BRB No. 09-0113

R.M.	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
P & O PORTS BALTIMORE, INCORPORATED	)	DATE ISSUED: 07/29/2009
	)	
and	)	
	)	
PORTS INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	DECISION and ORDER

Appeal of the Decision and Order Denying Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Eugene A. Shapiro (Shapiro & Schaub), Baltimore, Maryland, for claimant.

Christopher J. Field (Field Womack & Kawczynski, L.L.C.), South Amboy, New Jersey, for employer/carrier.

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

PER CURIAM:

Claimant appeals the Decision and Order Denying Benefits (2006-LHC-2136) of Administrative Law Judge Linda S. Chapman 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 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).

Claimant, who is a member of the International Longshoremen's Association, received an assignment on June 16, 2005, from the union hall, and was to report to the Port of Baltimore on June 17, 2005, beginning at 7:00 a.m., to unload cars from a ship. Due to traffic, he arrived after the designated start time – at approximately 7:15. Despite being told by the superintendent, Captain Bond, that he could not work, claimant boarded the vessel and entered one of the vehicles to be offloaded. Unable to locate a security guard or the second mate of the ship, Captain Bond went up the ramp and found claimant sitting in the car to be driven off the ship. There is no dispute that some sort of altercation occurred at the car when Captain Bond tried to open the door and claimant tried to keep it closed. Tr. at 145-147. After struggling with the door for several minutes, Captain Bond exited the ship. When claimant drove the vehicle down the ramp, he was stopped by security and escorted from the premises. Tr. at 34, 41, 65, 75. Claimant testified that his wrist and shoulder were injured during the altercation. He sustained a closed period of temporary total disability, June 18 through July 20, 2005, and filed a claim for benefits. On July 21, 2005, claimant returned to his usual work.

The dispute between the parties in this case involves whether there was an employer-employee relationship at the time of claimant's injury, and if so, whether claimant's injury occurred during the course of his employment. Specifically, there is contradictory testimony as to who had the authority to hire or replace claimant. Tr. at 37-38, 176-178. Claimant and Mr. Durham, his former foreman, testified that there is a 15-minute grace period during which only the foreman can determine whether to have an absent worker replaced. Tr. at 35-37, 107-108, 119-122, 124, 128. Claimant testified that he arrived within that 15-minute period and that Mr. Durham told him to get to work. Tr. at 26, 28, 108-110. Captain Bond and Mr. Bell, the timekeeper, testified that there is no 15-minute grace period and that the superintendent oversees, and has the final decision about, the labor. Tr. at 132-134, 176-178. They also testified that Captain Bond had told Mr. Bell, prior to 7:00 a.m., that anyone who had not arrived by 7:00 was to be replaced. Tr. at 139, 181-182. Mr. Bell testified that normal procedure requires that he confer with the foreman regarding the number of drivers who are missing and need to be replaced and report this to the superintendent. Once a worker has been replaced, he stated, that worker may be hired only by the superintendent. Tr. at 176-178.

According to Mr. Bell, at 7:00 a.m. on June 17, 2005, there were three missing longshoremen, one of whom was claimant. Mr. Bell stated that he followed procedure and discussed this with Mr. Durham, and at 7:05 a.m., he called the union hall to get replacements. Tr. at 182-183. At approximately 7:15, Mr. Bell informed Captain Bond of the missing men and told him that he had made the call for replacements. Tr. at 139-140, 183. While they were talking, claimant arrived. According to Mr. Bell and Captain Bond, Captain Bond told claimant he had been replaced and could not work. Tr. at 183-184. Captain Bond stated he also told Mr. Durham, but he was not sure Mr. Durham

heard him. Captain Bond said claimant became belligerent and went aboard the ship anyway. Tr. at 143-144.

The administrative law judge found that claimant and Mr. Durham were questionable witnesses and that Captain Bond and Mr. Bell were credible. Decision and Order at 17-19. She concluded that claimant had been replaced for the day prior to his arrival and, thus, was not an "employee" when the altercation occurred.[1] Additionally, she found that claimant's injury did not occur within the course of his employment, and she denied benefits. Decision and Order at 15-20. Claimant appeals, and employer responds, urging affirmance.

Claimant, citing Section 2(2) of the Act, 33 U.S.C. §902(2), and the Board's decision in *Kielczewski v. The Washington Post Co.*, 8 BRBS 428 (1978), contends his injury arose out of and in the course of his employment. He also asserts that he was an employee under the definition of Section 2(3), 33 U.S.C. §902(3), because he was engaged in maritime employment at the time of his injury. Employer argues that the Board need not address whether claimant's injury arose out of or during the course of his employment because there was no employment relationship at the time. Thus, it asserts, because claimant was not an employee, there can be no work-related injury.

In order to recover compensation, claimant and employer must be in an employer-employee relationship at the time of the injury. *See Herold v. Stevedoring Services of America*, 31 BRBS 127 (1987); *Holmes v. Seafood Specialist Boat Works*, 14 BRBS 141 (1981); *Clauss v. The Washington Post Co.*, 13 BRBS 525 (1981), *aff'd mem.*, 684 F.2d

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[1]The administrative law judge determined, Decision and Order at 16 (emphasis in original):

> at the time the incident between Mr. Bond and [claimant] occurred, [claimant] was not an *employee of P&O Ports*. Arguably, up until the time that Mr. Bell called the union hall to order the drivers requested by Mr. Bond, [claimant], along with the other drivers sent by the union hall, had standing as an employee of P&O Ports, who had a job waiting for him at the work site. But once Mr. Bell called for replacements, and told [claimant] he had been replaced, and Mr. Bond told [claimant] he had been replaced and he was not allowed to go on the ship, any employment relationship between [claimant] and P&O Ports ceased to exist. That [claimant] disagreed with Mr. Bond's authority to replace him does not change this.

1032 (D.C. Cir. 1982); *see also* 99 C.J.S. §138 (2000). Initially, we reject claimant's contention that he was an employee because he was engaged in the maritime work of unloading a vessel. The existence of an employment relationship between claimant and employer is a necessary element to establish entitlement in any workers' compensation scheme, including the Longshore Act. An employer-employee relationship must be established before the question of status under Section 2(3) based on the maritime nature of the work is addressed. *See Holmes*, 14 BRBS 141 (independent contractor is not an employee). While previous cases have not presented the Board with facts such as those here, involving whether claimant was in fact "employed" on the day of injury, we find persuasive authority in decisions from other jurisdictions and affirm the decision of the administrative law judge.

In order for an employer-employee relationship to exist, there must be an express or implied contract of employment with the informed consent of both parties. *Potter v. Hawaii Newspaper Agency*, 89 Haw. 411, 974 P.2d 51 (Haw. 1999); *Vanzant v. Hall*, 219 Conn. 674, 594 A.2d 967 (Conn. 1991); 99 C.J.S. §139 (2000). The type of relationship and its duration depends on the facts of each case, and the belief of the parties is immaterial. 99 C.J.S. §142 (2000). When the relationship ceases, either permanently or temporarily, the liability of the employer under a compensation act also ceases. *Carnes v. Trasport. Ins. Co.*, 615 S.W.2d 909 (Tex. Civ. App. El Paso 1981), *writ refused* (Sept. 23, 1981); *Kinnard v. Gibson*, 172 S. 595 (La. Ct. App. 2d Cir. 1937);[2] 99 C.J.S. §141 (2000). However the relationship ends, the worker must be given a reasonable time to leave the premises. 99 C.J.S. §141 (2000); 2 Larson's Workers' Compensation Law §26.01 (2007).

If an injury occurs before a worker has been hired, the basic rule is that there is no coverage. *State Comp. Ins. Fund v. Workers' Comp. App. Bd. [Bate]*, 59 Cal. App. 3d 647, 130 Cal. Rptr. 831 (1976) (claimant slipped and fell while leaving the labor office on the employer's premises; not entitled to compensation because she was a job applicant, not an employee); 2 Larson's Workers' Compensation Law §26.02[1] (2007). When a worker is hired through a union hall, an issue exists as to when he becomes an employee. Generally, hiring is not official until the worker is accepted by the employer at the job site; thus, any injuries that occur prior to this time are not the employer's responsibility. *Miller v. T.H. Browning Steamship Co.*, 73 F.Supp. 185 (W.D.N.Y.), *aff'd*, 165 F.2d 209 (2d Cir. 1947) (claimant, injured walking along the deck of the ship

[2]In *Kinnard*, a supervisor instructed a worker not to work because of illness. The workman went home but returned to work and was injured before the supervisor noticed his presence. The employer was not held liable for compensation because, although the worker was regularly employed, he was not in the employ of the operator at the time of the injury.

before he was hired, was not covered under the Jones Act). *Miller* is discussed in Larson's treatise on workers' compensation as demonstrating the requirement of a binding agreement in existence between a claimant and employer at the time of injury in order for claimant to obtain compensation:

> Although one gets the impression that plaintiff would have been hired as a matter of course [if he had not become injured], still [at the time of injury] he had not been officially accepted by the employer as an employee, nor had he made any agreement with the employer which would bind him or prevent him from turning and walking off the ship if he had chosen to do so.

2 Larson's Workers' Compensation Law §26.02[2] (2007); *see Fluor Engineers & Contractors, Inc. v. Kessler*, 561 P.2d 72 (Okla. 1977) (claimant, a union worker who had received his assignment the night before he was to commence work, sustained injuries in an accident on the highway *en route* to the job site; the court held that there was no employer-employee relationship at the time of the accident); *Posey v. Industrial Comm'n*, 87 Ariz. 245, 350 P.2d 659 (1960) (claimant, who was injured *en route* to the job site, had not been hired; injury not covered); *see also Huntley v. Howard Lisk Co., Inc.*, 154 N.C.App. 698, 573 S.E.2d 233 (2002) (injuries during road test for trucking job not compensable because no employment relationship, no promise of employment and claimant not paid for taking test).[3]

We affirm the denial of benefits, as claimant has failed to demonstrate error in the administrative law judge's finding that claimant had not been hired before he was injured. *Miller*, 73 F.Supp. 185. Specifically, the administrative law judge, as is within her authority, explicitly credited the testimony of Mr. Bell and Captain Bond to find that

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[3]Because the issue of the existence of an employment relationship is fact-intensive, the evidence may be sufficient to establish that the trip or activity resulting in injury prior to the hiring is sufficiently related to the employment such that the injury would be covered. *See, e.g., Hubble v. Dyer Nursing Home*, 188 S.W.3d 525 (Tenn. 2006) (injury during attendance at paid 3-day orientation covered); *Gilewski v. Mastic Beach Fire Dist. No. 1*, 19 A.D.2d 299, 241 N.Y.S.2d 874 (1963), *aff'd*, 14 N.Y.2d 595, 193 N.E.2d 262 (N.Y. 1964) (volunteer firefighters of one district rushed to help neighboring district fight fire; fireman suffered fatal heart attack; even though neighboring district chief refused the assistance of the first district firefighters, heart attack was chargeable to that neighboring district); *Smith v. Venezian Lamp Co.*, 5 A.D.2d 12, 168 N.Y.S.2d 764 (1957) (employer tried claimant out as a lamp polisher; claimant injured using buffing machine; compensation awarded).

Captain Bond had the ultimate control over whether claimant was hired to work that day, and she rationally found that claimant was not hired to work after he reported late and was replaced. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2d Cir. 1961); *Perini Corp. v. Heyde*, 306 F.Supp. 1321 (D.R.I. 1969). Consequently, there was no employer-employee relationship, and we affirm the administrative law judge's finding that claimant's injuries are not compensable.[4] *Clauss*, 13 BRBS at 529; *Miller*, 73 F.Supp. 185; *Kessler*, 561 P.2d 72; *Posey*, 87 Ariz. 245, 350 P.2d 659. Therefore, we affirm the denial of benefits.[5]

Accordingly, the administrative law judge's Decision and Order Denying Benefits 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

[4]In light of our holding, we need not address claimant's contention that the administrative law judge erred in finding that the injury did not occur in the course of his employment.

[5]*Kielczewski v. The Washington Post Co.*, 8 BRBS 428 (1978), is distinguishable from this case. In *Kielczewski*, the claimant stayed after his shift to talk with his supervisor when another employee attacked him. Unlike the claimant in the case at bar, Kielczewski was in an employment relationship and had not taken any actions which removed him from his employment.