BRB Nos. 07-0906
and 07-0906A

E.B.	)	
	)	
Claimant-Respondent Cross-Petitioner	)	
	)	
v.	)	
	)	
ATLANTICO, INCORPORATED	)	DATE ISSUED: 06/20/2008
	)	
Employer-Respondent	)	
	)	
and	)	
	)	
W.F. MAGANN CORPORATION	)	
	)	
Employer- Cross-Respondent	)	
	)	
and	)	
	)	
KIMBERLY B. WRENCH	)	
	)	
Principal-Respondent	)	
	)	
and	)	
	)	
DAVID B. O'NEAL	)	
	)	
Principal-Respondent	)	
	)	
and	)	
	)	
PATRICK HARGIS	)	
	)	
Principal-Respondent	)	
	)	
and	)	

ALLISON FISK	)	
	)	
Principal-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeals of the Decision and Order of Daniel A. Sarno, Jr., Administrative Law Judge, United States Department of Labor.

Gregory E. Camden (Montagna, Klein & Camden, L.L.P.), Norfolk, Virginia, for claimant.

F. Nash Bilisoly (Vandeventer Black LLP), Norfolk, Virginia, for W.F. Magann Corporation.

Robert A. Rapaport (Clarke, Dolph, Rapaport, Hull, Brunick & Garriott, P.L.C.), Norfolk, Virginia, for Patrick Hargis.

Helen H. Cox (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting Associate Solicitor; Mark A. Reinhalter, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

The Director, Office of Workers' Compensation Programs (the Director), appeals and claimant cross-appeals the Decision and Order (2005-LHC-1828) of Administrative Law Judge Daniel A. Sarno, Jr., rendered on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq*. (the Act). We must affirm the administrative law judge's findings of fact and conclusions of law if they are supported by substantial evidence, are rational, and are in accordance with law. 33 U.S.C. §921(b)(3); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Atlantico, Incorporated (employer) entered into a contract with the United States Navy to renovate sanitation and oily-waste piping and to perform electrical upgrades on Pier 20, located on the Norfolk Naval Base in Norfolk, Virginia. Subsequently, the Navy

authorized employer to replace fuel piping located on Pier 20. Coinciding with employer's contract for these renovations, the Navy contracted with Magann Corporation (Magann) for structural renovations and the installation of new electrical piping and replacement of steam piping on Pier 20. Since Magann was renovating the surface of Pier 20, employer was required to pace its work with that of Magann's employees.

Claimant was hired by employer to weld fuel pipes on Pier 20. While on the work site, claimant's activities were directed by Mr. Hughes, employer's superintendent on its Pier 20 project. On May 9, 1997, a severe storm required employer's employees to vacate the pier. While running off of the pier, claimant was struck by a four-by-four piece of sheet metal. Claimant was transported to the hospital where it was noted that he had sustained, *inter alia*, a broken nose, three lost teeth, and an injury to his neck. Claimant, who unsuccessfully attempted to return to work for employer in a supervisory capacity, has undergone two surgical procedures and physical therapy as a result of this work incident.

Following claimant's May 9, 1997, injury, employer's state workers' compensation insurance carrier commenced temporary total disability benefit payments to claimant under the Virginia state compensation law, as employer had not obtained longshore insurance coverage. Employer thereafter acknowledged that claimant was covered under the Act and, in a Form LS-206 Payment of Compensation Without Award dated October 8, 1998, it informed the Department of Labor that it had been supplementing the payments made by its state insurer to claimant since the date of claimant's injury. CX 6. Upon its subsequent bankruptcy, employer's supplemental payments to claimant ceased as of November 11, 2003.

In November 2003, the Office of Workers' Compensation Programs (OWCP) forwarded the case to the Department of Labor's National Office for review, having found no viable employer and/or carrier which could be held liable for the payments due claimant under the Act. After the case was transferred to the Office of Administrative Law Judges (OALJ), the case was remanded to the district director at the request of the Director for further investigation regarding the appropriate parties for the payment of claimant's benefits. Upon the request of the Director, the district director amended the list of parties to include 1) Kimberly O'Neal (president);[1] 2) David O'Neal (secretary); 3) Allison Fisk (secretary); and 4) Patrick Hargis (secretary), and once again transferred the case to the OALJ.

While the case was before the administrative law judge, Ms. Fisk and Mr. Hargis filed motions to be removed as parties. On November 9, 2005, the Director filed a brief in opposition to these respective motions; in support of his opposition, the Director

[1] Ms. O'Neal is also known as Kimberly Wrench and Kimberly Hargis. Ms. Wrench is the current name used by this individual, and the name used by the parties in their respective briefs below and by the administrative law judge. Thus, this decision will refer to Ms. Wrench by her current name.

attached supporting documentation which he asserted established the corporate officer status of Ms. Fisk and Mr. Hargis.[2] On November 16, 2005, the administrative law judge issued two separate Orders in which he denied Ms. Fisk's and Mr. Hargis's motions to dismiss. Specifically, the administrative law judge found, in his first Order, that "[i]t is clear that Ms. Fisk was a corporate officer of Atlantico during at least part of the crucial time period when the requisite insurance could have been obtained." In his second Order, after substituting the name "Mr. Hargis" for that of "Ms. Fisk," the administrative law judge used the same language in denying Mr. Hargis's motion.

Following the administrative law judge's denial of his motion to dismiss, Mr. Hargis filed a motion to add Magann as a potentially liable employer. On March 7, 2006, the administrative law judge remanded the case to the district director for an investigation of Mr. Hargis's motion. After adding Magann as a party, an informal conference was held, and the case was transferred back to the OALJ.

On February 2, 2007, a formal hearing was held before the administrative law judge during which time counsel for Ms. Fisk and Mr. Hargis once again moved to be dismissed as parties.[3] *See* Tr. at 16, 21. At the close of the hearing, the administrative law judge stated that as no evidence had been presented to support a finding that the named individuals could be liable under the Act for claimant's benefits, he was inclined to dismiss Ms. Fisk and Mr. Hargis as parties. The administrative law judge then closed the record, stating that "absent good cause" he would not reopen it. *Id*. at 68.

On February 5, 2007, claimant filed with the administrative law judge a motion to reopen the record; in support of his motion, claimant attached several of the documents previously submitted to the administrative law judge by the Director in opposition to the initial motions to dismiss filed by Ms. Fisk and Mr. Hargis in 2005. On that same day, the administrative law judge issued an Order granting Ms. Fisk's and Mr. Hargis's motions to dismiss; additionally, although they were unrepresented at the hearing, the administrative law judge dismissed Ms. Wrench and Mr. O'Neal as parties potentially liable for the payment of benefits to claimant under the Act. Post-Hearing Order #1.

On February 9, 2007, the administrative law judge denied claimant's motion to reopen the record, stating that the proceeding before him was *de novo*, all parties had access since 2005 to the documents now submitted by claimant, and that those documents were not timely offered into evidence. Additionally, the administrative law judge stated that he had dismissed the four identified individuals since "no evidence in the record identified any of them as corporate officers of Atlantico, Inc. during the relevant time

[2] These documents include Virginia State Corporation Commission annual report pages.

[3] Counsel for the Director did not attend the hearing. It appears that Ms. Wrench and Mr. O'Neal were not represented at any level during the course of claimant's claim for benefits.

period." Post-Hearing Order #2. In letters dated February 9, 2007, and February 13, 2007, claimant again requested that the record be re-opened. These requests were denied by the administrative law judge in an Order dated February 26, 2007. Post-Hearing Order #3.

On July 2, 2007, the administrative law judge issued a Decision and Order reiterating the dismissal of Ms. Wrench, Mr. O'Neal, Ms. Fisk, and Mr. Hargis as parties in this case. The administrative law judge found that: 1) claimant established that the present conditions of his head, neck, and right arm are causally related to his employment on Pier 20; 2) claimant has been and continues to be totally disabled as a result of those conditions; and 3) Magann was not the party responsible for the payment of claimant's benefits since claimant had not been working for Magann as a borrowed employee and employer had not been a subcontractor of Magann under Section 4(a) of the Act, 33 U.S.C. §904(a). The administrative law judge thus found that claimant was entitled to temporary total disability benefits from May 10 to May 22, 1997, and from August 22, 1997, through May 25, 2000, and to permanent total disability thereafter, as well as medical expenses, all payable by employer. 33 U.S.C. §§907, 908(a), (b).

On appeal, the Director contends that the administrative law judge's dismissal of the identified corporate officers is contrary to law. Mr. Hargis responds, urging affirmance of the administrative law judge's dismissal of him as a party potentially liable for the payment of claimant's benefits. In his cross-appeal, claimant challenges the administrative law judge's finding that Magann is not the party responsible for the payment of claimant's compensation and medical benefits; alternatively, claimant contends that the administrative law judge erred in dismissing the four named corporate officers of employer as parties to this claim and in failing to reopen the record on his motion. Magann has filed a response to claimant's cross-appeal, urging that the Board affirm the administrative law judge's finding that it was not a borrowing employer in this case.

We will first address claimant's contention that the administrative law judge erred in determining that claimant was not the borrowed employee of Magann. Specifically, claimant states that utilization of the nine-factor test set forth by the United States Court of Appeals for the Fifth Circuit in *Ruiz v. Shell Oil Co.*, 413 F.2d 310 (5th Cir. 1969), and in *Gaudet v. Exxon Corp.*, 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913 (1978), to determine the responsible employer in a borrowed employee situation establishes that claimant should be deemed the borrowed employee of Magann and that consequently Magann should be found to be the employer responsible for the payment of benefits to claimant.[4]

[4]The *Ruiz-Gaudet* test lists the following questions to determine 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) did the employee acquiesce in the new work situation; (3) who furnished tools and place for performance;

While the Board has applied the *Ruiz-Gaudet* test in cases arising in the Fifth Circuit, *see Pilipovich v. CPS Staff Leasing, Inc.*, 31 BRBS 169 (1997), claimant was injured on a pier located on the Norfolk Naval Base. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. That court has declined to adopt the nine-factor *Ruiz-Gaudet* test, and has instead applied an "authoritative direction and control" test for determining whether an employee is a borrowed employee. *White v. Bethlehem Steel Corp.*, 222 F.3d 146, 34 BRBS 61(CRT) (4th Cir. 2000). In adopting this test, the Fourth Circuit stated that an "authoritative direction and control inquiry will more efficiently resolve a plaintiff's borrowed servant status." *White*, 222 F.3d at 150, 34 BRBS at 64(CRT). The court stated that the authority of the borrowing employer does not have to extend to every incident of an employer-employee relationship; rather, it need only encompass the servant's performance of the particular work in which he is engaged at the time of the accident. The court then set forth a number of factors that may be looked at in order to determine direction and control: the supervision of the employee, the ability to unilaterally reject the services of an employee, the payment of wages and benefits either directly or by pass-through, and the duration of employment. 222 F.3d at 149, 34 BRBS at 63(CRT).

In his decision, the administrative law judge applied the Fourth Circuit's decision in *White* when addressing this issue, and concluded that as claimant was neither directly nor indirectly under the authoritative direction and control of Magann when he was injured on May 9, 1997, Magann was not a borrowing employer in this case. Specifically, after reviewing the evidence of record, the administrative law judge found: 1) that claimant was supervised by and received directions only from employer's superintendent, Mr. Hughes; 2) that claimant's welding work was solely the work of employer and was performed pursuant to a contract between employer and the Navy; 3) that claimant's place of employment, Pier 20, was owned by the Navy; 4) that claimant was not paid by Magann; 5) that Magann was not involved in the decision by employer to hire claimant, nor could Magann fire claimant or exclude him from Pier 20; and 6) that disputes arising between employer and Magann over the storing of materials or the scheduling of work were resolved by Navy representatives. Decision and Order at 24. The administrative law judge also found that when issues arose between employer and

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(4) who had the right to discharge the employee; (5) who had the obligation to pay the employee; (6) did the original employer terminate his relationship with the employee; (7) whose work was being performed; (8) was there an agreement or meeting of the minds between the original and borrowing employer; and (9) was the new employment over a considerable length of time. 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.

Magann, it was logical that Magann would have a say in where materials would be stored on the pier and that Magann appeared to review employer's pipe work to the extent that it affected the integrity of the pier, since employer's work could directly impact Magann's own work, which constituted a major portion of the overall rehabilitation of Pier 20. The administrative law judge thus concluded that the interactions between employer and Magann reflected nothing more than "the parties' practical need to coordinate various aspects of the pier renovation so that chaos would not ensue." *Id.* at 25. As the administrative law judge applied the proper law and his findings are supported by substantial evidence, we affirm his decision that Magann was not a borrowing employer. Accordingly, we affirm the administrative law judge's finding that Magann is not liable for the payment of the benefits due claimant under the Act.

In his appeal, the Director challenges the administrative law judge's decision to dismiss the individuals identified as employer's corporate officers. Specifically, the Director asserts that the administrative law judge, without acknowledging the existence of his two prior Orders issued on November 16, 2005, disregarded his findings in those orders when he dismissed on February 5, 2007, the four individuals identified as employer's corporate officers. Additionally, the Director avers that if the administrative law judge intended to reopen the issue of the identity of employer's corporate officers at the formal hearing, he erred in not giving notice to the parties that he intended to revisit his November 2005 rulings,[5] particularly in view of the evidence previously submitted by the Director on this issue on which the administrative law judge relied in issuing his 2005 Orders. In his cross-appeal, claimant agrees with the Director that the administrative law judge erred in this regard; additionally, claimant asserts that the administrative law judge erred in denying his multiple requests to re-open the record on this issue. For the reasons that follow, we agree with the Director and claimant that the administrative law judge's decision on this issue cannot be affirmed.

It is undisputed that employer did not have longshore insurance coverage as of May 9, 1997, the date on which claimant sustained the work-related injury which is the subject of this case. Section 38(a) of the Act, 33 U.S.C. §938(a), sets out the penalty for an employer who fails to secure the payment of longshore compensation as follows:

> Any employer required to secure the payment of compensation under this chapter who fails to secure such compensation shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than one year, or by both such fine and imprisonment; and in any case where such employer is a corporation, the president, secretary, and treasurer thereof shall be also severally liable to such fine or imprisonment as herein provided for the

[5] Mr. Hargis's counsel, who has filed a brief in response to the Director's appeal, concedes that the administrative law judge reopened the issue of employer's purported corporate officers at the time of the formal hearing. *See* Hargis br. at 10.

> failure of such corporation to secure the payment of compensation; *and such president, secretary, and treasurer shall be severally personally liable, jointly with such corporation, for any compensation or other benefit which may accrue* under the said chapter in respect to any injury which may occur to any employee of such corporation while it shall so fail to secure to payment of compensation as required by section 932 of this title.

33 U.S.C. §938(a)(emphasis added).

After being identified as corporate officers of employer, Ms. Wrench, Mr. O'Neal, Ms. Fisk, and Mr. Hargis were joined to the case as named parties potentially liable under the Act for the payment of claimant's benefits. On November 16, 2005, the administrative law judge issued two Orders denying the motions to dismiss of Ms. Fisk and Mr. Hargis. In his Order addressing Ms. Fisk's motion, the administrative law judge acknowledged Ms. Fisk's concession of her reappointment as Secretary of employer on or about April 28, 1997,[6] and further found that the documents submitted by the Director in support of his opposition to Ms. Fisk's motion to dismiss established her status with employer. Pursuant to these findings, the administrative law judge denied Ms. Fisk's motion, stating "[i]t is clear that Ms. Fisk was a corporate officer of [employer] during at least part of the crucial time period when the requisite insurance could have been obtained." November 16, 2005 Order Denying Motion to Dismiss Allison R. Fisk. In his Order addressing Mr. Hargis's motion, the administrative law judge found that the Director had submitted documentation showing that Mr. Hargis was the Vice President/Secretary of employer between March 20, 1997 and April 28, 1997; based upon this finding, the administrative law judge denied Mr. Hargis's motion to dismiss, stating that "[i]t is clear that Mr. Hargis was a corporate officer of [employer] during at least part of the crucial time period when the requisite insurance could have been obtained." November 16, 2005 Order Denying Motion to Dismiss Patrick Hargis.

Fourteen months later, at the formal hearing, the administrative law judge entertained a renewal by Mr. Hargis and Ms. Fisk of their respective motions to dismiss. The administrative law judge subsequently dismissed from the proceedings the four corporate officers. We cannot affirm this action, as the administrative law judge failed to notify the parties that he would not be bound by his prior orders denying the motions to dismiss the officers. *See generally Ferrari v. San Francisco Stevedoring Co.*, 34 BRBS 78 (2000); *Hall v. Newport News Shipbuilding & Dry Dock Co.*, 24 BRBS 1 (1990); *Lewis v. Norfolk Shipbuilding & Dry Dock Corp.*, 20 BRBS 126 (1987). In this regard, Section 702.336(b), 20 C.F.R. §702.336(b), permits the administrative law judge to consider "[a]t any time prior to the filing of the compensation order in the case," any new issue upon the application of a party, but requires that he give the parties "not less than 10 days notice of the hearing on such new issue." *See Ferrari*, 34 BRBS 78. Inasmuch as

[6] The administrative law judge further noted that Ms. Fisk also admitted that she had previously served as Vice President/Secretary of employer through August 1996.

the administrative law judge had previously ruled on the motions to dismiss in his two November 16, 2005 Orders, the parties were entitled to reasonable notice that he intended to reconsider the individuals' status as proper parties to this claim. *See Ferrari*, 34 BRBS at 81; *Ramirez v. Sea-Land Services, Inc.*, 33 BRBS 41 (1999). Consequently, the administrative law judge's dismissal of Ms. Wrench, Mr. O'Neal, Ms. Fisk and Mr. Hargis as named parties in this case is vacated, and the case remanded for reconsideration of this issue.

The administrative law judge, on remand, must allow the parties the opportunity to submit additional evidence and argument relevant to the issue of whether the four individuals named herein were employer's corporate officers and, if they were, whether or not these individuals are personally liable, jointly with the corporation, for claimant's benefits pursuant to Section 38 of the Act. While it is well established that the administrative law judge possesses considerable discretion in his conducting the formal hearing, his actions regarding the admissibility of evidence are reversible if they are shown to be arbitrary, capricious, or an abuse of discretion. *See Hansen v. Container Stevedoring Co.*, 31 BRBS 155 (1997); *Raimer v. Willamette Iron & Steel Co.*, 21 BRBS 98 (1988). Section 702.338 states, in this regard,

> The administrative law judge shall inquire fully into the matters at issue and shall receive in evidence . . . any documents that are relevant and material to such matters. . . . If the administrative law judge believes that there is relevant and material evidence available which has not been presented at the hearing, he may adjourn the hearing or . . . reopen the hearing for the receipt of such evidence. The order in which evidence and allegations shall be presented and the procedures at the hearings generally . . . shall be in the discretion of the administrative law judge and of such nature as to afford the parties a reasonable opportunity for a fair hearing.

20 C.F.R. §702.338. Section 702.339 gives similar guidance, stating,

> In making an investigation or inquiry or conducting a hearing, the administrative law judge shall not be bound by common law or statutory rules of evidence. . .except as provided by 5 U.S.C. 554 and these regulations; but may make such investigation or inquiry or conduct such hearing in such a manner as to best ascertain the rights of the parties.

20 C.F.R. §702.339.

At the formal hearing, the administrative law judge stated that he would close the record at that time, and that he would not reopen it "absent good cause." *See* Tr. at 68. Subsequently, and without acknowledging that he had previously relied upon evidence submitted by the Director in 2005 which addressed this issue, the administrative law judge denied claimant's multiple requests to re-open the record for the submission of documentation previously provided to the administrative law judge by the Director. The administrative law judge's rulings constitute an abuse of discretion as they effectively

prohibited claimant from presenting evidence specifically addressing an issue which, although previously adjudicated, was being re-examined by the administrative law judge. Therefore, on remand, the administrative law judge must re-open the record and admit into evidence documentation from the parties addressing the issue of the potential personal liability for claimant's benefits of Ms. Wrench, Mr. O'Neal, Ms. Fisk, and Mr. Hargis, and any evidence those individuals offer in response.

Accordingly, the administrative law judge's decision to dismiss Ms. Wrench, Mr. O'Neal, Ms. Fisk and Mr. Hargis, as named parties is vacated, and the case is remanded for consideration of the named individuals' potential personal liability for claimant's benefits pursuant to Section 38 of the Act. In all other respects, the administrative law judge's Decision and Order is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge