U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 19-0373

FASELA SHEREN	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
LAKESHORE ENGINEERING SERVICES, INCORPORATED	)	
	)	
	)	DATE ISSUED: 08/20/2020
and	)	
	)	
ALLIED WORLD ASSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Claim of Steven B. Berlin, Administrative Law Judge, United States Department of Labor.

Joshua T. Gillelan II (Longshore Claimants' National Law Center), Washington, D.C., Eric A. Dupree and Paul R. Myers (Dupree Law, LLC), Coronado, California, and Howard Grossman (Grossman Attorneys at Law), Boca Raton, Florida, for Claimant.

John R. Soler (Skarzynski Marick & Black LLP), New York, New York, for Employer/Carrier.

Before: ROLFE, GRESH and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Steven B. Berlin's Decision and Order Denying Claim (2015-LDA-00314) rendered on a claim filed pursuant to the Longshore

and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq.* (Act), as extended by the Defense Base Act, 42 U.S.C. §1651 *et seq.* (DBA). We must affirm the administrative law judge's findings of fact and conclusions of law if they are rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant sustained work-related physical and psychological injuries when she was stabbed in January 2013 while working in Afghanistan. Allied World Assurance Company (Allied), the potentially liable carrier, filed a motion for summary decision, and the administrative law judge found the DBA does not cover Claimant's injuries. Having granted Allied's motion, the administrative law judge dismissed Claimant's claim against Lakeshore Engineering Services (Lakeshore) and its carrier, Allied, and three individuals who had been joined due to their potential liability in light of Lakeshore's 2014 bankruptcy. *See* Allied Renewed Motion for Summary Decision (2016) Exh. 1 (M/SD). Claimant appeals the decision.[1] Allied responds, urging the Benefits Review Board to affirm the administrative law judge's decision. Claimant has not replied.[2] The undisputed facts of

[1] Grant C. McCullagh, Andrew J. Haliw III, and Jeff R. Miller were joined to this case for their potential joint and several liability when it appeared Allied might not accept or cover this claim. *See* 33 U.S.C. §938(a). Ultimately, the administrative law judge dismissed all three for two reasons: 1) Allied subsequently agreed to accept liability if Claimant is covered; and 2) Claimant is not covered; therefore, no party is liable for benefits. Decision and Order at 20. Claimant attached their names to her Notice of Appeal. On December 19, 2019, two of the three filed an uncontested motion to be dismissed from the case. They assert Claimant did not raise any contentions against them in her petition for review and brief, but raised arguments against Lakeshore and Allied only. Uncontested M/Dismiss at 2. Because Allied validly insured Lakeshore, Claimant does not oppose their motion. *Id.* at Exh. A. We grant their uncontested Motion to Dismiss and affirm the dismissal of all three individuals from this case. The administrative law judge's conclusion with regard to their liability has not been appealed. *Scalio v. Ceres Marine Terminals, Inc.*, 41 BRBS 57 (2007). In addition, Allied's coverage precludes individual liability. 33 U.S.C. §§904(a), 905(a), 932, 938; 42 U.S.C. §1651(a)(4).

[2] Claimant requested an extension of time to file a reply brief, which the Board granted, giving her 10 days from receipt of the Order within which to file a reply. Order (Jan. 24, 2020). She did not timely file a reply brief. On February 21, 2020, and April 22, 2020, Allied filed Motions to Strike any reply Claimant may file because it would be untimely. Allied also moved to close the appellate record. We grant Allied's motions and close the record.

this case, taken from the administrative law judge's decision, are set forth below. *See* Decision and Order at 3-8.

The Facts

The United States Air Force (Air Force) contracted with Lakeshore for the construction of an Afghan armed forces recruitment center in Mazar-e-Sharif, Afghanistan. In August 2012, Lakeshore subcontracted with Select Construction (Select), owned and operated by Mike Omar and Charles (Yusef) Brown, to work on the project. Brown acted as Select's on-site manager. Decision and Order at 3. Later that month, Claimant, an Afghan citizen living in the United States, joined Brown in Afghanistan and began working on-site for Select as the project manager and linguist; her job included administrative duties such as invoicing Lakeshore. *Id.* at 3-4; M/SD Exh. 5 at 26.

Claimant and Brown became dissatisfied with Select's operations because they and the construction workers were not being paid. In October 2012, while still employees of Select, they formed their own Afghan corporation, Yusef Sheren Construction Company (d/b/a Y&S Construction) (Y&S), with the goal of taking over the Lakeshore subcontract from Select. Decision and Order at 4.

On November 7, 2012, Lakeshore's project manager, Ken Ronsisvalle, ordered Select to stop construction due to poor workmanship and ordered the workers to vacate the premises. Brown and Claimant approached Ronsisvalle to propose he lift the stop-work order and allow a supply of Y&S workers to complete Select's subcontract. They also assured him Y&S would bid on the next phase of construction. Ronsisvalle agreed and construction continued under the Select subcontract using Y&S employees. Decision and Order at 4-5.[3]

Claimant continued to perform administrative services for Select, but, with the approval of Brown -- still Select's on-site manager -- she diverted the Lakeshore payments to a Y&S bank account. In December 2012, Omar objected to the change in bank account for receipt of payments, and Brown and Claimant asked Ronsisvalle about terminating Select's subcontract and awarding it to Y&S. Decision and Order at 5-6.

Thereafter, Brown, Claimant, Omar, and Ronsisvalle met to discuss the problems with Select's work performance and the possibility of Y&S taking over the project, but the meeting resolved nothing. As only Lakeshore's Procurement Department, and not

[3] Neither Select nor Y&S had secured DBA insurance. Allied provided Lakeshore's DBA insurance. Both Lakeshore and Y&S are now defunct. Decision and Order at 8.

Ronsisvalle, could authorize any official change, Select remained the subcontractor.[4] Decision and Order at 6.

Between December 2012 and mid-January 2013, Claimant continued to send and receive emails concerning the project from her Select email account. She also worked to procure the next phase of the Lakeshore contract for Y&S by attempting to secure DBA insurance and obtaining the forms Lakeshore required for vetting purposes. Decision and Order at 6; *see also* Cl. Affidavit (Aug. 17, 2015) at attachments.

Before she accomplished these tasks, an Afghan Lakeshore employee attacked Claimant on January 15, 2013, in the laundry room of the Lakeshore facility where she and Brown were living. He stabbed her multiple times in her face, back, hands, and neck, resulting in physical and psychological injuries. Decision and Order at 2, 4, 7.

Claimant filed a claim for benefits under the DBA.

The Motion for Summary Decision and the Administrative Law Judge's Decision

In its motion for summary decision, Allied asserted it is not liable for Claimant's compensation because she was not working for Select, the subcontractor, or Lakeshore, the general contractor, at the time of the attack. *See generally* 33 U.S.C. §904(a).[5] Claimant opposed the motion, making multiple arguments but focusing on her relationship with Lakeshore, either as a borrowed employee or as to the existence of an "implied-in-fact" contract between Lakeshore and Y&S or Lakeshore and herself. She also raised a promissory estoppel argument to preclude Lakeshore from denying the existence of a contract.

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[4] Y&S employees continued to perform the construction work under the Select subcontract. Decision and Order at 5; M/SD Exh. 5 at 34-39. Select remained the subcontractor until May 23, 2013. Decision and Order at 7.

[5] Section 4(a) of the Act, 33 U.S.C. §904(a), provides:

> 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.

The administrative law judge granted Allied's motion. He determined Allied established no written, oral, or implied-in-fact contract existed between Lakeshore and Y&S or Claimant, and Ronsisvalle did not have any actual or apparent authority to remove Select and award Y&S the subcontract. Decision and Order at 10-11, 13-14. The administrative law judge also found Claimant was not a Lakeshore employee based on three borrowed-employee tests: the "right to control," the "nature of the work," and the Restatement (Third) of Agency.[6] *Id.* at 15-19. He concluded Claimant was not Lakeshore's borrowed employee at the time of her injury or at any other relevant time but was an employee of Y&S solely by virtue of her response to a request for admission. He also concluded Y&S was not a government contractor or a Lakeshore subcontractor. Therefore, the administrative law judge found Allied not liable for Claimant's compensation and dismissed Claimant's DBA claim in its entirety. *Id.* at 19-21.

The Appeal

On appeal, Claimant does not challenge any particular finding but asserts the administrative law judge did not fully analyze DBA coverage. She contends the DBA covers contracts with the government as well as "subcontracts and subordinate contracts *under* such contracts," and coverage does not depend on the directness of the employment relationship. Cl. Br. at 9. Instead, complex overseas public works projects require "multi-level subcontracting" arrangements and she, as well as the Y&S construction workers, was "performing the 'public work'" the Air Force, Lakeshore, and Select contracts required. *Id.* at 10. Consequently, she asserts: "Regardless of by whom she was *employed* at the time of the injury, she was unquestionably *performing overseas 'public work' 'under'* a contract

[6] The file contains two claim for compensation forms, dated March 5, 2013, and January 7, 2014. The first identified Lakeshore as the responsible employer, and the second identified Select as the responsible employer. M/SD Exhs. 12, 13. The administrative law judge noted that, by the time the case was before him, Claimant identified Lakeshore as the responsible employer and had admitted she was not a Select employee. Decision and Order at 2 n.1; M/SD Exh. 9.

within §1(a)(4)."[7] *Id.* at 11.[8] Claimant also contends Select's subcontract required the work she performed, and Brown and Ronsisvalle approved it; thus, "[t]he most natural characterization of this arrangement is that Select, having been unable to perform its subcontract, *sub-contracted it to Y&S*." *Id.* at 14 (asserting the delegation of Select's work to Y&S is sufficient to establish coverage). Claimant contends Brown had the authority on Select's behalf to grant a subordinate contract to Y&S and, regardless, Lakeshore would be responsible for either Y&S or Select as uninsured subcontractors under 33 U.S.C. §904(a). *Id.* Claimant asks the Board to hold there is DBA coverage as a matter of law and remand the case for consideration of the remaining issues. *Id.* at 15-16.

Allied argues the "subordinate contract" theory was not raised before the administrative law judge in Claimant's response to the Motion for Summary Decision, so the Board should not address it. Allied Br. at 7-8. If addressed, Allied asserts the DBA's coverage provision does not support Claimant's interpretation: she was not working on a

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[7] Section 1(a)(4) of the DBA provides:

> Except as herein modified, the provisions of the Longshore and Harbor Workers' Compensation Act, approved March 4, 1927 (44 Stat. 1424), as amended, shall apply in respect to the injury or death of any ***employee*** *engaged in any employment—*
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> ***
>
> (4) *under a contract* entered into with the United States or any executive department, independent establishment, or agency thereof (including any corporate instrumentality of the United States), *or any subcontract, or subordinate contract with respect to such contract*, where such contract is to be performed outside the continental United States and at places not within the areas described in subparagraphs (1)-(3) of this subdivision, for the *purpose of engaging in public work*, and every such contract shall contain provisions requiring that the contractor (and subcontractor or subordinate contractor with respect to such contract) [secure compensation insurance].

42 U.S.C. §1651(a)(4) (all emphasis added); *see, e.g., Irby v. Blackwater Security Consulting*, 44 BRBS 17 (2010).

[8] Claimant references the DBA's legislative history, which intended the "comprehensive breadth" of coverage and the uniform availability of remedy. Cl. Br. at 8-9.

"public work" project at the time of her injury but was working to develop her own business with Lakeshore. Even if Claimant was doing public work, it asserts her argument is without merit because she was not employed under any contract. *Id.* at 8-13.

Analysis

In determining whether to grant a party's motion for summary decision, the administrative law judge must determine, after viewing the evidence in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the moving party is entitled to a decision in its favor as matter of law. *Morgan v. Cascade General, Inc.*, 40 BRBS 9 (2006); *see also O'Hara v. Weeks Marine, Inc.*, 294 F.3d 55 (2d Cir. 2002); *Brockington v. Certified Elec., Inc.*, 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026 (1991); *R.V. [Villaverde] v. J. D'Annunzio & Sons*, 42 BRBS 63 (2008), *aff'd sub nom. Villaverde v. Director, OWCP*, 335 F. App'x 79 (2d Cir. 2009); 29 C.F.R. §18.72. The parties do not dispute the administrative law judge's factual findings. Therefore, the question on review is whether the administrative law judge properly applied the law to those facts to grant summary decision. *Villaverde*, 42 BRBS 63.

We must determine whether the administrative law judge properly found Claimant is not a DBA-covered employee. Under Section 1(a)(4), a claimant must be "an employee engaged in any employment . . . under a contract . . . or any subcontract, or subordinate contract with respect to such contract . . . for the purpose of engaging in public work . . . ." 42 U.S.C. §1651(a)(4). The term "employee" is not defined in the DBA; its meaning must come from the "conventional master-servant relationship as understood by common-law agency doctrine." *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323 (1992); *Irby v. Blackwater Security Consulting*, 44 BRBS 17, 25 (2010). Therefore, "one must be an 'employee' under a common law 'master-servant' test in order to be covered under the DBA as 'an employee engaged in any employment.'" *Irby*, 44 BRBS at 25;[9] *see* 42 U.S.C. §1651(a)(4).

Claimant had three potential employers at the time of her injury -- Lakeshore, Select, and Y&S -- and the administrative law judge addressed only two of these entities. If Claimant worked for Lakeshore, the contractor, or Select, the subcontractor, she would be covered. 42 U.S.C. §1651(a)(4). He found she was not a Lakeshore employee, based on her admission, her deposition, and the application of three borrowed-employee tests. Decision and Order at 15-19. Based solely on her response to a request for admission that

[9] The "master-servant" tests include those the administrative law judge used to find Claimant was not a Lakeshore borrowed employee. *See Irby*, 44 BRBS at 25 n.17.

she did not consider herself a Select employee -- without any analysis -- the administrative law judge concluded Claimant was not a Select employee and, consequently, had to be an employee of Y&S. As a Y&S employee, he found she was not a covered employee because Y&S had no contract. *Id.* at 2 n.1, 18; M/SD Exh. 9; *see also* M/SD Exh. 5 at 29-30 (Claimant's deposition testimony that she stopped working for Select in October 2012 when Y&S formed). The administrative law judge's acceptance of Claimant's subjective belief of her employment situation as independently conclusive of the legal issue of her employment status with Select, however, does not comport with law.

Based on Rule 36 of the Federal Rules of Civil Procedure, Section 18.63 of the Office of Administrative Law Judges' Rules of Practice and Procedure provides for requests for admissions. 29 C.F.R. §18.63. A long line of precedent analyzing Rule 36 establishes that "[r]equests for admissions cannot be used to compel an admission of a conclusion of law." *Playboy Enterprises, Inc. v. Welles*, 60 F. Supp. 2d 1050, 1057 (S.D. Cal. 1999); *see also Commercial Money Ctr., Inc. v. Ill. Union Ins. Co.*, 508 F.3d 327, 336 (6th Cir. 2007); *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 377 (3d Cir. 2007); *AES Puerto Rico, L.P. v. Trujillo-Panisse*, 133 F. Supp. 3d 409, 427 (D.P.R. 2015) ("The Court is not obligated to accept as binding judicial admissions statements that are 'legal conclusions'"); *Tobkin v. The Florida Bar*, 509 B.R. 731, 734 (S.D. Fla. 2014) ("No admission made during discovery can affect [a] legal conclusion.").[10]

The determination of whether a claimant is an "employee" under the DBA or the Act is a conclusion of law based on application of the law to the facts. *See generally Southwest Marine, Inc. v. Gizoni*, 502 U.S. 81 (1991) (determining longshoreman versus seaman); *Newton-Sealey v. ArmorGroup Services (Jersey), Ltd.*, 49 BRBS 17 (2015) (borrowed employee/parent company issues). Claimant's "admission" she was not Select's employee after October 2012 was merely a statement of her perception of her employment status. It is not singularly determinative of the legal question of her

[10] In *Tobkin*, the court addressed whether a sanction against a disciplined attorney can be discharged in bankruptcy. The court held it could not because the Florida Bar was acting as a "governmental entity," so the attorney's obligation was non-dischargeable. The attorney appealed, arguing the Florida Bar admitted it is not a government entity in response to his request for admissions. The bankruptcy court concluded the attorney's request had been improper because it "asked for a conclusion of law." *Tobkin*, 509 B.R. at 733. It explained the Bar's admission "cannot alter its actual legal status, nor can it prevent a court from determining its actual legal status under 11 U.S.C. §523(a)(7) as a matter of law." *Id.* at 734.

employment status. The administrative law judge erred in treating it as such.[11] *Welles*, 60 F. Supp. 2d at 1057. Instead, he should have fully considered Claimant's employment activities to determine if she was Select's employee at the time of her injury. *Irby*, 44 BRBS at 25. Because the administrative law judge's analysis was based on an error of law, Allied is not entitled to summary decision. *See generally Wilson v. Boeing Co.*, 52 BRBS 7 (2018). Therefore, we vacate the administrative law judge's decision granting Allied's motion for summary decision. *Id.*

Nevertheless, we need not remand this case for further consideration of Claimant's employment status. The administrative law judge's findings of fact, which the parties do not dispute, and the application of any master-servant test to those facts supports one conclusion: Claimant was Select's employee at the time of the attack.[12] *See, e.g., B.E. [Ellis] v. Electric Boat Corp.*, 42 BRBS 35 (2008).

First, the administrative law judge's findings establish: 1) Lakeshore contracted with the Air Force and with Select to complete a public work in Afghanistan, Decision and Order at 3; 2) Select hired Claimant, she arrived in Afghanistan as its employee, and thereafter worked for Select, *id.* at 3-4; 3) once the Select construction workers were prohibited from the premises, Claimant's company, Y&S, supplied the workforce to satisfy Select's contractual obligation, *id.* at 4-5; and 4) Select remained Lakeshore's subcontractor up to and beyond the time Claimant was injured, *id.* at 7. None of these findings supports the conclusion that Select had terminated Claimant's employment.

Although Claimant subjectively believed she no longer worked for Select after Y&S began performing Select's contractual duties, her objective behavior was consistent with her Select employment. In November and December 2012, after Y&S was created, Claimant continued to perform her work under the Select contract, and Lakeshore

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[11] Notably, although Claimant also "admitted" she was not a Lakeshore employee, the administrative law judge fully addressed this issue by applying the various employment tests; he did not summarily accept Claimant's conclusion. Decision and Order at 15-19.

[12] Claimant sufficiently raised the issue of her employment status in her opposition to the motion for summary decision. Issue #6 in her opposition brief stated: "Carrier is liable for Claimant's injuries regardless of whether she is found to have been employed by Select [or] Y&S, if neither had DBA insurance at the time of her attack." Cl. Opp. Br. at 2. She reasoned that, under 33 U.S.C. §904(a), "the prime contractor and/or its carrier are liable for all downstream DBA claims of subcontractors[,]" and this analysis applies to both Select and to Y&S. *Id.* at 27-28; *see also* Order Vacating Hearing (Dec. 23, 2015), slip op. at 3.

continued to pay Select even though the funds were then diverted to Y&S. Decision and Order at 5. Moreover, as the administrative law judge acknowledged, Claimant sent an invoice to Lakeshore using her Select email account on January 13, 2013, two days before the attack, and she received a project-related email from Lakeshore management addressed to her Select email account on January 17, 2013, two days after the attack. *Id.* at 6; *see* Cl. Affidavit (Aug. 17, 2015) at attachments. No party disputes these facts, and the January emails establish Claimant continued to work for Select through the time of the attack.

Second, the undisputed facts conclusively establish an employer/employee relationship under the master-servant tests. Under the "right to control" test, Select had the right as the subcontractor to control the details of Claimant's work which supported its contract with Lakeshore even after Y&S employees took over Select's work. It also controlled the method of making payments to her because Y&S did not receive any payments except those Brown, as Select's manager, approved and funneled through Select. Because Select directly hired her, it retained the right to fire her.[13] *Cruz v. Nat'l Steel & Shipbuilding Co.*, 910 F.3d 1263, 52 BRBS 41(CRT) (9th Cir. 2018); *Herold v. Stevedoring Services of America*, 31 BRBS 127 (1997); *Tanis v. Rainbow Skylights*, 19 BRBS 153 (1986).

Under the "nature of the work" test, it is clear Claimant's job, even if under the guise of a "subcontract" with Y&S, was a regular part of Select's business related to its contract with Lakeshore and was not a separate or highly-skilled calling.[14] Also, she was paid from funds originating with Lakeshore, and because Select was uninsured, she typifies the employee intended to be covered. *American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001); *Carle v. Georgetown Builders, Inc.*, 19 BRBS 158 (1986). Under the Restatement test, which includes the factors above, we reach a similar result. *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990).

Having demonstrated the undisputed facts establish Claimant was a Select employee, and as nothing in the record establishes she ceased working for Select at any time prior to her injury -- other than her subjective opinion that contradicts the objective evidence -- we hold, on the particular facts of this case, Claimant remained a Select

[13] Who supplied the equipment, the fourth element of the test, is unclear.

[14] Though Claimant also acted as an interpreter, which may be considered highly skilled, her primary job was that of a project manager, and she continued to perform the work she was originally hired to perform, as evidenced by the January 13, 2013, invoice.

employee during her time in Afghanistan, including at the time of the attack.[15] If the administrative law judge had not improperly given conclusive weight to Claimant's admission, his undisputed findings of fact would have led him to this legal conclusion. As a Select employee, Claimant was "unquestionably *performing overseas 'public work' 'under'* a contract within §1(a)(4)" around the time she was injured. Thus, should her claim prove otherwise meritorious on remand, the DBA covers her injury and Allied, as Lakeshore's carrier, is liable for any benefits awarded. 33 U.S.C. §904(a); 42 U.S.C. §1651(a)(4); *see generally Tisdale v. American Logistics Services*, 44 BRBS 29 (2010); *Fitz Alan-Howard v. Todd Logistics Inc.*, 21 BRBS 70 (1988).

Accordingly, we reverse the administrative law judge's finding that Claimant is not a Select employee, vacate his Decision and Order Denying Claim, and remand this case for him to address any remaining issues between the parties on the merits.[16]

SO ORDERED.

JONATHAN ROLFE
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge

[15] Although Claimant's work "developing business" for Y&S is not covered employment, *Z.S. v. Science Applications Int'l Corp.*, 42 BRBS 87, 93 (2008), it is irrelevant because it does not negate her simultaneous work for Select. *See generally Oilfield Safety & Machine Specialties, Inc. v. Harman Unlimited, Inc.*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980) (affirmed finding the claimant had two employers); *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in the result only) (a claimant can have two employers).

[16] In light of our decision, we need not address Claimant's remaining arguments on appeal.