

## TOPIC 4      COMPENSATION LIABILITY

### 4.1            EMPLOYER LIABILITY

#### 4.1.1.        Contractor/Subcontractor Liability (See also Topic 5.1.)

Section 4(a) of the LHWCA provides:

**Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9. 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).

Thus, by express statutory mandate, an **employer is liable for and shall secure** the payment of compensation, medical benefits, and death benefits due to an injured employee. Section 32 of the LHWCA permits an employer to secure payment of compensation by contracting for insurance or furnishing satisfactory proof to the Secretary of its financial ability to pay as a self-insurer. 33 U.S.C. § 932(a). See Insurance Co. of North America v. U.S. Dep't of Labor, 969 F.2d 1400, 1409, 26 BRBS 14 (CRT) (2d Cir. 1992), aff'g 25 BRBS 71 (1991), cert. denied, 507 U.S. 909 (1993).

In Droogsma v. Pensacola Stevedoring Co., 11 BRBS 1 (1979), the Board concluded that the stevedoring company's insurer was responsible for payments to the decedent's widow where the decedent-employee was accidentally killed while employed by a separately operated division of the company which had state compensation insurance but did not have coverage under the LHWCA.

It is well-settled that an administrative law judge has the power to hear and resolve insurance disputes and coverage necessary to the resolution of a claim under the LHWCA. Abbott v. Universal Iron Works, 23 BRBS 196, 200 (1990), aff'd in part, part on recon., 24 BRBS 169 (1991). See also Jourdan v. Equitable Equipment Co., 21 BRBS 45 (ALJ) (1988), 889 F.2d 637, 23 BRBS 9 (CRT) (5th Cir. 1989), 25 BRBS 317 (1992) (vacating denial of petition for modification). (For a discussion of the Board's authority to resolve insurance contract disputes, see Topic 21, infra). However, see Temporary Employment Services v. Trinity Marine Group, Inc., 261 F.3d 456, (5th Cir. 2001) (Contract dispute was not integral to the longshore compensation claim and ALJ did not have statutory authority to determine this issue). (For more on this, see Topic 5.2.2.)

Prior to the 1984 Amendments, Section 4(a) provided that a contractor had to secure payment of benefits if a subcontractor working under it did not. See Stillwell v. Home Indem. Co., 5 BRBS 436 (1977), appeal dismissed on other grounds, 597 F.2d 87 (**6th Cir.**), cert. denied, 444 U.S. 869 (1979). In Washington Metropolitan Area Transit Authority v. Johnson, 467 U.S. 925 (1984), the **United States Supreme Court** observed that Section 4(a) "simply places on general contractors a contingent obligation to secure compensation whenever a sub-contractor has failed to do so." Id. at 938. The **Court** recognized a legislative compromise, a *quid pro quo*, in which employees surrendered common law remedies against the employer in exchange for compensation for work-related injuries. The employer's reward is immunity from employee tort suits. See Section 5(a); Barnard v. Zapata-Haynie Corp., 975 F.2d 919, 920 (**1st Cir.** 1992); Grantham v. Avondale Indus., 964 F.2d 471, 472 (**5th Cir.** 1992).

In Johnson, the **Court** held that by securing "**wrap-up**" insurance coverage for employees of subcontractors (thus "pre-empting" subcontractors by purchasing insurance before giving them the opportunity to fail or refuse to secure coverage), WMATA could be considered the "employer" of its subcontractor's employees for purposes of the exclusivity provision of Section 5(a) of the LHWCA and thus insulated from tort suits filed by injured workers of subcontractors.

Congressional intent to statutorily overrule Johnson by the 1984 Amendments to Section 4(a) resulted in clarification of the liabilities of contractors and general contractors. See Peter v. Hess Oil Virgin Islands Corp., 903 F.2d 935, 940-41 (**3d Cir.** 1990), cert. denied, 498 U.S. 1067 (1991); West v. Kerr-McGee Corp., 765 F.2d 526, 530 (**5th Cir.** 1985). Thus, Sections 4(a) and 5(a) were amended to provide that a general contractor is liable for compensation payments **only if** the subcontractor fails to secure payment of compensation, but that a subcontractor shall not be deemed to have failed to secure payment if the general contractor provides such insurance.

In Total Marine Services v. Director, OWCP, the **Fifth Circuit** held that under the borrowed employee doctrine "[o]ne may be in the general service of another, and, nevertheless, with respect to particular work, may be transferred, with his own consent or acquiescence, to the service of a third party, so that he becomes the servant of that person with all the legal consequences of the new relationship." Total Marine Services v. Director, OWCP, 87 F.3d 774, 777 (**5th Cir.** 1996), citing Standard Oil Co. v. Anderson, 212 U.S. 215 (1909) (emphasis in original). This leads to the conclusion that the borrowing employer is liable for securing the injured claimant's compensation benefits under the LHWCA. Id.; see generally Champagne v. Penrod Drilling Co., 341 F.Supp. 1282, 1283 (W.D.La.1971), aff'd, 459 F.Supp. 1042 (**5th Cir.**), modified on other grounds, 462 F.2d 1372 (1972), cert denied 409 U.S. 1113, (1973); West v. Kerr-McGee Corp., 765 F.2d 526 (**5th Cir.** 1985).

**[ED. NOTE:** *There is language in the holding of Total Marine Services that "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."* 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). This is a singular instance of

*the court endorsing such a reimbursement. The LHWCA has no provisions for this and the **Fifth Circuit** did not give any explanation for its holding. The most plausible explanation is that the **Fifth Circuit** found that the subcontractor had breached its duty under general contract law to provide for the compensation payments; and thus, equity says that they should not be allowed to profit from their dereliction of duty. This is an isolated case and should be narrowly limited to its facts. **For more on the Borrowed Employee Doctrine, see the end of this section.]***

The 1984 Amendments clearly deny tort immunity to contractors except in circumstances where the contractor has been forced to fulfill its role as a provider of compensation. Peter v. Hess Oil Virgin Islands Corp., 903 F.2d at 941; see also Joint Explanatory Statement of the Conference Committee, H.R. Rep. 98-1027, 98th Cong., 2d Sess., 24, reprinted in Vol. A BRBS 5-69, 5-71; 1984 U.S. Code Cong. & Ad. News 2772, 2774.

But see Hyon-Su v. Maeda Pac. Corp., 905 F.2d 302, 307 n.10 (**9th Cir.** 1990) (insistence by general contractor that insurance coverage be provided should not result in loss of exemption from third-party suit); Keener v. Washington Metro. Area Transit Auth., 800 F.2d 1173, 1175 (**D.C. Cir.** 1986), cert. denied, 480 U.S. 918 (1987) (1984 Amendments have no retroactive effect on pending claims).

In Director, OWCP v. National Van Lines, 613 F.2d 972, 11 BRBS 298 (**D.C. Cir.** 1979), cert. denied, 448 U.S. 907 (1980), the court held that:

A general contractor will be held secondarily liable for workmen's compensation 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 contractor's own employees** rather than by independent contractor.

613 F.2d at 986-87, 11 BRBS at 316 (emphasis added). Since the claimant was injured while performing duties which had been delegated to the claimant's employer by National Van Lines, and which National Van Lines had itself been under a contractual obligation to perform, the **D.C. Circuit** held National Van Lines secondarily liable for benefits pursuant to Section 4(a).

In Dailey v. Troth, 20 BRBS 75 (1986), the Board, following the rationale of National Van Lines, concluded that an investment partnership was not a contractor within the meaning of Section 4(a) and thus not obligated to provide compensation insurance to an injured employee employed by an uninsured construction company performing carpentry work for the investment partnership. The Board found that the carpentry work was neither a subcontracted fraction of a larger project or work normally conducted by the partnership's employees. For a discussion of employee-employer relationships, see Carle v. Georgetown Builders, 19 BRBS 158 (1986).

Where a subcontractor obtained workers' compensation insurance from an insurer which was later adjudicated insolvent, the Board determined that the subcontractor "secured" insurance, thus

exempting its general contractor from compensation liability under Section 4(a). B.S. Costello, Inc. v. Meagher, 867 F.2d 722, 22 BRBS 24 (CRT) (1st Cir. 1989), aff'g 20 BRBS 151 (1987).

In the absence of a "**cut-through**" agreement between a primary insurance carrier and an insurance company authorized to do business in the state of the situs of injury, a state insurance guaranty association cannot be held liable for an insolvent carrier's liability. Deville v. Oilfield Indus., 26 BRBS 123, 128-29 (1992).

In Sketoe v. Exxon Co., U.S.A., 188 F.3d 596, 33 BRBS 151 (CRT) (5th Cir. 1999), the United States Government executed an oil and gas lease of a tract off the Louisiana coast to Exxon. Exxon subsequently contracted with Dolphin Titan (DT) to drill on the tract. Sketoe was an employee of DT and, in the course and scope of his employment, he injured his hand. DT's compensation carrier paid benefits until it became insolvent. DT paid benefits until it also became insolvent about a year later. Sketoe then filed a claim against Exxon for payment of benefits, alleging that Section 4(a) required Exxon to cover for its subcontractor, DT.

The **Fifth Circuit** noted that for liability to attach to Exxon for the compensation benefits, Exxon must have been the subject of the same contractual obligation that DT contracted with Exxon to perform. This is the "**two contract**" requirement in which "a general employer will be held secondarily liable for workmen's compensation when the injured employee was engaged in work either that is a subcontracted fraction of a large project or that is normally conducted by the general employer's own employees rather than by independent contractual obligations." The court stated that the LHWCA distinguishes between employers who are owners and those who are general contractors working under contractual obligations to others. Only if there is a determination that Exxon delegated "the performance of portions of its contractual obligations" to DT is the Section 4(a) relationship formed thereby making Exxon statutorily liable for Sketoe's worker's comp benefits.

The **Fifth Circuit** then reasoned that because Sketoe was the employee of a drilling contractor, the determination depends upon the nature of the drilling obligation that Exxon owed to the Government. The court examined Louisiana mineral law to determine the obligations of Exxon. Accordingly, the **Fifth Circuit** concluded that Exxon is most appropriately considered as the owner of a real right, when it engaged the drilling services of DT, and was not a general contractor passing its own purely contractual obligation to its subcontractor, DT.

### **Borrowed Employee Doctrine**

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). The test was subsequently **applied by the Board** in Vodanovich v. Fishing Vessel Owners Marine Ways, Inc., 27 BRBS 286 (1994); Pilipovich v. CPS Staff Leasing, Inc., 31 BRBS 169 (1997). The nine factors to be considered are:

- 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?
- 9) was the new employment over a considerable length of time?

The **Fifth Circuit** has held that the principle 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 resulting risks incurred; and whether the new employment was for a sufficient duration that the employee could evaluate the risks and acquiesce to them. Gaudet, 562 F.2d at 357.

The **Fifth Circuit** also developed the borrowed employee doctrine in Total Marine Services, Inc. v. Director, OWCP, 87 F.3d 774, 30 BRBS 62 (CRT), reh'g en banc denied, 99 F.3d 1137 (**5<sup>th</sup> Cir.** 1996). There, Total Marine had employed the claimant through CPS, a temporary employment agency. When the claimant was injured on the job and filed a claim against his employer, CPS, the latter turned about and filed a claim against Total Marine as a borrowing employer. The ALJ originally dismissed Total Marine and the BRB reversed and remanded to the ALJ for an award of reimbursement from Total Marine to CPS.

Following the order of the Board, Total Marine appealed to the **Fifth Circuit** claiming that no reimbursement was due because applying the borrowed employee doctrine in this manner negated the clear statutory language of Section 4(a). The **Fifth Circuit** affirmed the Board's decision. The court had previously held in West v. Kerr-McGee Corp., 765 F.2d 526 (**5<sup>th</sup> Cir.** 1985), that its decision in Ruiz had survived the 1984 amendments to the LHWCA. Based upon this holding, the court concluded that "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 Services, Inc., 87 F.3d 774, 779, 30 BRBS 62, 66 (CRT).

The Board extended the Fifth Circuit's analysis of the borrowed employer situation in Ricks v. Temporary Employment Services, Inc., 33 BRBS 81 (June 8, 1999). Citing Total Marine Services, the Board held that a lending employer and its carrier could be liable to the claimant under a contract indemnifying the borrowing employer. In that case, Ricks was an employee of Temporary Employment Services, Inc (TESI). TESI was a temporary employment service like CPS in Total Marine. TESI assigned Ricks to work for Trinity through a contract which required TESI to indemnify the borrowing employer. Based on this clause, the Board held that the ALJ had properly required TESI to indemnify the borrowing employer, Trinity, for the worker's compensation claim brought by Ricks.

***[ED. NOTE: When a borrowing employer exists and is liable, as in Total Marine Services, the Board has held that the borrowing employer may be joined as a party to the claim even if they were not originally named as a party in the original claim. Further, the claimant's nominal employer in that situation has standing to seek reimbursement from the borrowing employer before the ALJ. See Vodanovich v. Fishing Vessel Owners Marine Ways, Inc., 27 BRBS 286, (BRB 1994).]***

## 4.2 LIABILITY REGARDLESS OF FAULT

Section 4(b) of the LHWCA provides:

**Compensation shall be payable irrespective of fault as a cause for the injury.**

33 U.S.C. § 904(b).

In Fields v. Henderson, 1 BRBS 37 (1974), aff'd mem. sub nom. Fields v. Director, OWCP, 535 F.2d 1324 (D.C. Cir. 1976), the Board rejected an employer's contention that the decedent-employee killed on the job exceeded the scope of his employment by drawing his own weapon in an attempt to prevent an armed robbery of the employer's place of business. See also Woodham v. U.S. Navy Exch., 2 BRBS 185 (1975) (whether employee was an aggressor or merely a participant, work-related injury occurred as a result of an altercation on the job); Kemp v. Evening Star Newspaper Co., 1 BRBS 195 (1974), aff'd, 533 F.2d 1224, 3 BRBS 379 (D.C. Cir. 1976) (death of employee arose out of a zone of special danger).