IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41241
Summary Calendar

BRENT SCHAUBERT,
Plaintiff-Appellant,

versus

MARC G, INC.,
Defendant,

and

ELF AQUITAINE OPERATING, INC.,
Defendant-Appellee,

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INSURANCE CO. OF NORTH AMERICA,
Intervenor-Defendant-Appellant,

BRENT SCHAUBERT,
Intervenor-Defendant-Appellant,

versus

ELF AQUITAINE OPERATING, INC.,
Intervenor-Defendant-Appellee.

Appeal from the United States District Court
For the Western District of Louisiana

(91-CV-695)

(August 16, 1995)

Before DUHÉ, WIENER, and STEWART, Circuit Judges:

PER CURIAM*:

Plaintiff-Appellant Brent Schaubert brought this suit against Defendant-Appellee Elf Aquitaine Operating, Inc. (Elf) to recover damages for injuries he suffered while working on an offshore oil platform operated by Elf. At the time of his accident, Schaubert was employed by Omega Services, Inc. (Omega), which supplies workers to oil and gas producers. Omega had assigned Schaubert to work for Elf. The district court entered summary judgment in favor of Elf on the ground that Schaubert was Elf's "borrowed employee"--granting Elf tort immunity under the Longshore and Harbor Workers' Compensation Act (LHWCA).[1] We affirm.

I.

FACTS AND PROCEEDINGS

The following facts are not in dispute. Schaubert was employed as a laborer by Omega. Omega entered into a contract with Elf to provide laborers for the purpose of performing construction work for Elf on a number of offshore oil platforms. Schaubert was assigned to work on Elf's South Marsh Island Block 235 platform (Elf platform) as a roustabout and rigger. Elf had complete

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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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

[1] 33 U.S.C. s 905(a) (West 1986 & Supp. 1995).

control over the platform. Schaubert took his day-to-day instructions from two Elf supervisors in charge of the Elf platform: Dale Beard and Joey Zager. He used Elf equipment to perform Elf's work. He ate and slept in Elf facilities and rode back and forth between the shore and the platform in transportation provided by Elf. Elf had the right to terminate or remove Schaubert from the platform.

In contrast, Omega exercised no control over Schaubert and was not involved with his specific work assignment or immediate supervision. Omega's only interest in Schaubert was knowing that his work was acceptable and, for the purpose of billing Elf, in being advised of the hours Schaubert worked. Omega billed Elf for Schaubert's services and signed Schaubert's pay check each week.

In October 1991, on his second day of work at the platform, Schaubert and Beard were cleaning the cover on a toxic waste storage bin. As the two men lifted the cover, it slipped and dropped on Schaubert's hand, amputating his thumb.

Schaubert filed this lawsuit against Elf. Elf answered and filed a motion for summary judgment, alleging that Schaubert was a borrowed employee, and arguing that, as a borrowed employee of Elf, Schaubert's sole remedy against Elf lay in the LHWCA. In response, Schaubert agreed that if he were a borrowed employee, his only remedy was the LHWCA, but contested his borrowed employee status. After considering the summary judgment evidence, the district court concluded that Schaubert was a borrowed employee as a matter of law, and entered summary judgment in favor of Elf. Schaubert

timely appealed.

II.

ANALYSIS

A. Standard of Review

We review the district court's grant of a motion for summary judgment de novo, applying the same standard as the district court applied.[2] Questions of law are decided just as they are outside of the summary judgment context: de novo.[3]

B. Borrowed Employee Status

The question of borrowed employee status is one of law.[4] To determine borrowed employee status, we consider the answers to nine questions:

(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 employer?
(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?

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[2] Berry v. Armstrong Rubber Co., 989 F.2d 1408, 1412 (5th Cir. 1993); Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir.)(citations omitted), cert. denied, -- U.S. --, 113 S.Ct. 462, 121 L.Ed.2d 391 (1992).

[3] Walker v. Sears, Roebuck & Co., 853 F.2d 355, 358 (5th Cir. 1988.

[4] Gaudet v. Exxon Corp., 562 F.2d 351 (5th Cir. 1977), cert. denied, 436 U.S. 913, 98 S.Ct. 2254, 56 L.Ed.2d 414 (1978).

(9) Who had the obligation to pay the employee?[5]

We have held repeatedly that no single factor is determinative.[6] When considering these factors, we do not apply a rigid, absolute test, requiring that each question be answered in the affirmative; instead, we look at all answers, albeit we place particular emphasis on the first: control over the employee.[7]

Schaubert concedes the first linchpin factor as well as several others weigh in favor of borrowed employee status. He contends, however, that genuine issues of material fact exist with respect to factors 3, 4, and 7 and preclude summary judgment. As we assume the answers to the other questions point clearly to borrowed employee status, we need only address the three contested factors.

1. *Factor 3: Meeting of Minds*

On factor 3, Schaubert argues that an express provision of the service contract between Omega and Elf contained language precluding the finding of borrowed employee status. Thus, we must decide whether this contractual provision purportedly prohibiting borrowed employee status makes the district court's summary

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[5] Brown v. Union Oil Co. of California, 984 F.2d 674, 676 (5th Cir. 1993).

[6] See, e.g., Brown, 984 F.2d at 676; see also Melancon v. Amoco Prod. Co., 834 F.2d 1238, 1245 (5th Cir. 1987)("[P]arties 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."), reh'g granted on other grounds, 841 F.2d 572 (5th Cir. 1988).

[7] Ruiz v. Shell Oil Company, 413 F.2d 310, 312 (5th Cir. 1977); see also Hebron v. Union Oil Co. of California, 634 F.2d 245 (5th Cir. 1981).

judgment inappropriate. When previously faced with this issue, we concluded that summary judgment remains appropriate if the remaining factors clearly point to borrowed employee status.[8] For the moment, therefore, we set aside question 3 and turn to examine the two others contested by Schaubert.

2. *Factor 4: Employee Acquiesce in the New Work Situation*

Schaubert argues that nothing in the record establishes that he acquiesced in his new work situation. We must disagree. Schaubert knew that Omega had transferred authority and supervision to Elf. Moreover, he impliedly consented to that transfer of authority and supervision by performing willingly the duties assigned to him by Elf. Schaubert stated in his deposition:

> Q: Was it your understanding that when you got out of there, you were going to be taking your orders from the Elf people?
>
> A: Yes, sir.
>
> Q: You understood they were going to be your supervisor on this job?
>
> A: Yes, sir.
>
> Q: And did you understand that the Elf people, Dale or Randy, had authority to run your off the platform if they wanted to?
>
> A: Yes, sir.
>
> Q: They could tell you -- if they weren't satisfied with your work, they could make you leave the job.
>
> A: Yes, sir.

Schaubert has produced no evidence that he ever refused or was

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[8] See Brown, 984 F.2d at 678 n. 5; Alexander v. Chevron, U.S.A., 806 F.2d 526, 529 (5th Cir.1986)(citing Gaudet v. Exxon Corp., 562 F.2d 351, 358 (5th Cir.1977)).

dissatisfied with his assignment to Elf. As a result, we conclude that Schaubert acquiesced in his work situation -- a conclusion that weighs in favor of borrowed employee status. Accordingly, we affirm the district court's determination that Factor 4 does not present a genuine issue of material fact precluding summary judgment.

3. *Factor 7: Considerable Length of Time*

Schaubert also contends that the short duration of his time on the Elf platform precludes summary judgment. Although "considerable length of time" remains a factor listed, it becomes significant if (and only if) the borrowing employer employs the employee for a considerable length of time.[9] Thus, when the employee's injury occurs in the first few days of his work with the borrowing employer, factor 7 becomes neutral -- essentially, factor 7 drops from our consideration.[10] As Schaubert's injury occurred on his second day on the job, factor 7 is neutral and disappears from our deliberations. It cannot, therefore, present an issue of fact precluding summary judgment.

4. *Factor 3: Meeting of the Minds Redux*

Even if we assume that Factor 3 weighs in favor of Schaubert's position and exclude factor seven as neutral, the summary judgment

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[9] Billizon v. Conoco, Inc., 993 F.2d 104, 105 (5th Cir. 1993)(factor 7 neutral if length of employment less than one month); Brown, 984 F.2d at 679 (Factor 7 is neutral where the length of employment (one month) is not considerable). Capps v. N.L. Baroid-NL Industries, Inc., 784 F.2d 615 (5th Cir. 1986), cert. denied, 479 U.S. 838, 107 S.Ct. 141, 93 L.Ed.2d 83 (1986)(same).

[10] See Capps, 784 F.2d at 618.

record establishes that the answers to all other questions -- factors 1, 2, 4, 5, 6, 8, and 9 -- clearly point to borrowed employee status. In Billizon v. Conoco Inc.,[11] the scorecard looked exactly the same: factors 1, 2, 4, 5, 6, 8, and 9 pointed to borrowed employee status. Schaubert has pointed to nothing that distinguishes his case from Billizon. We are guided and, more importantly, bound by Billizon. Accordingly, we conclude, as a matter of law, that when the answers to these seven questions support borrowed employee status and factor 7 is neutral, the employee in question is a borrowed employee as a matter of law, contractual provisions notwithstanding. We find the facts and realities of the work-place, rather than nice legal fictions, dispositive on this issue. Here the realities of the work-place convince us that Elf was in total control of Schaubert and his work on the Elf platform. Accordingly, we join the district court in holding that Schaubert was a borrowed employee. For the foregoing reasons, the district court's summary judgment in favor of Elf is, in all respects,

AFFIRMED.

[11] See 993 F.2d 104 (5th Cir. 1993).