessarily must exist at the time of injury. See *Clauss v. Washington Post Co.*, 13 BRBS 525 (1981), *aff'd mem.* 684 F.2d 1032 (D.C. Cir. 1982).

In the instant case, it is uncontroverted that claimant last performed work duties for employer on October 18, 1985, that employer voluntarily suspended its payment of compensation on March 22, 1988, and that Judge Williams ruled that further entitlement to compensation was barred by Section 33(g) in a Decision and Order issued on February 27, 1990. The record in this case, viewed in the light most favorable to claimant, reveals that the sole connection between employer and claimant subsequent to the issuance of Judge Williams' Decision and Order consisted of claimant's semiannual visits to employer's personnel office to update her employment status. That the record is capable of supporting the reasonable inference that claimant was not notified of her termination prior to her visit to employer's personnel office on April 1, 1994, is insufficient to confer on the parties an employer-employee relationship at the time of the April 1, 1994 injury. Rather, the record reflects that employer had no control over claimant, that claimant performed no services for employer, and that claimant received no wages or other employment-related benefits from employer as of April 1, 1994.³ See *Clauss*, 13

³Generally, the Board has applied three tests to determine whether an employer-employee relationship exists within the meaning of the Act; the tests are: 1) the relative nature of the work, 2) the right to control details of the work, and 3) those listed in Restatement (second) of Agency, Section 220, subsection 2, which encompass factors set forth in each of the other two tests. The administrative law judge should apply whichever test is best suited to the facts of the particular case. See *Herold v. Stevedoring Services of America*, 31 BRBS 127 (1997); *Reilly v.*

BRBS at 527. Thus, based on the facts of this particular case, we uphold the administrative law judge's finding that an employer-employee relationship no longer existed between employer and claimant at the time of the April 1, 1994 incident. We therefore affirm the administrative law judge's determination that claimant was not an employee at the time of her alleged injury on April 1, 1994 and, thus, her claim based upon an incident occurring on that date is not compensable under the Act.⁴

WMATA, 20 BRBS 8 (1987); *Tanis v. Rainbow Skylights*, 19 BRBS 153 (1986). In the instant case, the administrative law judge's failure to explicitly apply one of these three tests in his analysis of the employer-employee relationship issue does not constitute error. At the time of the alleged injury employer possessed no control over claimant, claimant performed no services for employer, and claimant received no wages or other employment-related benefits from employer; thus, application of any of the three tests would compel the conclusion reached by the administrative law judge that no employer-employee relationship existed at the time of the alleged injury.

⁴We note, in accordance with the principle that an employer is liable for a condition that is the natural and unavoidable result of the original work-related injury, that claimant's panic disorder might be viewed, not as the result of a new injury suffered on April 1, 1994, but, rather, as the natural and unavoidable result of

claimant's original 1985 work-related injury. See generally *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 144-145 (1991). Viewing the compensation claim for claimant's panic disorder in this light would not render the claim compensable, however, inasmuch as compensation for any disability arising out of the 1985 work-related injury is barred by Section 33(g) of the Act, 33 U.S.C. §933(g), in accordance with Judge Williams' 1990 Decision and Order which, not having been timely appealed, is final. 33 U.S.C. §921(a).

Accordingly, the administrative law judge's Order Granting Employer's Motion for Summary Decision and Order Denying Motion for Reconsideration are affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge