BRB No. 00-0724

HERBERT FITZGERALD	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED: Jan. 31, 2001
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	
	)	
NATIONAL ASSOCIATION OF WATERFRONT EMPLOYERS	)	
	)	DECISION and ORDER
Intervenor	)	*EN BANC*

Appeal of the Interim Decision and Order on Jurisdiction of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

Ralph R. Lorberbaum (Zipperer & Lorberbaum), Savannah, Georgia, for claimant.

Shari S. Miltiades (Sanders & Miltiades), Savannah, Georgia, for employer/carrier.

Joshua T. Gillelan II (Judith E. Kramer, Acting Solicitor of Labor; Carol A. DeDeo,

Associate Solicitor), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Charles Thomas Carroll, Jr. (Wilcox, Carroll & Froelich, P.L.L.C.), Washington, D.C., for intervenor.

Before: HALL, Chief Administrative Appeals Judge, SMITH, McGRANERY, and McATEER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.[1]

PER CURIAM:

Stevedoring Services of America (SSA) appeals the Interim Decision and Order on Jurisdiction (99-LHC-00420) of Administrative Law Judge Daniel F. Sutton 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 findings of fact and conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3).

[1]Administrative Appeals Judge J. Davitt McAteer did not attend the oral argument herein, but has reviewed the transcript, briefs and record.

Claimant worked for Georgia Ports Authority (GPA) for ten years operating various equipment at the Garden City Terminal located on the Savannah River. GPA is the terminal operator which owns the terminal as well as the equipment and cranes needed to load and unload vessels. Pursuant to a leasing arrangement known as "the tariff," GPA leases its equipment and equipment operators to stevedoring companies such as SSA.[2] Claimant testified that he spent approximately 70 to 80 percent of his work time in 1992 assisting vessel operations for stevedores, and the remainder of the time working in the field where he took orders from a GPA clerk. On May 28, 1992, while assigned to SSA to load containers onto trucks, claimant fell from a platform on a rubber tire gantry approximately 20 feet and suffered injuries to his left arm and left foot, as well as a possible psychological injury. It is undisputed that claimant received disability benefits from GPA pursuant to the State of Georgia's workers' compensation scheme for various periods in 1992 and 1993. Claimant filed a claim against SSA under the Act, contending that since he was working under the control of SSA at the time of the accident, SSA should be liable for his disability compensation and medical benefits under the Act. Claimant and employer agreed to a bifurcated proceeding, wherein the sole issue was whether there was an employer-employee relationship between SSA and claimant at the time of the May 28, 1992, accident.

In his Interim Decision and Order on Jurisdiction, the administrative law judge concluded that SSA was claimant's borrowing employer at the time of the accident, and therefore liable for benefits under the Act.[3] On appeal, SSA challenges the administrative law judge's decision. Specifically, SSA contends that since claimant was an employee of GPA, a subdivision of the State of Georgia, he is excluded from coverage under the Act by operation of Section 3(b) of the Act, 33 U.S.C. §903(b). SSA further contends that the administrative law judge erred in determining that it was claimant's borrowing employer at the time of claimant's accident, asserting that the administrative law judge's conclusion is contrary to the holding of the United States Supreme Court in *Standard Oil Co. v. Anderson*, 212 U.S. 215, 220 (1909). On July 6, 2000, the Board granted a motion filed by the National Association of Waterfront Employers (NAWE) to intervene in the instant case, and accepted its brief as part of the record. 20 C.F.R. §802.214. In its brief before the Board, NAWE supports employer's position that the administrative law judge erred in finding that SSA was

[2]Specifically, this arrangement is entitled Rules, Regulations and Charges Governing Rental of Cargo Handling Equipment applicable at Georgia Ports Authority's Deepwater Terminal Facilities at Savannah, Georgia and Brunswick, Georgia and Inland Barge Terminal Facilities at Bainbridge, Georgia and Columbus, Georgia. *See* Cl. Ex. 3.

[3]In an order issued on March 6, 2000, the administrative law judge denied SSA's motion for reconsideration.

claimant's borrowing employer. NAWE further contends that the Eleventh Amendment to the United States Constitution precludes jurisdiction in the instant case. Claimant responds, urging affirmance of the administrative law judge's Interim Decision and Order on Jurisdiction. The Director, Office of Workers' Compensation Programs (the Director) filed a motion to dismiss the appeal in which he argued, *inter alia*, that the administrative law judge properly applied the borrowed employee analysis in the instant case in a manner unaffected by Section 3(b). Specifically, the Director asserts that as the administrative law judge found that claimant was the employee of SSA at the time of his injury pursuant to the borrowed employee doctrine, then SSA, not GPA, was his employer at that time, and therefore, Section 3(b) has no application to the instant case.

In his motion to dismiss employer's appeal, the Director also asserted that, as the appeal is taken from a non-final order, the Board should remand the case to the administrative law judge for the award or denial of benefits without addressing the contentions raised in employer's appeal. In an Order issued on August 11, 2000, the Board denied the Director's motion to dismiss employer's appeal. While the Board generally does not accept interlocutory appeals, the Board denied the Director's motion in light of the significance of the issue in this case to the parties and the industry. *See Huff v. Mike Fink Restaurant*, 33 BRBS 179 (1999); *Williams v. Whiting Turner Contracting Co.*, 19 BRBS 33 (1986). Subsequent to the Board's Order, claimant filed a Supplemental Brief in Support of the Administrative Law Judge's Decision, wherein claimant urged the Board to dismiss employer's appeal on the ground that it was taken from a non-final order. At the oral argument in this case, held on September 12, 2000, in Savannah, Georgia, *see* 20 C.F.R. §802.306, the Director renewed his motion to dismiss employer's appeal. For the reasons stated in the Board's Order of August 11, 2000, we deny the Director's and claimant's motions to dismiss employer's appeal.[4]

[4]At the oral argument, the Director, in support of his renewed motion to dismiss, cited the holding of the United States Court of Appeals for the Eleventh Circuit in *Cooper Stevedoring Co., Inc. v. Director, OWCP [Dorsey]*, 826 F.2d 1011, 20 BRBS 27(CRT)(11th Cir. 1987). We hold that *Cooper* is inapposite to the instant case. Specifically, in *Cooper* the court dismissed an appeal from a Board decision that remanded for further fact-finding, pursuant to Section 21(c) of the Act, which provides: "Any person adversely affected or aggrieved by a *final order* of the Board may obtain review . . . in the United States court of appeals . . . ." 33 U.S.C. §921(c)(emphasis added). The instant appeal concerns Section 21(b)(2) of the Act, which provides that the Board is authorized to hear appeals "raising a substantial question of law or fact taken by any party in interest . . . ." 33 U.S.C. §921(b)(2). Thus, while the Board generally does not entertain appeals from interlocutory orders, it has the discretion to do so.

We now consider the merits of the instant case. On appeal, SSA, supported by NAWE, argues that claimant is excluded from coverage under the Act by operation of Section 3(b), inasmuch as claimant was, at the very least, the nominal employee of GPA, a governmental subdivision of the State of Georgia, at the time of his accident. In effect, SSA and NAWE argue that Section 3(b) prevents liability from being shifted from a governmental subdivision to a statutory employer, and therefore, the borrowed employee doctrine is not applicable in the instant case.[5] For the reasons set forth below, we reject the contentions raised by employer and NAWE.

Section 3(b) of the Act provides: "No compensation shall be payable in respect of the disability or death of an officer or employee of the United States, or any agency thereof, or of any State or foreign government, or any subdivision thereof." 33 U.S.C. §903(b). *See generally Tyndzik v. Director, OWCP*, 53 F.3d 1050, 29 BRBS 83 (CRT)(9th Cir. 1995), *rev'g in part Tyndzik v. Univ. of Guam*, 27 BRBS 57 (1993)(Smith, J., dissenting); *Keating v. City of Titusville*, 31 BRBS 187 (1997). In the instant case, it is uncontested that GPA is a governmental subdivision of the State of Georgia, and that claimant received his wages from GPA. However, in determining whether claimant is excluded from coverage under the Act by virtue of Section 3(b), our inquiry does not end there. The issue relevant to the instant case is whether Section 3(b) prevents the application of the borrowed employee doctrine, which recognizes that "[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 person, with all the legal consequences of the new relation." *Standard Oil*, 212 U.S. at 220. Contrary to the contentions of SSA and NAWE, we hold that Section 3(b) concerns the immunity of governmental entities from liability under the Act, and does not

[5]We reject claimant's contention that the issue of the applicability of Section 3(b) cannot be raised by employer for the first time on appeal. The Board has held that it will permit a party to raise an issue for the first time on appeal where a pertinent statutory provision has been overlooked. *See Stewart v. Bath Iron Works Corp.*, 25 BRBS 151, 154 n.2 (1991); *Bukovi v. Albina Engine/Dillingham*, 22 BRBS 97, 98 (1988); *see also Gardner v. United States*, 211 F.3d 1305, 1310 (D.C. Cir. 2000).

prevent a nominal state employee from becoming the borrowed employee of a statutory employer under the Act. In so holding, we are guided by the language of Section 4(a) of the Act, which provides: "*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." 33 U.S.C. §904(a)(1994)(emphasis added). Thus, under Section 4(a), all employers, including borrowing employers, are liable for compensation under the Act. *See, e.g., Total Marine Services, Inc. v. Director, OWCP*, 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); *Ricks v. Temporary Employment Services, Inc.*, 33 BRBS 81 (1999); *Pilipovich v. CPS Staff Leasing, Inc.*, 31 BRBS 169 (1997). Pursuant to Section 5(a) of the Act, 33 U.S.C. §905(a), that liability is the exclusive remedy against a statutory maritime employer. In his Interim Decision and Order below, the administrative law judge found that although claimant was the nominal employee of GPA, he was the borrowed employee of SSA at the time of his injury. We hold that Section 3(b) does not prevent a finding that SAA was claimant's borrowing employer at the time of his injury. Rather, a determination as to whether claimant is excluded from coverage under Section 3(b) is dependent on whether the administrative law judge properly determined that SSA was claimant's borrowing employer at the time of his injury. *See Herold v. Stevedoring Services of America*, 31 BRBS 127 (1997)(Board affirmed the finding that an employee of Port of Astoria, an Oregon municipal corporation, was not the borrowed employee of a statutory employer).

With regard to the above holding, we reject NAWE's assertion that the Eleventh Amendment to the United States Constitution precludes jurisdiction in the instant case. On appeal, NAWE argues that if the instant case went to a hearing on the merits, SSA would be allowed to prove that GPA, the owner of the gantry from which claimant fell, was negligent in its safety training and thus responsible for the accident, thereby creating tension between the Act and the Eleventh Amendment.[6] This argument is without merit, as it confuses the Act's "no fault" liability with negligence in a tort action.[7] A hearing on the merits would not

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[6]The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. CONST. amend. XI.

[7]Indeed, the United States Court of Appeals for the District of Columbia Circuit

concern whether GPA was negligent in its maintenance of its equipment; rather, if SSA is deemed to be the liable employer, a hearing would concern, in part, whether claimant's injuries arose in the course and scope of his employment.[8] In fact, while SSA asserted before the administrative law judge that it is not the liable employer, it conceded that claimant's injury arose in the course and scope of his employment. *See* Jt. Ex. 1; Interim Decision and Order on Jurisdiction at 2. Thus, a hearing on the merits would not concern causation at all.[9] Finally, we note that a finding that SSA cannot be the liable employer as a matter of law would potentially expose SSA to tort liability, as only claimant's employer or a co-employee is immune from tort liability under the Act. *See* 33 U.S.C. §§905(a), 933(i); *Perron v. Bell Maintenance & Fabricators, Inc.*, 970 F.2d 1409, *reh'g denied*, 976 F.2d 732 (5th Cir. 1992), *cert. denied*, 507 U.S. 913 (1993).

We next address the contentions of SSA and NAWE that the administrative law judge erred in finding that SSA was claimant's borrowing employer at the time of claimant's injury. 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

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has held that although Section 3(b) establishes that federal government employees are not covered by the Act, it does not preclude the rights of government employees to pursue remedies available at common law. *See Eagle-Pitcher Industries, Inc. v. United States*, 937 F.2d 625, 631 (D.C. Cir. 1991); *see also Bush v. Eagle-Pitcher Industries, Inc.*, 927 F.2d 445, 450 n.8 (9th Cir. 1991).

[8]Relying on *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), NAWE asserts that if the Board affirms the administrative law judge's decision, SSA would have a right of appeal to the United States Court of Appeals for the Third Circuit under the collateral order doctrine. NAWE's reliance on *Puerto Rico Aqueduct* is misplaced, as the Supreme Court held in that case that states and state entities may take advantage of the collateral order doctrine to appeal a lower court order denying a claim of Eleventh Amendment immunity even though the judgment is not complete. *Id.*, 506 U.S. at 147. In the instant case, SSA would have no such right as it is not a state entity.

[9]We further reject NAWE's contention that the administrative law judge's decision grants claimant a double recovery under the State of Georgia's workers' compensation scheme and the Longshore Act, as SSA would be entitled to a credit for amounts paid to claimant in state workers' compensation benefits against any award due under the Act as a matter of law, in accordance with Section 3(e) of the Act, 33 U.S.C. §903(e).

> 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 the injury. *See Clauss v. Washington Post Co.*, 13 BRBS 525 (1981), *aff'd mem.*, 684 F.2d 1032 (D.C. Cir. 1982). With regard to compensation liability under the Act, the borrowed employee doctrine provides that a borrowing employer may be held liable for benefits if application of the tests for employment so indicates. *Total Marine*, 87 F.3d 774, 30 BRBS 62 (CRT). The United States Court of Appeals for 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 *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913 (1978), and the Board has applied this test.[10] *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994). If a claimant is deemed a borrowed employee, "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*, 87 F.3d at 779, 30 BRBS at 66 (CRT); *see also Ricks*, 33 BRBS 81; *Pilipovich*, 31 BRBS 169.

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[10]The *Ruiz-Gaudet* test lists the following questions for determining if an employee is a borrowed servant: (1) who has control over the employee and the work he is performing, other than mere suggestions of details or cooperation; (2) whose work was being performed; (3) was there an agreement or meeting of the minds between the original and borrowing employer; (4) did the employee acquiesce in the new work situation; (5) did the original employer terminate his relationship with the employee; (6) who furnished tools and place for performance; (7) was the new employment over a considerable length of time; (8) who had the right to discharge the employee; and (9) who had the obligation to pay the employee. The Fifth Circuit has held that the principal 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 risks inherent therein, and whether the employment with the new employer was of sufficient duration that the employee could reasonably be presumed to have evaluated the risks of the work situation and acquiesced thereto. *Gaudet*, 562 F.2d at 357. The instant case arises within the jurisdiction of the United States Court of Appeals for the Eleventh Circuit. Nevertheless, since *Ruiz* and *Gaudet* were decided prior to the establishment of the Eleventh Circuit on September 30, 1981, those cases have precedential value within the Eleventh Circuit. *See Bonner v. City of Pritchard*, 661 F.2d 1206 (11th Cir. 1981)(*en banc*).

In assessing claimant's employment status in the instant case, the administrative law judge considered all nine *Ruiz-Gaudet* factors and found that the evidence indicated "borrowed employee" status on seven of the nine factors. The administrative law judge then concluded that claimant was functioning as SSA's borrowed employee at the time of the May 28, 1992, accident, and therefore, SSA is liable for claimant's benefits under the Act.[11] *See* Interim Decision and Order on Jurisdiction at 14.

[11]The administrative law judge distinguished *Herold*, as the Port Authority of Astoria in that case provided the equipment the claimant used, controlled the details of his work and enforced work rules while claimant was engaged in his work. *See* Interim Decision and Order on Jurisdiction at 15; *Herold*, 31 BRBS at 129.

On appeal, SSA, supported by NAWE, initially contends that the administrative law judge's application of the *Ruiz-Gaudet* factors is contrary to the principles announced by the Supreme Court in *Standard Oil*. We disagree. In *Standard Oil*, a case decided well prior to the enactment of the Longshore Act, a longshoreman was injured while loading a vessel, due to the negligence of the winch operator. The issue concerned whether the winch operator was the employee of the stevedore or defendant Standard Oil, which had contracted with the stevedore to load the vessel. The Court espoused the borrowed employee doctrine, stating that its justification is "that the master is answerable for the wrongs of the servant, not because he has authorized them nor because the servant, in his negligent conduct, represents the master, but because he is conducting the master's affairs, and the master is bound to see that his affairs are so conducted that others are not injured." *Standard Oil*, 212 U.S. at 221. In determining which entity was the winchman's employer, the Court considered whether the stevedore or Standard Oil had the power to control and direct the winch operator in the performance of his work, noting that authoritative direction and mere suggestion must be distinguished. *Id.*, 212 U.S. at 222. The Court held that the winch operator was not the borrowed employee of the stevedore, as he was in the general employ of Standard Oil, who paid his wages, had the sole right to discharge him, and supplied the winch and the winchman's services in return for an agreed compensation. Though the winchman obeyed the signals of the stevedore's gangman during the loading operation, the Court reasoned that this action constituted the giving of information, not orders, in the coordination of the loading operation, and thus it was not sufficient to show that there had been a change of employers. *Id.*, 212 U.S. at 225-226. Subsequent to the enactment of the Longshore Act, the United States Court of Appeals for the Fifth Circuit has applied the borrowed employee doctrine in the context of the Act.[12] *See, e.g., Total Marine*, 87 F.3d 774, 30 BRBS 62 (CRT); *West v. Kerr-McGee Corp.*, 765 F.2d 526 (5th Cir. 1985). In *Total Marine*, the court explained that the primary focus of its application of this doctrine to the Act is the tort immunity provision contained in Section 5(a) of the Act, 33 U.S.C. §905(a), which makes compensation benefits the exclusive remedy available to an injured worker from his employer.[13] The court "has

[12]For example, in *Total Marine*, the Fifth Circuit held that the contractor/subcontractor provisions of Section 4(a) of the Act, 33 U.S.C. §904(a)(1994), as amended in 1984, do not preclude the use of the borrowed employee doctrine. *Total Marine*, 87 F.3d at 776-779, 30 BRBS at 64-66 (CRT); *see also West v. Kerr-McGee Corp.*, 765 F.2d 530 (5th Cir. 1985).

[13]Section 5(a) of the Act provides in pertinent part:

> The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . . For purposes of this subsection, a contractor shall be deemed the

extended this tort immunity provision by means of the borrowed employee doctrine to encompass a worker's borrowing employer." *Total Marine,* 87 F.3d at 777, 30 BRBS at 64-65 (CRT); *see also Hebron v. Union Oil Co. of California*, 634 F.2d 245 (5th Cir. 1981). Thus, the *Ruiz-Gaudet* test represents the application of the borrowed employee doctrine in the context of the Act, and does not conflict with *Standard Oil*. Accordingly, the administrative law judge did not err in applying the *Ruiz-Gaudet* factors in the instant case. We now review the administrative law judge's application of the *Ruiz-Gaudet* factors to determine whether his findings are supported by substantial evidence.[14]

The first factor, the question of who has control over claimant and his work, has been considered the central issue of the borrowed employee doctrine, though not necessarily the determinative factor. *See Melancon v. Amoco Production Co.*, 834 F.2d 1238, 1244-1245 (5th Cir. 1988); *Hebron*, 634 F.2d at 247. In the instant case, the administrative law judge found that the tariff provided that GPA equipment operators, when leased to stevedores, are under the sole supervision of the lessees. *See* Cl. Ex. 3 at 6-7. The administrative law judge then found that the testimony of the witnesses established that SSA exercised control over equipment operators during vessel operations with regard to the sequence in which containers were loaded onto or unloaded from vessels, and that during vessel operations, the operator's hours and breaks were determined by the stevedore based on the exigencies of the work. The administrative law judge found that there was no evidence that GPA provided any direction

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> employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title.

33 U.S.C. §905(a).

[14]SSA argues that the administrative law judge erred in concluding that the tariff conferred borrowed employee status on claimant, as it does not address whether the lessee assumes the status of an employer or whether it is obligated to secure workers' compensation benefits. SSA further contends that it was not a party to the creation of the tariff, and thus, its provisions do not assume contractual obligations on the part of SSA. SSA's contention that the above indemnification provisions are ambiguous, and that it was not contractually bound to the tariff provisions, may arguably be true. Nevertheless, its argument must fail as the administrative law judge did not base his determination on the existence of a valid and enforceable indemnification agreement. Rather, the administrative law judge, in his application of the nine *Ruiz-Gaudet* factors, analyzed the testimony of the witnesses against the backdrop of the tariff agreement to determine whether GPA or SSA was claimant's employer at the time of the accident.

to an operator during the periods when its equipment was leased to SSA. Lastly, the administrative law judge noted that SSA did not instruct claimant how to operate his equipment, but, relying on *Melancon*, found that the absence of control over specialized aspects of a worker's performance does not preclude a finding of borrowed employee status. Thus, the administrative law judge concluded that SSA had sufficient control over claimant's work.

Contrary to SSA's assertion, *Standard Oil* does not require a different result than the one reached by the administrative law judge. While the facts in the instant case are similar to those in *Standard Oil*, SSA provided more than just mere signals to the claimant with regard to operating his equipment. In the instant case, John Walsh testified that when SSA plans a vessel operation, it contacts GPA the preceding day to advise how many pieces of equipment will be needed. The time when work is started is determined by the arrival of the vessel, and the work ends when the operation is completed. *See* Tr. at 21-22, 37-38. Mr. Walsh stated that once an operator is assigned by GPA, he receives all orders from SSA until the operation is completed. During a vessel operation, directions as to where to move containers come from an SSA clerk, who uses a sequence sheet which shows how the vessel is stowed and how it will be loaded or unloaded. *Id.* at 22-24, 59-60. Claimant confirmed this testimony, additionally stating that while working for SSA, when to take breaks and take lunch was determined only by SSA personnel, although lunch usually occurs at the same time each day. *Id.* at 81, 94. He testified that from the time he started working for a stevedore until the job was finished, he took orders only from the stevedore. *Id.* at 85-86, 89. Indeed, unlike the facts in *Standard Oil*, the tariff provides that all leased equipment is operated under the direct control of the stevedore, *see* Cl. Ex. 3 at 7, and there is no evidence in the record that SSA ever deviated from this rule.[15] While both John Walsh and claimant confirmed that SSA does

[15]The tariff governs the leasing arrangement between GPA and all stevedores at its facilities, including SSA. Section I, paragraph 2 of the tariff states:

> All charges include operator (operators) and oiler (oilers) for crane (cranes) with hook (hooks). The party renting any of said cranes agrees to assume and to be bound by all of the terms and conditions contained in SECTION IV infra entitled "Lessee Responsibility" and any revisions or reissues thereof.

Cl. Ex. 3 at 1. Section II, paragraph 2 states in pertinent part that "[t]he operator or operators shall be under the sole supervision of the party renting the equipment." *Id.* at 5. Section IV, regarding lessee responsibility, provides in pertinent part:

> When cranes, hoists, conveyors, lift trucks, tractors, and other

equipment, including rigging supplied by Lessor, which are used in the moving or lifting of cargoes (hereinafter called “Leased Equipment”) are rented or leased to others, it is expressly understood that such Leased Equipment will be operated under the direction and control of

the Lessee, and the Lessee shall be responsible for the operation thereof and assume all risks for injuries or damages which may arise from or grow out of the use or operation of said Leased Equipment.

Lessee, by acceptance of such Leased Equipment, agrees to fully protect, indemnify, reimburse, and save harmless the Georgia Ports Authority and its employees against any and all losses, claims, demands and suits for damages, including death and personal injury,

not hire equipment operators, does not train them to use the equipment, and does not direct their operation of the equipment, *see* Tr. at 22, 95, the totality of the evidence supports the

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> and including court costs and attorney fees, incident to or resulting from their operations on the property of the Georgia Ports Authority and the use of its facilities . . . .
>
> It is incumbent upon the Lessee to make a thorough inspection and to satisfy himself as to the physical condition and capacity of all Leased Equipment, as well as the competency of the operator (including any operator supplied by Lessor with said equipment), there being no representations or warranties with reference to such matter.

Id. at 7.

administrative law judge's finding.[16]

Moreover, the administrative law judge's finding in this regard is in accordance with law. In *Melancon*, the employee was a welder who was assigned by Beraud Enterprises, a machine shop, to work on an offshore oil platform owned by Amoco. Melancon performed this work for approximately five years prior to his injury in 1984. The employee filed a civil action against Amoco, but the district court dismissed the suit, finding that Melancon was a borrowed employee of Amoco, and therefore his suit was barred by Section 5 of the Act; the Fifth Circuit affirmed this decision. With regard to the issue of who controlled the employee's work, the Fifth Circuit held that although Melancon had specialized welding skills and none of the Amoco personnel had similar expertise, this did not bar a finding of borrowed employee status, in light of the fact that Melancon took orders only from Amoco personnel who told him what work to do, and when and where to do it. *See Melancon*, 834 F.2d at 1245. Based on the foregoing, we affirm the administrative law judge's finding that SSA had control over claimant's work.

[16]In a recent case, the United States Court of Appeals for the Fourth Circuit specifically rejected the application of the nine-part *Ruiz-Gaudet* test, stating that such a probe provides insufficient guidance to prospective litigants about the application of a legal standard. *See White v. Bethlehem Steel Corp.*, 222 F.3d 146 (4th Cir. 2000). Rather, the court stated that an inquiry as to who exercised authoritative direction and control will more efficiently resolve a plaintiff's borrowed servant status. In *White*, the plaintiff was an employee who had been assigned by a construction company to work for Bethlehem Steel over a 26 year period. The court held that the plaintiff was the borrowed employee of Bethlehem Steel, as he received authoritative direction and control from Bethlehem Steel over this period and Bethlehem Steel paid his wages, and could effectively fire him by excluding him from the job site.

Regarding the second factor, that of whose work was being performed, the evidence supports the administrative law judge's conclusion that claimant was performing work on behalf of SSA on the date he was injured. It is undisputed that claimant was assisting in carrying out the loading and unloading of vessels at the time of his injury, and that the work of SSA is to load and unload vessels. Considering the third factor, whether there was an agreement or understanding between GPA and SSA, the administrative law judge found that although there was no explicit contract which addressed whether a lessee assumed the status of an employer, GPA and SSA understood, as articulated in the tariff, that claimant would be taking instructions exclusively from SSA while working on SSA's vessel operations. The administrative law judge concluded that this factor further tipped the scale in favor of conferring borrowed employee status on claimant. This finding is in accordance with Fifth Circuit precedent. In *Melancon*, the Fifth Circuit held that an understanding that the employee would be taking instructions from Amoco satisfied the third factor, even though there was a specific contract provision between Amoco and Beraud that no Beraud employee was to be considered an employee of Amoco. *See Melancon*, 834 F.2d at 1245. Accordingly, we affirm the administrative law judge's finding that there was an understanding between GPA and SSA.

The administrative law judge found that claimant acquiesced in the work situation with SSA, the fourth *Ruiz-Gaudet* factor, as he worked with stevedores such as SSA 70 to 80 percent of the time, understood the working conditions including the direction by the stevedores, and there was no evidence that he ever complained about being assigned to work for SSA. We affirm the administrative law judge's finding in this regard as it is supported by substantial evidence.

With regard to whether GPA terminated its relationship with claimant, the Fifth Circuit in *Capps v. N.L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir.), *cert. denied*, 479 U.S. 838 (1986),[17] held that this factor does not require a lending employer to completely sever its relationship with the employee, as such a requirement would effectively eliminate the borrowed employee doctrine. *See Capps*, 784 F.2d at 617-618; *see also Melancon*, 834 F.2d at 1246. Rather, the court held that when considering this factor, the emphasis should be on the lending employer's relationship with the employee while the borrowing occurs. In

[17]In *Capps*, an employee who was assigned by a temporary employment company to work for Baroid and was injured on his first day of the job brought a personal injury suit against Baroid. The Fifth Circuit affirmed the district court's grant of summary judgment in favor of Baroid, ruling that the employee was a borrowed employee of Baroid and therefore his exclusive remedy was compensation pursuant to the Longshore Act.

that case, the court ruled that since the lending employer exercised no control over the employee during the borrowing period, it had temporarily terminated its relationship with the employee. *See Capps*, 784 F.2d at 618. In the instant case, the administrative law judge determined that although GPA did not specifically terminate its relationship with claimant, it did effectively cede its control over claimant to SSA during the period his services were leased by SSA, and thus, this factor was resolved in favor of finding of borrowed servant status. As GPA exercised no control over claimant when it leased claimant's services to SSA, the administrative law judge's finding in this regard is in accordance with law.

The administrative law judge found that the sixth factor, who furnished the tools and place for performance, provided a neutral assessment in determining whether an employee-employer relationship existed between claimant and SSA. GPA furnished the RTG claimant was operating at the time of his injury, and the injury occurred on property owned by GPA. However, the administrative law judge determined that since SSA was in charge of the vessel operation, SSA arguably furnished the place where claimant performed his duties when he was injured. This finding appears questionable. As the administrative law judge acknowledges, GPA alone provided the equipment claimant used while working for SSA and it owned the terminal upon which claimant was injured.[18] The fact that SSA was performing its work upon GPA's property does not appear to tip the balance in favor of its being the borrowed employer.

With regard to whether claimant's work for SSA was over a considerable length of time, the administrative law judge noted that SSA only leased equipment and claimant's services from GPA for the day of the vessel operation, and thus this was not a situation where an employee worked for a borrowing employer for an extended period of time. Nevertheless, relying on *Capps*, the administrative law judge determined that the length of employment factor could not be used by either claimant or SSA. In *Capps*, though the employee's injury occurred on his first day of work with the borrowing employer, the court stated: "In the case where the length of employment is considerable, this factor supports a finding that the employee is a borrowed employee; however, the converse is not true. When the employee's injury occurs on the first day, it does not follow that the employee is not a borrowed

[18]In *Capps*, the borrowing employer furnished the tools and the place of performance. *Capps*, 784 F.2d at 618. In *Melancon*, the borrowing employer provided some of the equipment the employee used, as well as the place of performance and transportation to and from work. *Melancon*, 834 F.2d at 1246.

employee; therefore, the factor provides a neutral assessment in the instant case." *Capps*, 784 F.2d at 618. In the instant case, claimant testified that between 70 and 80 percent of his work was spent assisting vessel operations for stevedores, *see* Tr. at 98, but there is no indication in the record how much of this work was performed on behalf of SSA over the ten years he worked as an operator. However, the Fifth Circuit's decision in *Capps* supports the administrative law judge's neutral finding in this regard.

The eighth factor concerns whether SSA had the right to discharge claimant. In this regard, the administrative law judge found that although GPA had the exclusive right to terminate claimant's employment, SSA had the authority to discharge an operator from a vessel operation and to preclude his assignment to its operations in the future. Accordingly, the administrative law judge concluded that SSA had the right to discharge claimant within the meaning of this factor. In this regard, the Fifth Circuit has held that the proper focus when considering the eighth factor is whether the borrowing employer had the right to terminate the employee's services with itself. *See Hebron*, 634 F.2d at 247; *Capps*, 784 F.2d at 618; *Melancon*, 834 F.2d at 1246. In the instant case, the testimony of John Walsh and Joe Michael Frost, GPA's superintendent over container operations, supports the administrative law judge's finding that SSA had the right to terminate a leased operator's services with itself.[19] *See* Tr. at 42-43, 54-55.

Lastly, Fifth Circuit case law supports the administrative law judge's conclusion that the ninth factor, which entity had the obligation to pay claimant, favors a finding of an employee-employer relationship between claimant and SSA. The administrative law judge acknowledged that GPA paid claimant his wages and that SSA had no control over his wage rate. However, relying on *Capps* and *Melancon*, the administrative law judge found that the fact that SSA provided the funds from which GPA paid claimant (through the leasing arrangement) supported a finding of borrowed employee status. In *Capps*, the temporary employment company had the obligation to pay the employee's wages, but these funds were directly received by the borrowing employer. Because of this fact, the Fifth Circuit ruled that the ninth factor supported a the lower court's finding of borrowed employee status. *See Capps*, 784 F.2d at 618. In *Melancon*, the machine shop paid the employee his wages.

[19]Specifically, John Walsh testified that there were two GPA operators that SSA refused to have assigned to their vessel operations. *See* Tr. 42-43. Joe Frost, who worked for GPA as superintendent over container operations in the field, testified that the stevedores had the right to fire an operator from a vessel operation, whereupon GPA would reassign another operator. *Id.* at 54-55.

Nevertheless, citing *Capps*, the *Melancon* court ruled that since Amoco furnished the funds from which the machine shop paid the employee, the ninth factor supported a finding of borrowed employee status, despite the fact that the machine shop kept a percentage of the amount Amoco was charged. *See Melancon*, 834 F.2d at 1246.

In summary, we hold that the administrative law judge conducted a thorough borrowed employee status analysis under the nine factor *Ruiz-Gaudet* test, and that his findings are supported by substantial evidence and are in accordance with law. Ultimately, the administrative law judge considered the principle focus of the inquiry and found that (1) SSA was responsible for the working conditions and the risks inherent therein at the time of claimant's injury, and (2) due to the recurring nature of claimant's work with stevedores, claimant acquiesced in that situation. These findings are supported by substantial evidence. Therefore, we affirm the administrative law judge's determination that claimant was SSA's borrowed employee at the time of his May 28, 1992, injury. Based on this holding, we further hold that claimant is not excluded from coverage under the Act pursuant to Section 3(b), as SSA is claimant's employer under the Act pursuant to the borrowed employee doctrine.

Accordingly, the Interim Decision and Order on Jurisdiction of the administrative law judge is affirmed, and the case is remanded to the administrative law judge for resolution of the remaining issues necessary to a final decision on the claim.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge