TOPIC 75 EMPLOYER-EMPLOYEE RELATIONSHIP

***[ED. NOTE:** For a discussion as to when an employer is a **subcontractor**, see Topic 4.1, supra.]*

75.0 REQUISITE EMPLOYER-EMPLOYEE RELATIONSHIP

The existence of a master-servant relationship is a condition precedent to making a claim under the LHWCA. In Newpark Shipbuilding & Repair, Inc. v. Roundtree, 698 F. 2d 743, 749 (**5th Cir.** 1983), the **Fifth Circuit** held that self-employment is not "employment" within the meaning of the LHWCA. The only employment covered by the LHWCA is an employee's employment by an employer. The LHWCA does not confer rights or benefits on the self-employed because it is a federal workers' compensation statute and — like any state workers' compensation law — it supplants common law with a scheme of strict employer liability and limited employee benefits. The LHWCA requires, as its fundament, an employment relationship — a master-servant relationship between employer and an employee. Crowell v. Bensen, 285 **U.S.** 22, 54 (1932) ("[The LHWCA] has limited application, being confined to the relation of master and servant")

The **Ninth Circuit** seems to recognize the necessity of two persons, one an employer, the other an employee:

> Prior to the [1972] amendment [of the LHWCA], an employee was entitled to federal compensation if his injuries occurred on navigable waters and **his employer** had **an employee** (not necessarily the injured employee) engaged in maritime employment…

Weyerhaeuser Co. v. Gilmore, 528 F.2d 957, 960 (**9th Cir.** 1975) (emphasis in original) (injured employee held eligible for compensation under the LHWCA based on his own work and employment, as distinguished from his employer's diversified operations).

In Holmes v. Seafood Specialist Boat Works, 14 BRBS 141 (1981), the Board found that determining whether a claimant was in "an employee-employer relationship with employer…is necessary in order [] to exercise subject matter jurisdiction over a case." Id. at 147.

Congressional intent is also convincing on this point. The legislative history shows that when Congress amended the LHWCA in 1972 it had

> no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment.

H.R. Rep. No. 1441, 92d Cong., 2d Sess. (1972), reprinted in 1972 U.S. Code Cong. & Admin. News 4698, 4708.

Self-employed independent contractors are not covered employees. It is well-settled that the basic feature of an independent contract is that it does not involve an employment relationship. Casement v. Brown, 148 **U.S.** 615, 622-23 (1893); See Cadillo v. Mockabee, 102 F. 2d 620, 622 (**D.C. Cir.** 1939) ("Since in our opinion claimant was an independent contractor, he is not entitled to claim under the Compensation Act [LHWCA] as an employee."); See also Noel v. Isbrandsten Co., 179 F. Supp. 325, 327 (**E.D. Va.** 1959), aff'd, 287 F.2d 783 (**4th Cir.**), cert. denied, 366 **U.S.** 974, 975 (1961) (holding that a marine surveyor was not covered by the LHWCA because he was an independent contractor).

75.1 DETERMINING EMPLOYER-EMPLOYEE RELATIONSHIP

***[ED. NOTE:** See also Topic 2 Generally, and Topics 2.3 Employee and 2.4 Employer.]*

Three tests have been used in cases under the LHWCA to determine whether an employer-employee relationship exists. The Board initially relied on the factors enunciated in the Restatement (Second) of Agency Section 220, Subsection 2, (**"restatement test"**) which include the extent of control, kind of occupation, and method of payment. See Ronan v. Maret School, Inc., 1 BRBS 348 (1975), aff'd mem., 527 F.2d 1386 (**D.C. Cir.** 1976) (claimant performing maintenance and repair work was an employee, not an independent contractor).

Applying these factors to determine whether a claimant is an "employee" is a matter for the judge as trier-of-fact. Melech v. Keys, 12 BRBS 748 (1980) (carpenter was not entitled to benefits as he was an independent contractor). The fact that an employer did not insure the claimant does not establish the absence of an employment relationship. Tanis v. Rainbow Skylights, 19 BRBS 153 (1986). Furthermore, such a practice is in direct violation of Section 32 of the LHWCA, which requires employers to provide worker's compensation coverage for their employees. See Holmes v. Seafood Specialist Boat Works, 14 BRBS 141 (1981) (affirming that the claimant and the employer were not in an employer-employee relationship); Hansen v. Oilfield Safety, 8 BRBS 835, reaff'd on recon., 9 BRBS 490 (1978), aff'd sub nom. Oilfield Safety & Mach. Specialties v. Harman Unlimited, 625 F.2d 1248, 14 BRBS 356 (**5th Cir.** 1980) (affirming that claimant was an employee of two employers).

The Board has held that the **"right to control details of work" test** is also an appropriate method. See Burbank v. K.G.S., Inc., 12 BRBS 776 (1980) (reversing ALJ's conclusion that a go-go dancer was an independent contractor); Gordon v. Commissioned Officers' Mess, Open, 8 BRBS 441 (1978) (affirming holding that a musician was an independent contractor); Wise v. Horace Allen Excavating Co., 7 BRBS 1052 (1978) (diver was an employee).

In Herold v. Stevedoring Services of America, 31 BRBS 127 (1997), the Board affirmed the ALJ's findings that the Port of Astoria was liable for benefits awarded to the claimant because it "had the right to control the details of the 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." The Board further held that the ALJ "rationally found that the method of payment was not dispositive as it pointed to both the Port and [employer] as employer, and that the right to fire claimant was a neutral factor."

The third test, adopted by the **Fifth Circuit**, is the **"relative nature of the work" test**. In Haynie v. Tideland Welding Service, 631 F.2d 1242, 12 BRBS 689 (**5th Cir.** 1980), rev'g BRB No. 79-361 (Feb. 29, 1980), the **Fifth Circuit** held that this test rather than the "right to control" test is appropriate under the LHWCA, and remanded the case for further findings. See also IC Larson, Workmen's Compensation Law, § 43 et seq. (1980); Oilfield, 625 F.2d 1248, 14 BRBS 356. This test requires a two part analysis, examining (1) the nature of the claimant's work, and (2) the relation of that work to the regular business of the employee. The "relative nature of the work" test generally

is more liberal than the right to control test. The **Fifth Circuit**, in Oilfield, found this approach to be the most appropriate test in worker's compensation cases, in accordance with the LHWCA's expansive view of coverage. Following the **Fifth Circuit's** remand in Haynie, the Board affirmed a judge's holding that a claimant was not an employee. Haynie v. Tideland Welding Serv., 18 BRBS 17 (1985).

In evaluating the nature of a claimant's work, the fact-finder should consider the skill required to do the work, the degree to which the work constitutes a separate calling or enterprise, and the extent to which the work might be expected to carry its own accident burden. Carle v. Georgetown Builders, Inc., 19 BRBS 158 (1986) (Carle II).

Factors relevant to analyzing the relationship between the claimant's work and the employer's business include whether the claimant's work is a regular part of the employer's regular work, whether the claimant's work is continuous or intermittent, and whether the duration of the claimant's work is sufficient to amount to the hiring of continuous services as distinguished from the contracting for the completion of a particular job. Carle II, 19 BRBS at 161.

In Oilfield, 625 F.2d 1248, 14 BRBS 356, the **Fifth Circuit** reasoned that the employer-employee test should be inclusive, so that any worker whose services form a regular and continuing part of a business is protected under the workers' compensation laws.

Where a claimant works during a trial period, as a matter of law, the claimant is an employee. Reilly v. Washington Metro Area Transit Auth., 20 BRBS 8 (1987). Here, the claimant was offered and accepted employment as a track inspector; performed this necessary and gainful employment for the employer's benefit, receiving benefits in lieu of a regular salary, was under the control of the employer and was not working casually or gratuitously.

In Reilly, the ALJ did not make use of any of the three tests used to determine whether an employer-employee relationship exists within the meaning of the LHWCA. The judge concluded that during the claimant's trial period as a track inspector the claimant was not considered an employee. The judge relied on the fact that this was a trial period and on the fact that the claimant was not on the payroll at that time. (The claimant continued to receive temporary total disability benefits for a prior injury in lieu of a salary.) The Board held that, as a matter of law, the claimant was an employee of the employer at the time in question.

Although the **Fifth Circuit** has held that one test is appropriate under the LHWCA, the Board has allowed judges to apply whichever test is best suited to the facts of a particular case. Holmes v. Seafood Specialist Boat Works, 14 BRBS at 145 n.4; Carle v. Georgetown Builders, 14 BRBS 45 (1980) (Carle I), aff'd, 19 BRBS 158 (1986) (Carle II); Burbank, 12 BRBS 776.

For a good analysis of both the Restatement test and the "relative nature of the work" test, see Brien v. Precision Valve/Bayley Marine, 23 BRBS 206 (1990), where a "lumper" (person who

off-loads fish from vessels brought into port) was found to be an employee rather than an independent contractor.

The Board has held that the Section 20 presumption does not apply to this issue. Holmes, 14 BRBS 141. The LHWCA does not cover claimants who are independent contractors rather than employees. See, e.g., Cardillo v. Mockabee, 102 F.2d 620 (**D.C. Cir.** 1939); Gordon, 8 BRBS 441. It is the true nature of the relationship that is determinative rather than the label placed on it by a contract. Burbank, 12 BRBS 776.

The Board has affirmed a judge's conclusion that a claimant was an employee of two employers. Hansen, 8 BRBS 835 and 9 BRBS 490. In Edwards v. Willamette Western Corp., 13 BRBS 800 (1981), however, the Board vacated the holding that two employers were liable and remanded for further findings regarding whether claimant was a borrowed employee. The Board held that the judge must utilize a rational test in making this finding. The Board stated that the nine factor test adopted by the **Fifth Circuit** was one appropriate test in a "borrowed employee" case. See Gaudet v. Exxon Corp., 562 F.2d 351 (**5th Cir.** 1977), cert. denied, 436 **U.S.** 913 (1978); Ruiz v. Shell Oil Co., 413 F.2d 310 (**5th Cir.** 1969). See also Cappo v. N.L. Baroid-NL Indus., Inc., 784 F.2d 615 (**5th Cir.**), cert. denied, 479 **U.S.** 838 (1986).

The LHWCA does not cover volunteers, even if they are performing services for clients with a view in part to furthering the volunteer's or his employer's interest. Symanowicz v. Army & Air Force Exch. Serv., 672 F.2d 638, 14 BRBS 651 (**7th Cir.** 1982), aff'g 12 BRBS 961 (1980), cert. denied, 459 **U.S.** 1016 (1982).

No employment relationship was found in Clauss v. Washington Post Co., 13 BRBS 525 (1981), aff'd mem., 684 F.2d 1032 (**D.C. Cir.** 1982), where the employee was on strike at the time of his death.

Corporate officers and shareholders are not precluded from being employees under the LHWCA if injured when performing the duties of an employee. Cooper v. Cooper Assocs., Inc., 7 BRBS 853 (1978), rev'd on other grounds sub nom. Director, OWCP v. Cooper Assocs., Inc., 607 F.2d 1385 (**D.C. Cir.** 1979). A partner in a business, however, is not an employee. The dual capacity doctrine does not apply to a partner because a partnership, unlike a corporation, is not a separate legal entity. Duncan v. D & K Foreign Auto Repair, 17 BRBS 40 (1985).

Where a claimant and respondent are distinctly separate enterprises, expected to carry their own accident burdens, there is no employer-employee relationship. McMaster v. Robert Miller & Assoc., 21 BRBS 252 (ALJ) (1988). In McMaster, the claimant was in the business of cleaning, inspecting, and repairing barges. Respondent was a barge fleeting line which hauled freight. Barge fleeting lines are companies that receive loaded barges, deliver them to an elevator, pick them up when empty, clean and repair them, and secure them in tow to go to other loadings. The claimant offered a rather unique service in that he offered a more economical alternative to barge fleeting lines.

The claimant and his employees would travel to the empty barge, clean it, inspect it, and make minor repairs. By the claimant's going to the barge, the barge line would save the charges for towing. The claimant's company worked for a number of different barge lines. If repairs were needed, the claimant would charge for them, calculating the price of his services at the end of the job.

The claimant holding himself out to those with whom he did business as the "Bayou Barge Company," considered himself self-employed. The claimant testified that he considered the respondent to be one of his customers. The respondent paid the claimant without withholding income tax or social security.