IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3161
Summary Calendar

RONNIE WAYNE OWEN,

Plaintiff-Appellant,

RICHARD H. BARKER, IV,

Movant-Appellant,

versus

CHEVRON U.S.A. INC.,

Defendant-Appellee.

Appeal from the United States District Court for
the Eastern District of Louisiana
(CA 92 2510 "F" (4))

(October 19, 1993)

Before REAVLEY, SMITH and DEMOSS, Circuit Judges.

REAVLEY, Circuit Judge:[*]

Ronnie Owen (Owen) brought this suit against Chevron U.S.A. Inc. (Chevron) seeking damages for alleged injuries he suffered while working on one of Chevron's offshore platforms. The district court granted summary judgment in favor of Chevron, on

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

grounds that Owen was a "borrowed servant" under Fifth Circuit precedent, and that Chevron was therefore immune from suit under § 5(a) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905(a) (1986). Owen appeals, arguing that Chevron did not meet its burden of establishing its entitlement to summary judgment. We affirm.

INTRODUCTION

Owen slipped and fell on April 28, 1991. The accident occurred on a fixed platform owned by Chevron and located in its West Delta 30 oil and gas production field, off the coast of Louisiana. At the time, he was a wireline operator nominally employed by Horton Wireline Service, Inc. (Horton). From the time he went on Horton's payroll in July of 1990 until the date of his accident, Horton assigned him to work exclusively for Chevron in the West Delta 30 field.

Since the accident occurred on the Outer Continental Shelf, the Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331-1356, provides at § 1333(b) that compensation for his injuries is governed by the LHWCA, 33 U.S.C. §§ 901-950. Section 5(a) of the LHWCA, 33 U.S.C. § 905(a), mandates that workers' compensation as provided in the LHWCA is the exclusive remedy for an employee against his employer. The district court ruled that, under the "borrowed servant" doctrine, Owen was the borrowed servant of Chevron; Chevron was therefore his "employer" under the LHWCA, and the state-law claims asserted against Chevron in this suit were barred.

DISCUSSION

In determining whether a summary judgment was appropriate, we review the record and the pleadings independently, viewing all fact questions in a light most favorable to the nonmovant. *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 358 (5th Cir. 1988). Summary judgment is appropriate if the record discloses "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). We find that no material issues of fact are in dispute, and that even if all the evidence presented and inferences therefrom are considered in the light most favorable to Owen, he was a borrowed servant as a matter of law.

This court looks to nine factors in deciding whether the borrowed-servant doctrine applies:

(1) Who had control over the employee and the work he was performing, beyond mere suggestion of details or cooperation?

(2) Whose work was being performed?

(3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employee?

(4) Did the employee acquiesce in the new work situation?

(5) Did the original employer terminate his relationship with the employee?

(6) Who furnished tools and place for performance?

(7) Was the new employment over a considerable length of time?

(8) Who had the right to discharge the employee?

(9) Who had the obligation to pay the employee?

Billizon v. Conoco, Inc., 993 F.2d 104, 105 (5th Cir. 1993). The question of borrowed-servant status is a question of law for the district court to determine, although in some cases factual disputes must be resolved before the district court can make its determination. *Id.*; *Brown v. Union Oil Co. of Cal.*, 984 F.2d 674, 677 (5th Cir. 1993).

As to the first factor, Chevron personnel gave Owen all of his work assignments for the entire period he was working at Chevron's West Delta 30 field. Chevron had control over when and where Owen worked and what particular jobs he performed. Horton's only directive to Owen was to do whatever Chevron asked of him. Owen would only call Horton when he had a problem, and the record indicates that at most his calls to Horton occurred about once a week. Under these circumstances the first factor favors borrowed-servant status. *Melancon v. Amoco Production Co.*, 834 F.2d 1238, 1245 (5th Cir. 1988) ("[Plaintiff] took orders from [defendant's] personnel who told him what work to do, and where to do it."). The fact that Owen was highly skilled and completed his assigned tasks without direct supervision does not compel a different result. *Id*. at 1241, 1245 ("[Plaintiff], of course, chose the *manner* in which to do his welding work according to his professional judgment, but [defendant's personnel] could tell [plaintiff] when to do the welding work and when to do other kinds of work. . . . The fact that [plaintiff] had specialized welding skills he utilized in most of his work

and none of the [defendant's] personnel had similar welding expertise does not bar a finding of 'borrowed employee' status."). Likewise, evidence submitted by Owen indicating that he supervised a helper, also nominally employed by Horton, is immaterial. The focus of the first factor is on which employer -- Horton or Chevron -- exercised control over Owen, not on whether Owen controlled subordinates.

The second factor, which looks to whose work was being performed, also favors Chevron, since Owen's work while on the payroll of Horton was performed at a Chevron site, for the benefit of Chevron's offshore oil and gas business. His work was essential to maintaining the production of oil and gas from the West Delta 30 field. *Compare Melancon*, 834 F.2d at 1245 ("As to the second factor, there can be no doubt that [defendant's] work was being performed by [plaintiff]. [Plaintiff's] work assisted [defendant] in the production of hydrocarbons by maintaining the production equipment and platforms in [defendant's] field.").

The third factor asks whether there was an agreement, understanding, or meeting of the minds between the original and borrowing employee. As in similar cases appealed to this court, a written agreement between Chevron and Horton contains language describing the service contractor's status as that of an independent contractor. The Master Service Order and Agreement between Chevron and Horton states that Horton "shall perform the services as that of an independent contractor and not as an employee of" Chevron. A separate one-page Service Order and

Agreement listed Horton as the "Contractor" and was signed by Owen on behalf of the Contractor, but this document has no language regarding Horton's or Owen's status as an independent contractor versus an employee.

Language virtually identical to that in the Master Service Order and Agreement, found in another Chevron agreement, was held insufficient to defeat summary judgment when the remaining factors pointed toward borrowed-servant status. In *Alexander v. Chevron, U.S.A.*, 806 F.2d 526 (5th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987), the agreement between Chevron and another service contractor contained, as here, language that the service contractor "agrees to perform the work as an independent contractor and not as an employee of" Chevron. *Id*. at 528. The court noted that the language did not "purport to prohibit Chevron from becoming the borrowing employer of [the service contractor's] payroll employees." *Id*. The *Alexander* court distinguished two cases cited by Owen, *West v. Kerr-McGee Corp.*, 765 F.2d 526 (5th Cir. 1985), and *Alday v. Patterson Truck Line, Inc.*, 750 F.2d 375 (5th Cir. 1985). It noted that in both of those cases the agreements in question stated that neither the service contractor nor its *employees* shall be deemed an employee of the defendant. *Id*. Further, we noted in *Melancon* that "parties to a contract cannot automatically prevent a legal status like 'borrowed employee' from arising merely by saying in a provision in their contract that it cannot arise," and that the reality of the worksite and the parties' actions in carrying out

the agreement can implicitly modify, alter, or waive its provisions. 834 F.2d at 1245. Here, as in *Melancon*, the plaintiff understood that he would be taking his instructions from Chevron as to his job assignments. He received the same transportation, food and lodging as the other Chevron employees. *Compare West*, 765 F.2d at 531 (finding summary judgment inappropriate in part because borrowing employer's preferential treatment "in transportation and bunking arrangements is inconsistent with the notion that a borrowed servant differs from a true employee only as a paper formality.") Based on all the evidence, we conclude that the third factor is either neutral or only slightly favors Owen.

Under the fourth factor, Owen acquiesced in the work situation. He performed all of the tasks Chevron asked of him without question, including tasks that did not involve wireline work. He never complained about his assignment to Chevron or requested a transfer to another site. This factor focuses on whether the employee was aware of his work conditions and chose to continue working in them, *Brown*, 984 F.2d at 678, and therefore favors a finding that Owen was a borrowed servant.

The fifth factor, inquiring whether the original employer terminated its relationship with the employee, does not require the original employer to sever completely its relationship with the employee, since such a requirement would effectively eliminate the borrowed-servant doctrine. *Melancon*, 834 F.2d at 1246. The focus should be on the lending employer's relationship

with the employee while the borrowing occurs. *Id*. While assigned to Chevron, Owen received all of his work assignments from Chevron. Chevron provided his transportation to the work site as well as food and lodging. Owen worked seven days on (or more) and seven days off, and after he returned to shore he had little or no contact with Horton, except to drop off his time tickets, or pick up his paycheck or an occasional tool. He did not go into work at Horton during his days off from Chevron. This factor favors Chevron.

The sixth factor asks who furnished the tools and place of performance. Chevron furnished the place of performance, as well as transportation, food and lodging. Chevron also furnished the principal pieces of equipment -- the wireline unit and lubricator -- for Owen's wireline work. Although Horton furnished tool boxes, hand tools, safety equipment and certain specialized tools, we conclude that this factor favors Chevron. *See Melancon*, 834 F.2d at 1241, 1246 (finding this factor favored defendant who provided place of performance, food, lodging and transportation to welder, even though original employer provided welding machine and employee provided his own safety equipment).

The seventh factor asks whether the new employment was over a considerable length of time. Owen was assigned to Chevron for approximately nine months. This court has not established specific time periods for evaluating this factor. In our recent *Billizon* decision, we found that a period of employment of more than three months rendered this factor neutral. 993 F.2d at 106.

However, we have noted that an injury occurring even on the first day of work with the borrowing employer does not necessarily preclude a finding of borrowed-servant status. *Capps v. N.L. Baroid-NL Indus., Inc.*, 784 F.2d 615, 618 (5th Cir.), *cert. denied*, 479 U.S. 838 (1986). Owen went on Horton's payroll in July of 1990, and his injury occurred in April of 1991. During this entire period of employment he was assigned to work for Chevron. During a prior period of employment with Horton he had also been assigned to work at Chevron sites. We conclude that this factor is either neutral or slightly favors Chevron. *See Hebron v. Union Oil Co. of Cal.*, 634 F.2d 245, 246-47 (5th Cir. 1981) (finding borrowed servant doctrine applied to employee stationed on defendant's offshore platform for approximately eight months).

The eighth factor asks who had the right to terminate Owen. Here, Chevron had the right to terminate Owen from further work at its Delta 30 field, although Chevron could not terminate Owen's employment with Horton. We have held that the proper focus when considering this factor is the borrowing employer's right to terminate the employee from his association with the borrowing employer. *Capps*, 784 F.2d at 618. We have on numerous occasions found the employee to be a borrowed servant where, as here, the defendant had the right to end its association with the employee, even though it could not discharge him from employment with the original employer. *Id.*; *Billizon*, 993 F.2d at 105; *Melancon*, 834 F.2d at 1246. This factor favors Chevron.

The ninth factor addresses who had the obligation to pay Owen. There is no dispute that Owen prepared work tickets showing his time, that Chevron would pay Horton an agreed-upon rate for Owen's time and that of his helper, and that Horton would in turn issue Owen a paycheck based on the hours reflected in his work tickets. The funds Horton used to pay Owen came from Chevron. Under such circumstances this factor favors Chevron. *Melancon*, 834 F.2d at 1246 ("The fact that [original employer] kept a percentage of the amount [borrowing employer] was charged is not relevant. [Borrowing employer] furnished the funds from which [original employer] paid [employee], and this is the determinative inquiry for this factor.").

Owen originally testified in his deposition that his work tickets had to be approved by Chevron personnel before he could be paid. After the court granted summary judgment, counsel for Owen filed a motion for reconsideration or new trial under FED. R. CIV. P. 59 and submitted a new affidavit signed by Owen. In this affidavit, Owen stated that Chevron personnel were not required to sign and did not sign his time tickets, and that the tickets contain printed language that the customer was required to pay Horton whether or not the customer was satisfied with the work performed. The district court treated the motion as one for relief under FED. R. CIV. P. 60(b) and denied it. We do not find that this affidavit raises a genuine issue of material fact or otherwise alters our view that the summary judgment was properly granted.

First, a district court's ruling on a Rule 59 or Rule 60(b) motion is subject to appellate review only for an abuse of discretion, and we have noted that in ruling on such motions based on alleged newly discovered evidence, the district court should consider whether the omitted evidence was available to the moving party prior to the time for filing his response to the summary judgment motion. *Lavespere v. Niagra Mach. & Tool Works, Inc.*, 910 F.2d 167, 174-75 (5th Cir. 1990) (Rule 59), *cert. denied*, ___ U.S. ___ (1993); *AG Pro, Inc. v. Sakraida*, 512 F.2d 141, 143-44 (5th Cir. 1975) (Rule 60(b)), *rev'd on other grounds*, 425 U.S. 273 (1976). We find no abuse of discretion by the district judge in denying the motion, since we find no explanation in the record for why the information asserted in the affidavit was unavailable to Owen. Indeed, Owen's affidavit only recited his knowledge of employment conditions with Chevron prior to his accident. Second, "the nonmovant cannot defeat a motion for summary judgment by submitting an affidavit which directly contradicts, without explanation, his previous testimony." *Albertson V. T.J. Stevenson & Co.*, 749 F.2d 223, 228 (5th Cir. 1984). Third, even if the allegations in the new affidavit are taken as true and properly raised, we conclude that the ninth factor still favors Chevron. If Chevron did not have to sign off on the work tickets and was required to pay for Owen's work whether or not it was satisfied, this arrangement only seems to strengthen Chevron's obligation to pay the employee under the ninth factor.

Owen argues that certain statements in Chevron's amended answer and interrogatory answers make summary judgment inappropriate. The answer in question asserts that Owen was "nominally employed" by Horton, and asserts, in the alternative, that Owen's injuries "were caused by the acts of an independent contractor for whom Chevron is not responsible." The answer also alleges in the alternative that "recovery against Chevron is barred by the exclusive remedy provisions of the applicable workman's compensation statute." We do not see any of these statements as admissions that Owen was not Chevron's borrowed servant, the only defense raised in the motion for summary judgment.

Owen also points to Chevron's interrogatory answers filed early in discovery. At that time Chevron looked to the terms of the contract and depicted Owen as the servant only of Horton. By the time of this judgment the record clearly established that Owen was the borrowed servant of Chevron in doing his work at the time of his injury. It would have been the better procedure for Chevron to obtain the court's permission to withdraw or strike those original answers, but we will not prolong this litigation when it is clear that the parties knew by the time of the federal judgment that the original answers had been negated and abandoned.

Owen also argues that the 1984 amendments to the LHWCA make the borrowed-servant defense unavailable to a defendant who has not actually paid workers' compensation benefits to the

plaintiff. The amendments added the last sentence to the current version of § 5(a) of the LHWCA, which provides that "[f]or purposes of this subsection, a contractor shall be deemed the employer of a subcontractor's employees only if the subcontractor fails to secure the payment of compensation as required by section 904 of this title." 33 U.S.C. § 905(a). In *West* we concluded that these amendments did not alter existing jurisprudence on the borrowed-servant doctrine. 765 F.2d at 528-30. *Accord Melancon*, 834 F.2d at 1247. We cannot overrule the holding of a previous panel of our circuit. *Capps*, 784 F.2d at 619.

CONCLUSION

We have independently reviewed the record, and have reviewed *de novo* the summary judgment and the ultimate legal question of whether Owen was a borrowed servant. Applying the nine factors we are to consider, we find that all of the factors except the third and the seventh favor Chevron's position that Owen was a borrowed servant. We find that the third factor is either neutral or slightly favors Owen, and that the seventh factor is either neutral or slightly favors Chevron. Weighing all the factors, we agree with the district court that Chevron was entitled to summary judgment.

AFFIRMED.