BRB No. 96-1080

ROBERT HEROLD	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
STEVEDORING SERVICES OF AMERICA	)	DATE ISSUED:
	)	
and	)	
	)	
HOMEPORT INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order - Denying Benefits of Alexander Karst, Administrative Law Judge, United States Department of Labor.

David Hytowitz (Pozzi Wilson Atchison), Portland, Oregon, for claimant.

John Dudrey (Williams, Fredrickson & Stark, P.C.), Portland, Oregon, for employer/carrier.

Before: SMITH, BROWN and DOLDER, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order - Denying Benefits (94-LHC-3358) of Administrative Law Judge Alexander Karst 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 which 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).

On January 9, 1994, claimant injured himself in the course and scope of his employment while working as a linesman performing a tie-up of the oil tanker, *the Prince William Sound,* that had come into the Port of Astoria (the Port) for repairs. Subsequently, claimant filed a claim for disability and medical benefits and for a scheduled award for a facial scar. In his Decision and Order, the administrative law judge identified the threshold and controlling question as whether the Port or Stevedoring Services of America (SSA) was

claimant's employer at the time of injury.

It was undisputed that had the injury occurred prior to April 19, 1993, the Port would have been claimant's employer. Prior to April 19, 1993, the Port was a member of the Pacific Maritime Association (PMA), which is an association of West Coast maritime employers that acts as the payroll agency for its members. The Port provided tie-up services by requesting linesmen through a dispatch hall jointly operated by PMA and the union, linesmen appeared on PMA records as the Port's employees, and were paid by the Port through PMA. CX 13, 18, 20. On April 19, 1993, however, the Port withdrew its membership from the PMA. EX 1. Subsequently, Mr. Larsen, the Acting Executive Director of the Port, outlined employment procedures for the Port in a letter dated February 15, 1994. With respect to ship tie-ups, such as that during which claimant was injured, Mr. Larsen stated that the Port is considered an employer for this work and as an employer, requirements for hard hats and vests would be enforced by Port personnel on site during the work. He also stated that the Port would remain an employer on all lines service work until such time as a stevedore is appointed by the Port to act as the employer for this work and that vessels calling at the Port for other than cargo purposes would be payrolled by the stevedore with the most recent cargo vessel at the docks. EX 2.

After the tie-up in which claimant was injured was completed, the line leader, in accord with the Port's verbal agreement with SSA, filled out a Port time sheet and turned it in to the Port's office. The Port sent its time sheet to SSA since SSA had serviced the last prior cargo ship. As part of its agreement with the Port, SSA prepared its own time sheet and turned it in to PMA so that the linesmen could be paid through PMA. *See* EX 14.

The administrative law judge concluded that the Port was claimant's employer after applying the "right to control the details of the work" test, the "borrowed employee" test, and the "relative nature of the work" test. Consequently, the administrative law judge denied benefits as the Port is immune from liability under Section 3(b) of the Act, 33 U.S.C. §903(b), as an Oregon municipal corporation. The administrative law judge summarily denied claimant's Motion for Reconsideration.

On appeal, claimant contends that the administrative law judge erred in concluding that the Port was his employer at the time of injury. SSA responds in support of the administrative law judge's denial to which claimant has replied.[1]

[1]SSA's argument that claimant's Motion for Reconsideration was untimely filed

before the administrative law judge lacks merit. The administrative law judge's decision was filed in the district director's office on March 7, 1996, and claimant's Motion for Reconsideration was filed on March 18, 1996, within ten days as March 17, 1996, was a Sunday, as is evidenced on its Certificate of Service, as well as on the postmark receipt submitted by claimant in his reply brief. *See* 20 C.F.R. §§802.206(c), 802.221. Contrary to SSA's argument, the Board considers claimant's appeal as an appeal of both the administrative law judge's Decision and Order and his summary denial of claimant's Motion for Reconsideration on April 16, 1996.

The Board has identified certain tests for determining the existence of an employer-employee relationship. The administrative law judge should apply whichever test is rational considering the facts of the particular case. *See Tanis v. Rainbow Skylights*, 19 BRBS 153 (1986). The "right to control the details of the work" test has four recognized elements: 1) the right to control the details of the work; 2) the method of payment; 3) the furnishing of equipment; and 4) the right to fire. *Tanis*, 19 BRBS at 153; *Burbank v. K.G.S., Inc.*, 12 BRBS 776, 778 (1980). Where the administrative law judge's application of one test is affirmable, the Board need not address the administrative law judge's application of the other tests. *See Holmes v. Seafood Specialist Boat Works*, 14 BRBS 141 (1981).

After consideration of claimant's contentions on appeal, employer's response, claimant's reply, and the administrative law judge's decision in light of the record evidence, we affirm the administrative law judge's finding that the Port, and not SSA, was claimant's employer at the time of injury as it is supported by substantial evidence. The administrative law judge acted within his discretion in finding that two of the recognized elements of the "right to control the details of the work" test, namely, the right to control the details of the work and the furnishing of equipment, indicated that the Port was claimant's employer. *See Tanis*, 19 BRBS at 153; Decision and Order at 7-8; CX 20; EX 2. The administrative law judge found that the Port had the right to control the details of claimant's work as it had a rule requiring linesmen to wear hard hats and vests, and it furnished the truck used in the tie-up service. Moreover, the administrative rationally found that the method of payment was not dispositive as it pointed to both the Port and SSA as the employer, and that the right to fire claimant was a neutral factor. Decision and Order at 3, 8; CX 13, 15, 18; EX 4, 14. The administrative law judge found that the Port's time sheets indicated that the Port was the employer, but that SSA's paperwork treated the linesmen as its employees. The administrative law judge acted within his discretion in finding that Mr. Larsen's letter, which post-dated claimant's injury, was formal notice to the union that pursuant to the prior verbal agreements between the Port and the stevedores, payroll for linesmen on tie-ups would be processed through PMA by the stevedores, but that the Port would remain their employer.[2] Decision and Order at 3. Consequently, we affirm the administrative law judge's finding that the Port, and not SSA, was claimant's employer at the time of injury based on the administrative law judge's application of the "right to control the details of the work" test. Because we affirm the administrative law judge's application of this test in this case, we need not address the administrative law judge's application of the two other tests. *See Holmes*, 14 BRBS at 141.

Contrary to claimant's remaining contentions, we note that the administrative law judge considered them and rejected each one of them in his decision. The administrative

[2]The administrative law judge also acted within his discretion in finding that Commissioner's McGowan's statement that it would be more advantageous for the Port to get out of an employer/employee relationship did not rule out the Port as the employer of linesmen until it worked out the details of its withdrawal as an employer. Decision and Order at 5.

law judge's inference that the Port either contributes to the dispatch hall or the contribution was waived is supported by SSA's assertion that it tacked a contribution to PMA onto the Port's bill for lines services. Decision and Order at 5 n. 2. Moreover, the administrative law judge rationally rejected claimant's arguments that SSA was acting on behalf of an undisclosed principal or that claimant should receive benefits as a third-party beneficiary of the agreement between the Port and the stevedores. Decision and Order at 6, 7.

Accordingly, the administrative law judge's Decision and Order - Denying Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge