BRB No. 98-1227

LEROY RICKS, SR.	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
TEMPORARY EMPLOYMENT SERVICES, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
MARYLAND CASUALTY COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
TRINITY MARINE GROUP, INCORPORATED	)	
	)	
Self-Insured Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of James W. Kerr, Jr., Administrative Law Judge, United States Department of Labor.

B. Ralph Bailey (Bailey & Dwyer), Mandeville, Louisiana, for employer Temporary Employment Services, Incorporated, and carrier Maryland Casualty Company.

Peter L. Hilbert, Jr. and Darnell Bludworth (McGlinchey Stafford), New Orleans, Louisiana, for employer Trinity Marine Group, Incorporated.

Joshua T. Gillelan II (Henry L. Solano, Solicitor of Labor; Carol DeDeo,

Associate Solicitor; Samuel J. Oshinsky, Counsel for Longshore), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: HALL, Chief Administrative Appeals Judge, SMITH and BROWN, Administrative Appeals Judges.

PER CURIAM:

Temporary Employment Services, Incorporated (TESI) and its carrier, Maryland Casualty Company (Maryland), appeal the Decision and Order on Remand (94-LHC-2213) of Administrative Law Judge James W. Kerr, Jr., 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).

This is the second time this case is before the Board. To recapitulate the facts, claimant was employed by TESI, a temporary employment company which provides labor to shipyards. On January 11, 1993, claimant, while working as a laborer at Trinity Marine Group, Incorporated (Trinity), hit his head and back on the ground after tripping over a piece of steel. He was treated with medication for his neck and lower back pain and advised by his treating physician, Dr. Reyes, not to return to work. Claimant was later diagnosed by Dr. Steiner with degenerative changes at the L4-5 and L5-S1 levels, consistent with his age group, but no other significant findings. Four months after the accident, claimant sought treatment for blurred vision and difference in color perception. TESI's longshore insurance carrier, Maryland, voluntarily paid claimant temporary total disability compensation and medical benefits from January 15, 1993 through April 24, 1994. 33 U.S.C. §§907, 908(b). Thereafter, Maryland controverted the claim on the basis of Dr. Steiner's opinion that claimant could return to work.

In his initial Decision and Order, the administrative law judge found that claimant was entitled to temporary total disability benefits with regard to his back and neck injuries for the period of January 11, 1993 to January 3, 1996. As the administrative law judge determined that claimant suffered no loss in wage-earning capacity as of January 3, 1996, the administrative law judge found that claimant was entitled to no further compensation benefits as of that date. Next, the administrative law judge concluded that Trinity was liable for claimant's benefits as the borrowing

employer. In determining whether Maryland was entitled to reimbursement from Trinity for benefits it paid to claimant, the administrative law judge found that while the insurance policy TESI obtained from Maryland contained a waiver of subrogation endorsement, this clause only applied if required by the TESI/Trinity contract. As the contract between Trinity and TESI contained no such requirement, the administrative law judge ordered Trinity to reimburse Maryland for all compensation and medical benefits it paid to claimant.

On appeal, the Board acknowledged that it was unchallenged by Trinity that, as the borrowing employer, it would be liable for claimant's benefits absent a valid contractual obligation. Thereafter, pursuant to the holding of the United States Court of Appeals for the Fifth Circuit in *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), the Board vacated the administrative law judge's decision regarding Trinity's liability for claimant's benefits, as his inquiry did not include a review of the contractual provisions of record in order to determine whether there was a valid contractual obligation on the part of an entity other than Trinity to pay for claimant's benefits. In this regard, the Board noted that while the TESI/Trinity contract did not contain a waiver of subrogation clause in favor of Trinity, it did contain a clause requiring TESI to indemnify and hold harmless Trinity from any claims resulting from an injury to a TESI employee working at Trinity's shipyard. The Board rejected TESI's contention that Trinity did not specifically raise the issue regarding the indemnity clause contained in the TESI/Trinity contract before the administrative law judge, noting that at the hearing and in its post-hearing brief, Trinity argued that the contractual relationship between it and TESI absolved Trinity of liability for claimant's compensation benefits. Thus, the Board held that the issue of whether the administrative law judge should have examined the contractual provisions of record, including the indemnification clause, in order to determine the responsible employer, was properly before it. *Ricks v. Temporary Employment Services, Inc.*, BRB No. 97-0544 (Dec. 23, 1997)(unpublished).

On remand, the administrative law judge, after initially finding that the indemnity agreement contained in the TESI/Trinity contract was ambiguous, credited the testimony of Tim Berger, TESI's president, that he did not believe Trinity was liable for claimant's benefits based on the contract. In light of this testimony, the indemnity agreement itself, and TESI's insurance policy with Maryland, the administrative law judge determined that TESI indemnified Trinity from any claims arising in connection with work performed at Trinity's shipyard, and therefore, Trinity was not liable for the payment of claimant's benefits.

On appeal, TESI and its carrier, Maryland, challenge the administrative law judge's finding that Trinity is not liable for claimant's compensation.[1] Specifically, Maryland contends that the administrative law judge erred in considering the parol testimony of Tim Berger in his interpretation of the TESI/Trinity contract. As this contract is one in admiralty, it argues that any ambiguity must be interpreted against the drafter of the document, in this case, Trinity. Maryland further contends that its policy with TESI only covered TESI's employees, not Trinity's employees, and since Trinity, as the borrowing employer, was the employer liable for claimant's benefits, the TESI/Maryland policy did not cover claimant. Maryland further maintains that the Board's previous determination that the issue of the indemnification clause contained in the TESI/Trinity contract was before the administrative law judge during the initial hearing was in error and should be re-examined. Alternatively, assuming the indemnification clause is considered, Maryland asserts that since this clause only covers claims arising out of the negligence or willful act of TESI, it has no application to claimant. Trinity responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, asserting that the administrative law judge has jurisdiction to answer only the question of who is the responsible employer or carrier under applicable law, and that contractual issues outside this question are beyond the jurisdiction of the administrative law judge. The Director further contends that the identity of a liable employer cannot be changed by virtue of a contractual agreement. Maryland replies to the Director's response, agreeing with the Director that the liability of the borrowing employer cannot be abrogated by contract, but disagreeing with the Director's position that issues ancillary to the responsible employer issue cannot be adjudicated by the administrative law judge. Trinity replies to the Director's response, maintaining that, pursuant to the holding of the United States Court of Appeals for the Fifth Circuit in *Total Marine*, contractual provisions are relevant to determining which party is responsible for the payment of claimant's compensation, and that the administrative law judge did have jurisdiction to consider the relevant contractual provisions. Lastly, Maryland replies to Trinity's response, reiterating its contentions raised in its appellate brief.

[1]In discussing the contentions raised on appeal, these parties will be referred to jointly as Maryland in this opinion.

At the outset, we reject the Director's contention that the administrative law judge lacked jurisdiction to consider the relevant contractual provisions in determining whether Maryland was entitled to reimbursement for the payment of claimant's benefits. The Board has held that it is within the authority of the administrative law judge to hear and resolve insurance issues which are necessary to the resolution of a claim under the Act. *See Schaubert v. Omega Service Industries, Inc.*, 31 BRBS 24 (1997); *Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993). In *Pilipovich v. CPS Staff Leasing, Inc.*, 31 BRBS 169 (1997),[2] the Board specifically held that an administrative law judge should resolve contractual indemnity and insurance issues between the lending employer, its insurer, and the borrowing employer, where the arguments raised were ancillary to the responsible employer issue and it was not in the interest of judicial economy to defer adjudication of related issues to another place and time. *Id.* at 171-172; *see generally Jourdan v. Equitable Equipment Co.*, 32 BRBS 200 (1998). The Board has recognized that the administrative law judge has the requisite jurisdiction to decide issues involving the liable employer or carrier, including whether the borrowed employee doctrine is applicable, even if the claimant is not an "active" participant in the adjudication proceedings. *Schaubert*, 31 BRBS at 27. Accordingly, as the issue in the instant case regarding whether Maryland is the carrier liable for compensation payments to claimant arises out of, and is ancillary to, the responsible employer issue, the administrative law judge properly considered that issue in his decision.

The Director further contends that parties cannot contractually abrogate the liability of a responsible employer, or require the Act's compensation scheme to enforce a claimant's rights to compensation against a party other than the responsible employer. This contention, however, is in direct contravention of the Fifth Circuit's holding in *Total Marine*. In that case, the court held that "a borrowing employer is required to pay 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)(emphasis added); *see also Pilipovich*, 31 BRBS at 169.

[2]The Director notes that the Board's decision in *Pilipovich* was appealed and suggests that resolution of this case should await disposition by the United States Courts of Appeals for the Fifth Circuit. However, this appeal was subsequently dismissed with prejudice on joint motion of the parties. *CPS Staff Leasing v. Pilipovich,* No. 98-60005 (5th Cir. March 2, 1999) (Order).

Thus, the import of *Total Marine* is that a lending employer and its insurer may be liable to an injured worker under a contract indemnifying the borrowing employer. *See Schaubert v. Omega Service Industries, Inc.*, 32 BRBS at 233, 239 (1998). Accordingly, we hold that the administrative law judge acted within his authority in resolving the issue of whether Maryland is liable for claimant's disability compensation, based on his interpretation of the relevant contracts.

Next, as it did before the Board in the initial appeal in this matter, Maryland maintains that Trinity improperly relies on the indemnity clause contained in the TESI/Trinity contract, as Trinity did not specifically raise this contention before the administrative law judge at the initial hearing. The Board fully addressed and rejected this contention in its previous decision, noting that at the hearing and in its post-hearing brief, Trinity argued that the contractual relationship between it and TESI absolved Trinity of liability for claimant's compensation benefits. *Ricks*, slip op. at 5 n.6. Specifically, at the formal hearing before the administrative law judge, counsel for Trinity stated that Trinity maintained the position that TESI was responsible for workers' compensation benefits as part of the TESI/Trinity contract. *See* Tr. at 20-21. That counsel did not explicitly mention the indemnification clause contained in the contract is not persuasive. Thus, as this issue has been previously decided by the Board, and the prior decision constitutes the law of the case, we reject this contention. *See, e.g., Schaubert*, 32 BRBS at 234; *Doe v. Jarka Corp. of New England*, 21 BRBS 142 (1988).

We next consider Maryland's argument that the administrative law judge improperly considered parol evidence in interpreting the contract between TESI and Trinity. In his Decision and Order on Remand, the administrative law judge found that the indemnity clause contained in the TESI/Trinity contract was ambiguous. Specifically, the administrative law judge found that the last phrase of that clause, which stated that TESI will indemnify Trinity for any claims "in connection with the Work occurring prior to acceptance of the Work caused by the alleged negligence or willful act of the Contractor," Trinity Ex. 1, clause 5; *see infra*, was ambiguous. Thus, the administrative law judge determined that the use of parol evidence in interpreting this contract, specifically the testimony of Tim Berger, was permissible. On appeal, Maryland challenges this determination, contending that with regard to admiralty contracts, any ambiguity should be construed against the drafter of the contract, in this case Trinity. We disagree.

The parol evidence rule provides that when the parties to a contract put their agreement in writing in a manner so that the terms of the agreement are certain, those terms cannot be varied or contradicted on the basis of extrinsic evidence. 29A Am. Jur. 2d *Evidence* §1092. However, where the language used in a written instrument is ambiguous or uncertain, parol evidence is admissible to explain, rather than vary, the meaning of the language used. *Id.*, §1100. Contrary to carrier's contention, the Board has affirmed the

admission of parol evidence with regard to contracts ancillary to claims under the Act where the administrative law judge has determined that the terms of the agreement were ambiguous.[3] *See, e.g., Sellman v. I.T.O. Corp. of Baltimore*, 24 BRBS 11 (1990)(Brown, J., dissenting on other grounds), *rev'd in part on other grounds*, 954 F.2d 239, 25 BRBS 101 (CRT)(4th Cir.), *modified in part on reh'g*, 967 F.2d 971, 26 BRBS 7 (CRT)(1992), *cert. denied*, 507 U.S. 984 (1993). Thus, in the instant case, we hold that the administrative law judge acted within his discretion in determining that the indemnity clause in the TESI/Trinity contract was ambiguous, and in considering parol evidence in interpreting this contract.

We now turn to the merits of the instant case. On appeal, Maryland asserts that pursuant to the borrowed employee doctrine, Trinity is liable for claimant's disability compensation under the Act, and that the administrative law judge's interpretation of the contracts at issue is flawed. We begin our analysis with the borrowed employee doctrine, which provides that a borrowing employer may be held liable for benefits if application of the tests for employment so indicates. *See Total Marine*, 87 F.3d at 774, 30 BRBS at 62 (CRT). 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), and the Board has applied this test.[4]

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[3]Relying on *Chevron Oil Co. v. E.D. Walton Const. Co.*, 517 F.2d 1119 (5th Cir. 1975), TESI asserts that with respect to admiralty contracts, any ambiguity should be construed against the drafter of the contract. However, *Chevron* concerned not an admiralty contract but a construction contract for a gas processing plant, whereby the contractor agreed to indemnify Chevron against injuries arising out of its operations. The case arose after one of the contractor's employees was injured due to the negligence of Chevron. Interpreting Texas contract law, the district court denied Chevron indemnity since, as the drafter of the contract, Chevron failed to expressly provide for indemnity against the consequences of its own negligence. This case is inapposite to the instant case.

[4]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) did the employee acquiesce in the new work situation; (3) who furnished tools and place for performance; (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

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." *See Total Marine*, 87 F.3d at 779, 30 BRBS at 66 (CRT); *see also Pilipovich*, 31 BRBS at 169.

The central issue raised by the instant appeal is whether the insurance coverage provided by Maryland extends to employees borrowed by Trinity from TESI, Maryland's insured. It is not contested that Trinity is claimant's borrowing employer; thus, Trinity is liable for benefits unless relieved of this obligation by contract. In his Decision and Order on Remand, the administrative law judge found that TESI, which had no employees performing longshore work on its behalf, provided longshore workers' compensation insurance coverage which inured to the benefit of Trinity, a borrowing employer who obtained workers from TESI. The administrative law judge further found that the TESI/Maryland policy extended insurance coverage to Trinity for injuries sustained by its borrowed employees covered under the Act, and that Maryland, pursuant to the policy it issued to TESI, waived its right to seek reimbursement from Trinity. Based on this insurance policy, and the indemnification clause contained in the TESI/Trinity contract, the administrative law judge concluded that Maryland was liable for compensation payments to claimant. Accordingly, in order to address the issue raised on appeal, two contracts must be analyzed: the TESI/Trinity contract, and the contract between TESI and Maryland.

The TESI/Trinity Contract

Clause 5 of the contract between TESI (the "Contractor") and Trinity (the "Company"), states:

> The Contractor agrees to indemnify the Company against demand or payment of any and all contributions, withholding deductions or taxes measured by the wages, salaries or other compensation paid to persons employed by the Contractor or any Sub-Contractor in performance of the Work. The Contractor agrees to defend, protect, indemnify and save harmless the Company from and against any and all claims, suits, loss, cost, damage or expense, including reasonable

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the risks of the work situation and acquiesced thereto. *Gaudet*, 562 F.2d at 357.

> attorney's fees and court fees, arising out of injury or death of persons and/or loss of or damage to property (whether of the parties hereto, or of others), *including* loss of use thereof, occurring in, arising out of or in connection with Work occurring prior to acceptance of the Work caused by the alleged negligence or willful act of the Contractor.

Trinity Ex. 1, clause 5 (emphasis added). The TESI/Trinity contract further required TESI to carry workers' compensation insurance for claims under the Act, and it is undisputed that TESI did enter into a workers' compensation policy with Maryland. Based on the TESI/Trinity indemnity agreement, and the testimony of Tim Berger that he believed that Maryland was liable for claimant's claim under the Act, the administrative law judge found that TESI had indemnified Trinity against all claims arising in connection with work performed, and therefore, Trinity was not liable for claimant's compensation under the Act.

On appeal, Maryland asserts that the indemnification clause is not applicable to the instant case as there has been no finding that claimant's injury occurred as a result of the negligence or willful act of TESI, a requirement which Maryland insists must occur before the indemnity clause can be triggered. This contention is not supported by the text of the contract. Generally, a phrase beginning with the word "including," as is the case with the instant indemnity clause, is meant to be exemplary, not exclusive. *See, e.g., Story v. Navy Exchange Service Center*, 30 BRBS 225, 227 (1997). In this case, in the indemnification clause, the word "including" is exemplary of the entire sentence preceding the word, such that the indemnity clause provides a promise by TESI that it will indemnify Trinity for "any and all claims" arising out of injury or death, *including* any loss caused by TESI's negligence or willful act. Put another way, while TESI agreed to indemnify Trinity for its own negligence or willful acts, this phrase does not *exclude* other types of situations in which TESI agreed to indemnify Trinity.

This interpretation is supported by the testimony of Tim Berger, TESI's president, who testified that TESI reported claimant's payroll information to Maryland for purposes of establishing the premium Maryland charged TESI for its workers' compensation coverage. Significantly, Mr. Berger testified that subsequent to claimant's work accident, for which negligence was neither alleged nor established, it was his belief that Maryland was liable for claimant's compensation. *See* Trinity Ex. 22 at 32-33, 44-47. Based on this testimony, it is apparent that the intent of the parties was for TESI to indemnify Trinity for any and all claims arising out of injury or death or loss of property, which would include any claim arising out of the negligence or willful act of TESI. Based on the language used in the indemnification clause, as well as the testimony of Tim Berger, we therefore hold that the administrative law judge rationally found that the TESI/Trinity indemnification clause indemnified Trinity for liability for claimant's claim under the Act.

The TESI/Maryland Contract

Maryland additionally contends that pursuant to the court's holding in *Total Marine*, Trinity, as the borrowing employer, was claimant's employer as a matter of law. While the TESI/Trinity contract required TESI to carry workers' compensation insurance for claims under the Act, *see* Trinity Ex. 1, clause 6, Maryland asserts that the insurance policy TESI obtained from it is not applicable to the instant case, as it covers only workers' compensation claims with respect to TESI's employees and not those employees borrowed from TESI by Trinity. This contention is not supported by the record. The TESI/Trinity contract required TESI to carry insurance, at its expense, for claims under the Jones Act, claims under state workers' compensation schemes, and for claims under the Act. It is undisputed that TESI did in fact enter into a policy with Maryland for workers' compensation coverage under the Act. *See* Trinity Exs. 7, 11. As mentioned above, Tim Berger testified at the hearing that claimant was paid by TESI, and that TESI reported claimant's payroll information to Maryland so that it could be included in the premium that Maryland was charging TESI for workers' compensation coverage. *See* Trinity Ex. 22 at 32-33, 44. Mr. Berger further testified that TESI reported claimant's accident to Maryland because he believed that Maryland was liable for claimant's compensation. *Id.* at 44-47. Thus, Mr. Berger's testimony directly contradicts the contention that TESI's policy with Maryland did not provide workers' compensation coverage for the employees Trinity borrowed.

Maryland's contention is further belied by the language contained in the TESI/Maryland contract. Specifically, the insurance policy contains a "Waiver of Our Right to Recover From Others Endorsement" clause, which states the following:

> We have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against the person or organization named in the Schedule. (This agreement applies only to the extent that you perform work under a written contract that requires you to obtain this agreement from us.)

Trinity Ex. 10. By the terms of the contract, this waiver of subrogation clause applies in the instant case if Trinity is named in the schedule and such a waiver is required by the TESI/Trinity contract. Initially, in his Decision and Order on Remand, the administrative law judge found that a stipulation was introduced into the record, signed by the representatives for Trinity, TESI and Maryland, stating that Trinity was in fact named in the schedule on the "Waiver of our Right to Recover from Others Endorsement." *See* Decision and Order on Remand at 3; Trinity Ex. 10. Thus, the administrative law judge properly concluded that this endorsement "provided that Maryland would not enforce its right to

recover its payments from anyone liable for an injury covered by the policy against any organization named in the Schedule such as Trinity." Decision and Order on Remand at 3.

Maryland asserts, however, that this provision only applies if such a waiver was required by the TESI/Trinity contract and argues that the administrative law judge erred in finding that such a waiver requirement existed. Maryland notes that during the contract negotiations, Trinity insisted that a waiver of subrogation in its favor was not required, and asserts that, therefore, the TESI/Trinity contract contained no waiver of subrogation. On this issue, the instant case is similar to the situations presented in *Pilipovich* and *Schaubert*, 32 BRBS at 233. In *Pilipovich*, the claimant, who was employed by CPS, a temporary employment agency, was injured during the course of his employment as a shipfitter at Avondale. The administrative law judge determined that both Avondale and Wausau, CPS's carrier, were liable for the claimant's benefits. *Pilipovich*, 31 BRBS at 170. Both Avondale and Wausau appealed, *inter alia*, the finding of liability. After affirming the finding that Avondale was the borrowing employer, the Board held that the contract between Avondale and CPS required CPS to provide workers' compensation insurance and that CPS contracted with Wausau to provide this coverage. Further, the Board held that the administrative law judge correctly found that CPS paid an extra premium to Wausau in return for "a waiver of its right of recovery from anyone liable for an injury covered by the policy." *Id*. at 172. From the contractual agreements, the Board held that Wausau was solely liable, as it waived its right to seek reimbursement from Avondale. Therefore, the Board modified the administrative law judge's decision to reflect Wausau's liability to the claimant. *Id*.

Similarly, in *Schaubert*, Omega Services Industries (Omega) agreed to indemnify and hold harmless Elf Aquitaine Operating, Incorporated (Elf), the borrowing employer, against all claims brought by Omega employees, including workers' compensation claims. Further, Omega agreed to carry workers' compensation insurance which would contain sufficient endorsements waiving any claims the insurer may have against Elf. Thus, the Board held that Omega and its insurer were entrusted to protect and indemnify Elf from liability for workers' compensation claims and were therefore liable for the claimant's benefits. *Schaubert*, 32 BRBS at 238-239.

As in *Pilipovich* and *Schaubert*, in the instant case, TESI agreed to hold Trinity harmless against all claims brought by TESI employees, including workers' compensation claims under the Act. Further, TESI agreed to carry workers' compensation insurance, which, by virtue of the parties' stipulation, contained a sufficient endorsement waiving any claims Maryland may have against Trinity. Based on the texts of the relevant contracts, the stipulations thereto, and the testimony of Tim Berger, we hold that the administrative law judge correctly determined that TESI and Maryland were entrusted to protect and indemnify Trinity from liability for workers' compensation claims brought under the Act, and are liable for claimant's benefits herein. Accordingly, we affirm the administrative law judge's

conclusion that Trinity is not liable for claimant's compensation and that Maryland is not entitled to reimbursement for payment of claimant's compensation.

One final issue flowing from the first appeal to the Board remains for our consideration. Counsel for Trinity has submitted a petition for an attorney's fee for services performed before the Board in connection with its initial appeal to the Board, seeking $5,993.75, at hourly rates of $150, $135 and $50, plus $243.93 in expenses. TESI/Maryland filed an objection to counsel's fee petition, requesting that the Board adopt the administrative law judge's Order Requiring Clarification of Attorney's Fee Application, wherein the administrative law judge found that Trinity's fee petition before him was deficient under the regulations. While an administrative law judge and the Board can resolve issues regarding insurance contract coverage in the context of determining the liable employer or carrier, the question of whether TESI is liable to Trinity for its attorney's fees is not a "question in respect of a claim" within the meaning of Section 19(a) of the Act, 33 U.S.C. §919(a), as the resolution of this issue is not necessary for, or related to, any issue involving compensation liability. *See Jourdan,* 32 BRBS at 205. Moreover, neither Section 28, 33 U.S.C. §928, nor any other provision of the Act provides for an award of an attorney's fee to an employer. *Id.* at 206. As we are without statutory authority to award an attorney's fee to an employer's counsel, this fee request is denied.

Accordingly, the Decision and Order on Remand of the administrative law judge is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge