BRB No 00-0322 BLA

KENNETH KOCH Claimant-Respondent v. MIDDLEPORT MATERIALS, INCORPORATED Employer-Petitioner KOCHER COAL COMPANY and AUSTIN POWDER COMPANY Employer-Respondents TRAVELERS INSURANCE COMPANY Carrier DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order on Remand of Ainsworth H. Brown, Administrative Law Judge, United States Department of Labor.

Debra A. Smith, (Krasno, Krasno & Quinn Law Offices), Pottsville, Pennsylvania, for claimant.

Frank L. Tamulonis, Jr. (Zimmerman, Lieberman & Derenzo, LLP), Pottsville, Pennsylvania, for Middleport Materials, Incorporated.

Donald C. Ligorio (Hourigan, Kluger, Spohrer & Quinn), Wilkes-

Barre, Pennsylvania, for Kocher Coal Company.

John P. Neblett (Reed, Smith, Shaw & McClay), Harrisburg, Pennsylvania, for Austin Powder Company.

Sarah M. Hurley (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: McGRANERY and McATEER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer, Middleport Materials Incorporated (MMI), appeals the Decision and Order on Remand (96-BLA-1725) of Administrative Law Judge Ainsworth H. Brown denying modification on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). This case is before the Board for the second time. Previously, the Board vacated the administrative law judge's decision denying employer's request for modification of its designation as the responsible operator, and remanded the case for the administrative law judge to hold a hearing. *Koch v. Middleport Materials, Inc*., BRB No. 98-0215 BLA (Oct. 26, 1998)(unpub.). On remand, after conducting a hearing, the administrative law judge found that MMI is the responsible operator. Accordingly, he denied employer's request for modification.

On appeal, MMI contends that the administrative law judge made several errors in finding that MMI was properly identified as the responsible operator. Claimant has not filed a response, but the Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The administrative law judge who awarded benefits to claimant in 1994 found that MMI met all of the criteria for identification as the responsible operator. *See* 20 C.F.R. §§725.491, 725.492, 725.493; Director's Exhibit 118. Employer's request for modification challenged that finding as a mistake of fact pursuant to 20 C.F.R.

§725.310. Employer alleged that, as a threshold matter, MMI did not fall within the definition of an "operator" under the Act. Employer alleged further that claimant had no coal mine employment with MMI.

Section 725.310 provides that a party may request modification of the terms of an award or denial of benefits within one year on the grounds that a change in conditions has occurred or because a mistake in a determination of fact was made in the prior decision. 20 C.F.R. §725.310(a). The United States Court of Appeals for the Third Circuit, within whose jurisdiction this case arises, has held that the administrative law judge has the authority to reconsider all the evidence for any mistake of fact in the prior decision. *Keating v. Director, OWCP*, 71 F.3d 1118, 1123, 20 BLR 2-53, 2-61-63 (3d Cir. 1995); *see O'Keeffe v. Aerojet-General Shipyards, Inc*., 404 U.S. 254, 256 (1971). The facts and procedural history relevant to employer's request for modification are as follows.

The district director initially named Kocher Coal Company (Kocher) and Austin Powder Company (Austin) as the potential responsible operators. At the March 26, 1992 hearing, claimant testified that subsequent to his employment with Kocher and Austin, he worked from 1986 to 1990 as a truck driver for W & W Construction Company (W & W), hauling rock containing coal from a bank to a breaker on the premises of Aldernay Coal Company (Aldernay), which would then extract coal from the rock. Director's Exhibit 84 at 23-42.

The "responsible operator" is the operator or other employer with which the miner had the most recent periods of cumulative employment of not less than one year. 20 C.F.R. §725.493(a). Accordingly, based on claimant's testimony, Kocher and Austin moved for remand to the district director for further investigation of the responsible operator issue. Along with its written motion to remand, Austin submitted copies of claimant's W-2 forms for 1986-1990, and stated that the W-2 forms indicated that W & W had changed its name to MMI in 1989, but remained at the same address. Director's Exhibits 86, 87. Consequently, Administrative Law Judge Paul H. Teitler ordered that the case be remanded for "the district director to notice W.W. Construction Company and Middleport Materials Inc., of 501 W. Bacon Street (Palo Alto), Pottsville, Pennsylvania, that they are a potential responsible coal mine operator. . . ." Order, Jun. 5 1992; Director's Exhibit 88.

On remand, the district director mailed two separate letters to both W & W and MMI, at the same address, relating the substance of claimant's testimony and requesting confirmation thereof. Director's Exhibits 89, 90. Mr. John W. Land, the office manager for W & W and MMI, responded by typing at the bottom of each letter, "The above information is correct 4/26/86 to 6/7/90. Mr. Koch was a truck driver." *Id*.

Thereafter, apparently in the belief that W & W and MMI were one and the

same, the district director issued an operator notification form to MMI only. Director's Exhibit 92. MMI did not respond to the notice. Subsequently, MMI was served with notice of the upcoming hearing on the claim. Director's Exhibits 98, 104. MMI did not respond to the notice or attend the hearing conducted by Administrative Law Judge Frank D. Marden on June 15, 1993. Director's Exhibit 115.

At the hearing, claimant's counsel informed the administrative law judge that "Middle Port [Materials] is the same as W & W Construction." Director's Exhibit 115 at 6. Claimant testified that he worked as a truck driver for W & W from 1986 to 1990. In so testifying, he used the terms "W & W" and "Middleport" interchangeably. Director's Exhibit 115 at 51, 55, 57, 88, 60. Claimant stated that he primarily hauled sand and stone, but that when business was slow, the owner of W & W "rented his trucks to Albany [sic] Coal Company," where claimant "hauled breaker rock from one bank into the breaker, dumped it into the hopper and left out." Director's Exhibit 115 at 52, 54. Claimant testified that he was exposed to coal dust during this work. Director's Exhibit 115 at 54, 56.

Subsequently, Judge Marden awarded benefits in a Decision and Order issued on May 26, 1994. Director's Exhibit 118. In his Decision and Order, Judge Marden found that the evidence of record indicated that W&W "became Middleport Materials, Inc.," and further established that "W.W. Construction Company/Middleport Materials, Inc." was the responsible operator. Director's Exhibit 118 at 6. The Decision and Order awarding benefits was served on MMI. Director's Exhibit 118 at 18. MMI did not request reconsideration.

Thereafter, on September 22, 1994, the district director sent MMI a letter requesting that MMI commence the payment of benefits to claimant. Director's Exhibit 124A. MMI did not respond. By letter dated January 24, 1995, the district director again requested that MMI initiate benefits payments, and also requested reimbursement for the retroactive and ongoing benefits paid to claimant by the Black Lung Disability Trust Fund. *Id*.

By letter to the district director dated March 24, 1995, MMI responded and requested modification premised on a mistake of fact. Director's Exhibit 125. MMI, through its owner, Mr. Joe Walacavage, stated that it ran a sand and gravel business and never engaged in the extraction or preparation of coal. MMI indicated that claimant drove a truck delivering sand and gravel for MMI in 1989 and 1990. MMI further indicated that claimant worked for W & W[1] as a truck driver in 1986, 1987, and 1988, during part of which time he was "loaned to Aldernay Coal Company, where he hauled rock banks to Aldernay's breaker." Director's Exhibit 125 at 1-2. MMI stated further that Mr. Land's typed responses to the district director's inquiry

[1] MMI's letter did not point out that W & W was also owned by Joe Walacavage, but this information was provided in later documentation and testimony.

letters were incorrect to the extent that they purported to confirm coal mine employment with either W & W or MMI. MMI added that it did not respond to the operator notification form because Mr. Walacavage believed that his insurance carrier was defending the claim.

Subsequently, MMI submitted the affidavits of Mssrs. Land and Walacavage. Director's Exhibit 127. Mr. Land stated that claimant worked as a truck driver for W & W from April 26, 1986 through December 10, 1998, and as a truck driver for MMI from April 8, 1989 to June 7, 1990. Director's Exhibit 127 Exhibit G. Mr. Land stated that claimant's job duties for W &W and MMI did not involve hauling rock bank to a coal breaker, and indicated that "any such duties occurred while on loan to Aldernay Coal Company," for 129 days in 1986, 110 days in 1987, and 10 days in 1988. Exhibit G at 2. Mr. Walacavage stated that he was the president of MMI and the sole proprietor of W & W, which were separate and distinct companies. Director's Exhibit 127 at 1-2. According to Mr. Walacavage, W & W provided excavation and demolition services, while MMI processed and sold sand and gravel. *Id*. He further stated that W & W never changed its name to MMI. Director's Exhibit 127 at 4.

The district director denied MMI's request for modification, and MMI requested a hearing. Director's Exhibits 130, 131. Due to Judge Marden's unavailability, the case was reassigned to Administrative Law Judge Ainsworth H. Brown, who denied MMI's request for modification without holding a hearing. Upon consideration of employer's appeal, the Board, as noted above, remanded the case for the administrative law judge to hold a hearing on MMI's request for modification. [1998] *Koch*, slip op. at 3-4.

On remand, the Director deposed Mr. Land, requested documents from MMI, and had Mr. Land testify at the July 13, 1999 hearing regarding claimant's employment history and the structure and relationship of W & W and MMI. Mr. Land testified that he maintained the books and the payroll of W & W and MMI, which operated out of the same office. Director's Exhibit 140 at 6. Mr. Land stated that claimant worked as a truck driver for W & W from 1986 through 1988, took four months off due to illness, then returned to work as a truck driver for MMI from April 1989 through June 7, 1990. *Id*. at 34-35; Hearing Tr. at 21. Both companies were owned by Mr. Walacavage, who, at some point during claimant's leave of absence, directed that all of the employees of W & W be transferred to the payroll of MMI. Director's Exhibit 140 at 6, 13-14; Hearing Tr. at 38. According to Mr. Land, the transfer of employees was done for insurance purposes, and W & W and MMI remained separate entities. Hearing Tr. at 32-33. Mr. Land testified that the employees of W & W and MMI used the same equipment and storage facilities. Hearing Tr. at 39. Mr. Land also stated that from time to time, MMI made loans to W & W so that W & W could meet its payroll and purchase equipment, and W & W in turn made loans to MMI so that MMI could cover its payroll, purchase fuel, and pay other bills. Director's Exhibit 140 at 42-43; Hearing Tr. at 32.

Mr. Land confirmed that during claimant's employment with W & W, at a time when Mr. Walacavage had no work for his trucks, Mr. Walacavage agreed to rent his trucks to Aldernay to haul bank material into a breaker. Hearing Tr. at 23. Claimant would report to work at W & W and would be instructed by either Mr. Land or Mr. Walacavage to drive a truck over to Aldernay. Hearing Tr. at 34. On any given day, Mr. Walacavage determined whether claimant would haul for W & W or for Aldernay. *Id*. Aldernay paid W & W for truck rental only. Hearing Tr. at 35. Claimant filled out time cards, which W & W used to keep track of his hours and where he worked. Hearing Tr. at 24-25, 36. W & W paid claimant's wages. Hearing Tr. at 35.

Based on all of the documentary evidence and testimony, the administrative law judge found that when claimant worked as a truck driver for W & W in 1986-88, he performed the work of a miner when he hauled rock containing coal from a bank to a breaker on the premises of Aldernay. The administrative law judge additionally found that claimant was not the borrowed servant of Aldernay, but remained the employee of W & W while performing this hauling. The administrative law judge concluded that claimant's hauling of rock bank material to Aldernay's breaker was an essential mine service, and was of sufficient duration to give W & W a continuing presence at Aldernay's mine. Consequently, the administrative law judge found that W & W was an "operator" under the Act because it was an independent contractor performing services at a mine. Finally, the administrative law judge found that claimant's last two employers, W & W and MMI, were so closely affiliated that it was appropriate for MMI to be held liable as the responsible operator. Accordingly, the administrative law judge found that no mistake of fact occurred when MMI was designated as the responsible operator. Therefore, the administrative law judge denied MMI's request for modification.

On appeal, MMI does not challenge the administrative law judge's finding that claimant's work transporting rock containing coal to Aldernay's breaker for processing constituted the work of a miner under the Act.[2] Substantial evidence supports the administrative law judge's finding, which is consistent with the law governing the extent to which a coal transportation worker may be considered a "miner" under the Act. *See Elliot Coal Mining Co. v. Director, OWCP [Kovalchick]*, 17 F.3d 616, 18 BLR 2-125 (3d Cir. 1994); *Hanna v. Director, OWCP*, 860 F.2d 88, 12 BLR 2-15 (3d Cir. 1988); *Stroh v. Director, OWCP*, 810 F.2d 61, 9 BLR 2-212 (3d Cir. 1987). Accordingly, we affirm the administrative law judge's finding that claimant worked as a miner while employed by W & W.

MMI argues that the administrative law judge erred in finding that claimant was

[2] The term "miner" includes any individual who has worked in "transportation, in or around a coal mine, to the extent such individual was exposed to coal dust as a result of such employment." 30 U.S.C. §902(d). MMI has not challenged claimant's testimony that he was exposed to coal dust while hauling rock containing coal to Aldernay's breaker.

not the borrowed servant of Aldernay when he hauled rock bank material to Aldernay's breaker. MMI contends that Aldernay, not W & W, controlled the details of claimant's hauling work for Aldernay, and thus became a borrowing employer which should have been designated as the responsible operator.

Generally, the "borrowed servant doctrine" states that where a servant is lent to another employer, the borrowing employer may be liable for claimant's workers' compensation benefits. *Hoover v. Manor Mines, Inc*., 17 BLR 1-1, 1-4 n.4 (1992). In *Hoover*, the Board endorsed the test set forth in Larson's *Workers' Compensation Law* to determine whether a worker is a borrowed servant. Under this test, an alleged borrowing employer is liable for workers' compensation only if 1) the employee has made a contract of hire, express or implied with that employer, 2) the work being done is essentially that of the borrowing employer, and 3) the borrowing employer has the right to control the details of the work. 8 A. Larson, *Workers Compensation Law* (MB) §67.01 (1998). Because workers' compensation becomes an injured employee's exclusive remedy against a borrowing employer, the requirement of a contract of hire, express or implied, is the predominant factor. "[T]here can be no compensation liability in the absence of a contract of hire between the employee and the borrowing employer;" if there is no express or implied contract of hire, "the investigation is closed." *Id*.

Here, substantial evidence supports the administrative law judge's finding that the record establishes "no contract of hire, express or implied, between claimant and Aldnernay." Decision and Order at 6. As highlighted by the administrative law judge, the owner of W & W agreed to rent his trucks to Aldernay when his other business was slack. Aldernay paid W & W for the truck rental only; W & W set claimant's work hours, maintained his time cards, and paid his wages. Claimant would report to work at W & W and Mr. Walacavage or Mr. Land would instruct him to report to Aldernay with a truck. Claimant testified that Mr. Walacavage retained the right to remove claimant from his work at Aldernay if there was gravel or sand to haul for W & W or MMI, and in fact pulled claimant "off of that job a lot of times for making his deliveries." Director's Exhibit 84 at 34. At all stages of his testimony, claimant stated that he was an employee of W & W and MMI. Under these circumstances, the administrative law judge was justified in concluding that claimant did not make an express or implied contract of hire with Aldernay and thus was not the borrowed servant of Aldernay while transporting rock bank material to Aldernay's breaker, but remained the employee of W & W. *See Hoover, supra*.

Employer alleges that the administrative law judge erred by failing to apply the formulation of the borrowed servant test set forth in *Peter v. Hess Oil Virgin Islands Corp*., 903 F.2d 935 (3d Cir. 1990). In *Hess*, the Third Circuit court emphasized two factors, whether the borrowing employer was responsible for the borrowing employee's working conditions, and whether the employment was of such duration that the borrowed employee could be presumed to have acquiesced in the risks of

his new employment. *Hess*, 903 F.2d at 942. In so doing, however, the court predicated the availability of the borrowed servant doctrine on the presence of a contract of hire. *Id*. ("[C]ompensation liability cannot exist in the absence of some express or implied contract of hire between the borrowed employee and the borrowing employer."), *applying Vanterpool v. Hess Oil V.I. Corp*., 766 F.2d 117, 126 (3d Cir. 1985)("Because the foundation of workers' compensation rests on the contract of hire, the threshold inquiry must be whether the employee made such a contract with the borrowing employer."). Thus, whereas MMI focuses on the alleged control of Aldernay over claimant's hauling work, the threshold inquiry is whether claimant made a contract of hire with Aldernay. *See Hess, supra*; *Vanterpool, supra*; *Hoover, supra*. Substantial evidence supports the administrative law judge's finding under *Hoover* that claimant made no such contract, and such finding is consistent with the law of the Third Circuit. Accordingly, we reject employer's contention and affirm the administrative law judge's finding that claimant was not the borrowed servant of Aldernay.

Employer does not challenge the administrative law judge's finding that, by hauling rock containing coal to Aldernay's breaker, W & W performed activities that qualify it as an "operator" under the Act. MMI argues only that neither W & W nor MMI owned, operated, or leased a mine, or supervised or controlled a mine facility. However, "[n]either the Act nor the regulations require . . . that an operator actually supervise or control a mine facility." *Itell v. Ritchey Trucking Co*., 8 BLR 1-356, 1-358 (1985). An operator includes "any independent contractor performing services or construction at [a] mine," 30 U.S.C. §802(d), if the independent contractor is performing an essential mine service and has a continuing presence at the mine. *Etzweiler v. Cleveland Brothers Equip. Co*., 16 BLR 1-38, 1-40-41 (1992)(*en banc*); *Zimmerman v. J. Robert Bazley, Inc.*, 10 BLR 1-75, 1-76-77 (1987); *Itell*, 8 BLR at 1-358. The administrative law judge rationally concluded that hauling rock containing coal to the breaker was an essential mine service, and substantial evidence supports the administrative law judge's finding that W & W had a continuing presence at Aldernay's mine site. Director's Exhibit 127 Exhibit G at 2. Accordingly, we affirm the administrative law judge's finding that W & W was an "operator" under the Act.

Employer next contends that, because W & W and MMI are separate companies, the administrative law judge erred in treating W & W and MMI as a single entity for purposes of determining liability as the responsible operator. We disagree. As highlighted by the administrative law judge, the record indicates that W & W and MMI were owned and controlled by the same person, Joe Walacavage, were located at the same address, shared the same personnel, including office manager, and operated the same heavy equipment. As of 1989, all of the employees of W & W were transferred to the payroll of MMI at Mr. Walacavage's direction. W & W's employees used MMI's equipment and storage facility. Both

companies shared funds in order to meet necessary expenses.[3]

Under these circumstances, the administrative law judge reasonably found that W & W and MMI were so closely affiliated that it was appropriate for MMI to be held liable as the responsible operator for the effects of any coal mine employment that claimant performed while with W & W. *See Ridings v. C & C Coal Co*., 6 BLR 1-227, 1-231 (1983). The administrative law judge's reasoning is consistent with the Board's analysis in *Ridings*, wherein the Board focused on evidence that ostensibly separate companies had the same corporate officers, the same address, and the same employees. Additionally, the administrative law judge's focus on the close relationship between and the centralized control over W & W and MMI is consistent with the analogous, and well-established, "single employer" test routinely applied in the context of federal labor and civil rights statutes. *See NLRB v. Browning-Ferris*, 691 F.2d 1117, 1122 (3d Cir. 1982); *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1341-42 (11th Cir. 1999). Accordingly, we reject employer's contention that the administrative law judge erred in treating W & W and MMI as one entity for purposes of holding MMI liable as the responsible operator.

[3] Mr. Land testified that, "when we needed the money for the payroll and stuff like that, if we didn't have it in one company, we would just transfer it back and forth between the other company." Hearing Tr. at 31-32. Mr. Walacavage would direct these transfers, which were treated as loans. Hearing Tr. at 32, 45.

Employer alleges that the Department of Labor's initial belief that W & W had changed its name to MMI, and its concomitant failure to send an operator notification form to W & W, were mistakes of fact which now preclude naming MMI as the responsible operator. Employer ignores the fact that the Department's view was based on the evidence then of record, and was perpetuated by MMI's own failure to respond to notice or participate in the proceedings until after an administrative law judge held a hearing and entered an award designating MMI as the responsible operator.[4] *See McCord v. Cephas*, 532 F.2d 1377, 1381 (D.C. Cir. 1976)(purpose of modification would be "thwarted by any lightly considered reopening at the behest of an employer who, right or wrong, could have presented his side of the case at the first hearing and . . . thereby saved all parties a considerable amount of expense and protracted litigation.). Therefore, the administrative law judge permissibly concluded that no mistake of fact was made when MMI was designated as the responsible operator. *See Keating, supra*.

[4] When MMI failed to respond to the operator notification, it waived its right to contest the claim unless it showed good cause for failing to respond. 20 C.F.R. §725.413(b). However, review of the record does not reveal that MMI was ever made to show good cause before its responsible operator defenses were considered.

Accordingly, the administrative law judge's Decision and Order on Remand denying modification is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge