RESPONSIBLE EMPLOYER/EMPLOYMENT RELATIONSHIP

Responsible Employer

In General

Traumatic Injury or Occupational Disease

The test to be applied in determining the responsible employer turns on whether the case involves multiple traumatic injuries or an occupational disease. In *Gencarelle v. General Dynamics Corp.*, 22 BRBS 170 (1989), *aff'd*, 892 F.2d 173, 23 BRBS 13(CRT) (2d Cir. 1989), the Board defined an occupational disease under the Act, s*ee* 33 U.S.C. §902(2), as characterized by two factors: 1) unexpectedness; *i.e*., an inherent hazard of continued exposure to conditions of a particular employment; and 2) gradual, rather than sudden, onset. The Board held in *Gencarelle* that claimant's chronic synovitis of the knee, an arthritic condition aggravated by repeated bending, stooping and climbing on the job, was not an occupational disease as there was no evidence that it was an inherent hazard to others in employment similar to that of claimant but rather was unique to him. The Board also noted that an injury may occur over a gradual period and still be construed as an accidental injury. Affirming the Board's decision, the Second Circuit identified three elements that must be present: 1) claimant must suffer from a disease; 2) hazardous conditions of employment must be the cause of the disease; and 3) the hazardous conditions must be "peculiar to" claimant's employment as opposed to employment generally. The court found that claimant's condition failed to meet the third requirement, as his job activities were not peculiar to his employment as a maintenance man. *See Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991), *aff'g Vanover v. Foundation Constructors*, 22 BRBS 453 (1989) (back injury is a cumulative trauma and not a disease; thus, two-injury rule applies); *Steed v. Container Stevedoring Co.*, 25 BRBS 210 (1991) (Board reverses administrative law judge's finding that claimant's lumbar stenosis is an occupational disease).

Hearing loss is an occupational disease for purposes of determining the responsible employer or carrier. *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). However, because hearing loss results in immediate disability, the provisions of the Act specifically applicable to occupational diseases which do not immediately result in death or disability, *see* 33 U.S.C. §§902(10), 908(c)(23), 910(i), 912(a), 913(b)(2), do not apply. *Bath Iron Works Corp. v. Director, OWCP*, 506 U.S. 153, 26 BRBS 151(CRT) (1993).

Burden of Proof

The responsible employer/carrier rules involve allocating liability between employers and carriers in cases involving multiple traumatic injuries or occupational exposures. The responsible employer rule developed in order to determine the party responsible for payment where claimant is entitled to benefits. The employer/carrier bears the burden of establishing that it is not the liable employer or carrier.

In cases involving multiple traumatic injuries, the issue turns on determining which injury resulted in claimant's disability. Section 20(a) aids claimant in establishing entitlement and does not aid either employer in proving that the other is liable. Establishing the responsible employer therefore involves weighing the relevant evidence and determining whether the disability is the result of the natural progression of the initial injury or an aggravation due to the subsequent injury. Each potential employer bears the burden of persuading the fact-finder that its evidence is entitled to greater weight. In the unlikely event that neither employer is able to persuade the administrative law judge that its evidence is entitled to greater weight, the purposes of the Act are best served by assigning liability to the last employer. *Buchanan v. Int'l Transp. Services*, 31 BRBS 81 (1997), and 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hospital, Inc.*, No. 99-70631 (9th Cir. Feb. 26, 2001). *See Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005) (administrative law judge properly addressed the liability issue based on the record as a whole without reference to Section 20(a)).

In occupational disease cases, employer or carrier must establish that it is not responsible under the *Cardillo* rule. In *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986), the Board initially held that an administrative law judge erred in denying the claim because claimant had not proven that he was not exposed to injurious stimuli after working for the named employer. If claimant establishes exposure with a covered employer, it is not also claimant's burden to prove that no other employer is liable. Thus, the Board stated that employer can escape liability by establishing the absence of a causal relationship between *any* exposure and claimant's employment, *i.e.*, by rebutting the Section 20(a) presumption with substantial evidence that the exposure to injurious stimuli did not cause the harm, or, consistent with *Cardillo*, by demonstrating that it was not the last employer to expose claimant to injurious stimuli. *See Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992); *Lustig v. Todd Shipyards Corp.*, 20 BRBS 207, 213 n.12 (1988), *aff'd in part and rev'd in part sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989).

Various formulations of the *Susoeff* rule that employer bears the burden of proving it is not the responsible employer have been adopted by the Fourth Circuit, *Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001); *see Newport News Shipbuilding & Dry Dock*

Co. v. Stilley, 243 F.3d 179, 35 BRBS 12(CRT) (4th Cir. 2001), *aff'g* 33 BRBS 224 (2000); the Fifth Circuit, *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *aff'g in part and rev'g in part* 35 BRBS 50 (2001), *cert. denied*, 540 U.S. 1141 (2004); *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002); *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992); and the Ninth Circuit, *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991).

While all of these courts agree that employer bears the burden of proving it is not the responsible employer, there are differences as to what this burden entails. The cases agree that an actual causal relationship between exposure at a specific employer and the disease is not necessary and that evidence of the long latency period for the development of an asbestos-related disease is not sufficient. In *General Ship*, the Ninth Circuit adopted the Board's decision in *Susoeff*, holding that the last employer to expose claimant to asbestos is liable for benefits and that, where the evidence does not clearly indicate which of the covered employers who exposed claimant to injury was his last employer, the purposes of the Act are best served by assigning liability against the employer who is claimed against. In an earlier case, *Todd Shipyards Corp. v. Director, OWCP*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990), *rev'g Picinich v. Lockheed Shipbuilding*, 22 BRBS 289 (1989), the court held that, where the evidence established that claimant's exposure to asbestos with a later employer was in amounts so minimal that the exposure was not injurious, it was not the responsible employer; thus, an earlier employer was held liable. Following *Picinich*, employers in some cases argued that claimant's exposure at their facilities was insufficient to be injurious. The Fourth Circuit in *Faulk* held employer liable as it was the last employer to expose claimant to asbestos and it failed to establish that such exposure could not have caused claimant's disease, refusing to adopt a *de minimis* rule for asbestos exposure.

The Board in its decision in *Ibos* applied a similar analysis, holding the last employer to expose claimant to asbestos prior to his diagnosis of mesothelioma liable and rejecting its contention that it satisfied its burden through medical opinions regarding the long latency period for the development of mesothelioma on the basis that the opinions did not establish that the asbestos exposure at NOS did not have the potential to give rise to the disease. The Fifth Circuit affirmed this result, but stated that the Board did not articulate the appropriate legal standard insofar as it suggested that an employer can escape liability by showing that claimant's exposure did not have the potential to cause the disease. The court stated that the issue is not whether an employer can prove that a particular exposure with a particular employer did not have the potential to cause the disease, nor does it involve whether an employer can prove that there is no evidence of a true causal link between a particular exposure and the development of the employee's disease. In order to meet its burden of establishing that it is not the responsible employer, an employer must prove either (1) that exposure to injurious stimuli did not cause the employee's occupational disease, or (2) that the employee was performing work covered under the

Act for a subsequent employer when he was exposed to injurious stimuli. As NOS was the last employer here, the only issue was whether employer proved that exposure to asbestos did not cause decedent's mesothelioma regardless of whether the exposure decedent experienced at employer either caused or had the potential to cause decedent's mesothelioma. As employer failed to present specific medical evidence disproving that decedent's mesothelioma was caused by his exposure to *any* asbestos, it was the responsible employer. *Ibos*, 317 F.3d 480, 36 BRBS 93(CRT).

The Board has attempted to clarify the analysis of causation and responsible employer, as arguments combining these issues result in confusion in many cases. Causation is necessary to establish claimant's entitlement to benefits and concerns whether his alleged harm is related to any workplace exposure rather than an exposure at a specific employer. Where causation is established, *i.e.*, that claimant's injury is related to an occupational exposure, the responsible employer rule allocates liability to one of the potential employers/carriers. The Board attempted to clarify this interplay in *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005), *decision after remand*, 41 BRBS 28 (2007), and *Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64 (2005), *modified in part on recon.*, 40 BRBS 1 (2005). In both cases, the Board remanded the case for the administrative law judge to weigh the relevant evidence and determine which employer last exposed the employee to potentially injurious stimuli. Each employer bears the burden of convincing the administrative law judge, by a preponderance of the evidence, that it did not last expose the employee, which requires a finding as to which employer "more likely than not" last exposed decedent to injurious amounts of asbestos. *McAllister*, 41 BRBS 28.

The cases discussed here and others are described in more detail in the occupational disease section.

Multiple Traumatic Injuries

In cases involving multiple traumatic injuries, the determination of the responsible employer turns on whether claimant's disabling condition is the result of the natural progression or aggravation of a prior injury. If claimant's disability results from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable and claimant's employer at that time is responsible. If, however, the subsequent injury aggravates, accelerates or combines with the earlier injury to result in claimant's disability, then the subsequent injury is the compensable injury and the subsequent employer is responsible. *See, e.g., Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991), *aff'g Vanover v. Foundation Constructors*, 22 BRBS 453 (1989); *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986), *aff'g Kelaita v. Triple A Machine Shop*, 17 BRBS 10 (1984); *Abbott v. Dillingham Marine & Manufacturing Co*., 14 BRBS 453 (1981), *aff'd*, 698 F.2d 1235 (9th Cir. 1982) (table); *Mulligan v. Haughton Elevator*, 12 BRBS 99 (1980); *Crawford v. Equitable Shipyards, Inc*., 11 BRBS 646 (1979), *aff'd per curiam sub nom. Employers National lnsurance Co. v. Equitable Shipyards, Inc.*, 640 F.2d 383 (5th Cir. 1981) (table).

In a case involving one injury, the Board and the Fifth Circuit approved holding two employers jointly and severally liable where the employee actually worked for both employers at the same time. *Oilfield Safety and Machine Specialties, Inc. v. Harman Unlimited, Inc.*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980), *aff'g Hansen v. Oilfield Safety Inc.*, 8 BRBS 835 (1978) and 9 BRBS 490 (1979). *See* discussion of employer/employee relationship, *infra*. In *Edwards v. Willamette Western Corp.*, 13 BRBS 800 (1981)**,** the Board vacated the administrative law judge's holding that two employers were jointly liable and remanded for further findings regarding the employer/employee relationship. The Board also held that, where two employers were potentially liable, one employer and claimant could not agree to withdraw controversion; the responsible employer issue must be litigated.

Digests

The Ninth Circuit affirmed the application of the "two-injury" rule, *i.e.*, aggravation/natural progression, rather than the "occupational-disease" rule, in a case involving a cumulative-trauma shoulder injury. The court also affirmed the administrative law judge's determination that aggravations of claimant's shoulder problems, caused by conditions existing at his more recent job, constituted new "injuries" absolving the previous employer from liability under the Act. *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986), *aff'g Kelaita v. Triple A Machine Shop*, 17 BRBS 10 (1984).

The administrative law judge applied the occupational disease test of *Cardillo* to a claimant whose back injury steadily deteriorated due to his job activities, finding the last employer liable. The Board affirmed the administrative law judge's responsible employer determination on this basis, but it noted that the result would be the same whether claimant's back injuries were considered to be an occupational disease or repetitive traumas. *Vanover v. Foundation Constructors,* 22 BRBS 453 (1989), *aff'd sub nom. Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). In affirming the Board's decision, the Ninth Circuit held that the multiple traumatic injury rule applied on the facts presented, as the *Cardillo* rule applies to occupational diseases and the natural progression/aggravation rule applies to cumulative trauma. The court found that this case involves trauma and not a disease, and it agreed that substantial evidence supported the finding that the duties of claimant's last employment aggravated his back condition. *Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991).

Based on the testimony of claimant and two co-workers, medical evidence and claimant's work history indicating that his earnings increased after the first injury and dramatically decreased after the second, the Board affirmed a finding that claimant's chronic back condition was related to the second injury. The employer at the time of the aggravating second injury was thus liable for all compensation and subsequent related medical expenses. The Board rejected employer's argument that it was not liable for claimant's spinal surgery, as claimant was not informed of need for surgery until after the second injury and substantial evidence supported the aggravation finding. *Lopez v. Southern Stevedores,* 23 BRBS 295 (1990).

Initially, the Board reversed the finding that claimant's lumbar stenosis was an occupational disease. Thus, claimant's date of awareness is not relevant to the responsible employer inquiry as the responsible employer in cases of accidental injury is the employer for whom claimant worked at the time of injury, *i.e.*, the last aggravation. In this case, claimant had a chronic back condition which resulted in his inability to work for several periods in 1986. The parties stipulated that claimant last worked for Container prior to November 14, 1986, when he returned to work. The administrative law judge dismissed the employers who employed claimant after this date, finding that he was totally disabled at this time and returned to work only because payment for surgery was denied. In any event, claimant limited his claim to compensation for periods in 1986 prior to this date and medical expenses; substantial evidence established that claimant's work in September 1986 aggravated his condition and resulted in the need for surgery. The Board therefore affirmed the conclusion that Container is liable for these benefits, albeit under the aggravation rule rather than *Cardillo,* as claimant was working for employer when he sustained the last aggravation that forms the basis of his claim. *Steed v. Container Stevedoring Co.,* 25 BRBS 210 (1991).

The Board vacated an administrative law judge's decision holding the second employer liable on the basis that employer did not rebut the Section 20(a) presumption. The Board stated that Section 20(a) aids a claimant in establishing the compensability of his claim, *i.e.*, whether he has a work-related injury, and neither employer established that claimant did not sustain an injury in its employment. The presumption does not aid either employer in proving that it is not the responsible employer. Thus, in this two-injury case where claimant suffered injuries with successive employers, each bears the burden of establishing it is not responsible, *i.e.*, the first employer must prove a subsequent aggravation and the second employer must prove the condition is the result of a natural progression in order to avoid liability. The case was remanded for the administrative law judge to weigh the evidence in the record as a whole. *Buchanan v. Int'l Transp. Services*, 31 BRBS 81 (1997).

Following remand, the Board found that despite some confusion, the administrative law judge followed its remand instructions and weighed the evidence. The Board attempted to further clarify its holding in *Buchanan*, 31 BRBS 81, regarding the determination of the responsible employer. The key is determining which injury resulted in claimant's disability. This involves weighing the evidence as a whole; the Section 20(a) presumption is inapplicable to the responsible employer issue. The burden is one of persuasion, with each employer bearing the burden of persuading the fact-finder that its evidence is entitled to greater weight. The Board rejected the argument that the first employer was required to show that its injury played no role in claimant's ultimate disability and held it need only establish that the second injury aggravated, accelerated or combined with the prior injury to result in disability in order to be relieved of liability. In the unlikely event that neither employer is able to persuade the administrative law judge that its evidence is entitled to greater weight, the purposes of the Act are best served by assigning liability to the later employer, consistent with case law regarding the responsible employer in an occupational disease context. The Board affirmed the administrative law judge's finding that the second employer is fully liable as it is supported by substantial evidence. *Buchanan v. Int'l Transp. Services*, 33 BRBS 32 (1999), *aff'd mem. sub nom. Int'l Transp. Services v. Kaiser Permanente Hospital, Inc.*, No. 99-70631 (9th Cir. Feb. 26, 2001).

The Seventh Circuit held that Section 20(a) applies to the compensability of an injury and does not apply in determining which entity is the responsible employer/carrier. The administrative law judge properly addressed the liability issue based on the record as a whole, without reference to Section 20(a). The Seventh Circuit held that the aggravation rule does not require that a later injury fundamentally alter a prior condition, but that it is enough that it produces or contributes to a worsening of symptoms. The administrative law judge weighed the evidence and found that the later injury contributed to claimant's condition. Thus, the court affirmed the administrative law judge's finding that the carrier at the time of the second injury was liable for benefits. *Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005).

The Board rejected employer's assertion that claimant's current knee condition is the result of an alleged intervening injury sustained in 1987 while claimant was working for another longshore employer. The Board affirmed the administrative law judge's finding that claimant's condition is related to his original 1984 injury, sustained while working for employer, as substantial evidence supported the administrative law judge's finding of a connection between the 1984 injury and the current disability. *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff'd on recon. en banc*, 32 BRBS 251 (1998).

Where there is conflicting evidence as to whether claimant's disability was the result of his 1996 injury with Ceres or a 1997 incident at ITO where his knee buckled, the Board affirmed the administrative law judge's decision to credit the doctors who opined that claimant's disability was the result of the 1996 injury. Ceres is therefore liable for all benefits, as substantial evidence supports the administrative law judge's decision. *Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001).

Where claimant sustained a back injury in 1996 with one employer and a more serious "flare-up" in 1998 with another employer, who had taken over the first employer's facility, the Third Circuit held that the Board properly reversed the administrative law judge's determination that the first employer was liable for claimant's disability benefits. It stated that the administrative law judge's conclusion was not supported by substantial evidence where the record established that claimant's work in early 1998 aggravated his condition to the degree that even the administrative law judge acknowledged there was an aggravation. The court held that the Board properly determined that the administrative law judge erred in addressing whether the earlier injury was the "precipitant injury" rather than ascertaining whether the subsequent work aggravated or exacerbated claimant's condition. Accordingly, the court affirmed the Board's determination that claimant's second employer is liable for claimant's benefits as a matter of law. *Delaware River Stevedores, Inc. v. Director, OWCP*, 279 F.3d 233, 35 BRBS 154(CRT) (3d Cir. 2002).

In this case, claimant sustained two work related injuries. Claimant and the second employer settled the claim for benefits due to the second injury, thus precluding any further recovery from the last employer. The Second Circuit initially affirmed the Board's finding that there was no evidence that claimant had fully recovered from the first injury before the second injury occurred. The court rejected the first employer's argument that it was not liable for benefits on the basis that claimant's second injury with another employer aggravated the first injury, holding that the aggravation rule is not a defense to be used by first or earlier employers as a shield from liability. The court then addressed the effect of claimant's settlement with the second employer, holding that claimant may recover from an earlier employer when he cannot recover from the last employer. However, the court stated that in order to hold the first employer liable, claimant bears the burden of showing that his current disability can be attributed to the

first injury, reasoning that as there is less proximity between the current condition and the first injury, the normal shifting burdens applicable in establishing disability do not apply. The court remanded the case for the administrative law judge to determine whether, and to what extent, the first injury contributed to claimant's disability. In so doing, the administrative law judge must consider whether claimant acted in good faith in entering into the settlement and whether he attempted to manipulate the aggravation rule. *New Haven Terminal Corp. v. Lake*, 337 F.3d 261, 37 BRBS 73(CRT) (2d Cir. 2003).

The Ninth Circuit affirms the Board's holding that Metropolitan is the responsible employer where claimant had knee surgery on April 24, 1995, and his last employment prior to knee surgery was with Metropolitan on April 22, 1995. Claimant had sustained cumulative trauma to his knee during years of employment with multiple employers, and the surgery had been scheduled in December 1994 while claimant was employed by a different employer. Claimant worked only the day prior to surgery with Metropolitan. Based on medical evidence that claimant's employment with Metropolitan caused a minor but permanent increase in the extent of his disability and increased his need for surgery, the court affirmed the finding that Metropolitan is the responsible employer. Where, as here, the disability is at least partially the result of a subsequent injury aggravating, accelerating, or combining with a prior injury to create the ultimate disability, the employer at the time of the most recent injury is liable. The court rejected employer and the Director's argument that diminished earning capacity should be used as the standard for determining responsible employer in two injury cases; the court also rejected the Director's contention that the date of the need for surgery should be used, as such an inquiry is not straight-forward. The court noted that the "unfairness" of its holding is mitigated by the spreading of the risk through mandatory insurance, and the availability of Special Fund relief to the last employer. *Metropolitan Stevedore Co. v. Crescent Wharf & Warehouse Co. [Price]*, 339 F.3d 1102, 37 BRBS 89(CRT) (9th Cir. 2003), *cert. denied*, 543 U.S. 940 (2004).

The Board modified the administrative law judge's decision to reflect that CUT, the employer at the time of a 2000 aggravation of claimant's back, and not SSA, which employed claimant at the time of the initial 1998 incident, is responsible for medical benefits related to claimant's back injury subsequent to the date of the second injury. SSA remains liable for all medical care for the treatment of claimant's other injuries associated with his March 10, 1998, accident, *i.e.*, his right thumb, left elbow, and cervical spine injuries. *Carpenter v. California United Terminals*, 37 BRBS 149 (2003), *vacated on other grounds on recon.*, 38 BRBS 56 (2004).

The Board affirmed the administrative law judge's finding that SSA is the responsible employer based on the last employer rule in *Price*, 339 F.3d 1102, 37 BRBS 89(CRT). Specifically, the Board affirmed the administrative law judge's rational decision to accord greatest weight to the opinions of Drs. Gold and Delman that the signal work performed by claimant for SSA on April 8, 2003, contributed to the progression of

claimant's shoulder and knee conditions, as well as claimant's corroborating testimony that he sustained increased symptoms and pain while working in that capacity and on that date for SSA. The Board also held that the administrative law judge correctly determined that, consistent with the last employer rule, SSA is liable for all reasonable and necessary medical expenses related to claimant's work injuries. The Board, however, clarified that SSA cannot be held liable for any expenses related to medical treatment prior to the time it employed claimant. *Lopez v. Stevedoring Services of America*, 39 BRBS 85 (2005).

The administrative law judge rationally found that claimant did not sustain a work-related aggravation of her back injury during the last period she was able to perform longshore employment from March 26 to June 21, 1997 with MTC, notwithstanding that she sustained aggravating injuries during the two prior periods she attempted to return to work after her initial back injury. The credited physician stated claimant's condition was not aggravated during this last period of employment. Therefore, the Board affirmed the finding that ITS is the responsible employer as the last aggravation occurred during claimant's employment with ITS. *Reposky v. Int'l Transp. Services*, 40 BRBS 65 (2006).

Occupational Disease

The rule for determining the responsible employer in occupational disease cases was enunciated in *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). Pursuant to *Cardillo*, the responsible employer is the last employer during whose employment claimant was exposed to injurious stimuli, prior to claimant's awareness that he was suffering from an occupational disease. This employer is liable for the full amount of the award. *See, e.g., Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), *aff'g in pertinent part* 13 BRBS 682 (1981)**;** *General Dynamics Corp., Electric Boat Division v. Benefits Review Board*, 565 F.2d 208, 7 BRBS 831 (2d Cir. 1977); *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th Cir.), *cert. denied*, 440 U.S. 911 (1970); *Kier v. Bethlehem Steel Corp*., 16 BRBS 128 (1984).

The Board has held that the Cardillo rule does not apply to traumatic injuries. *Rodriguez v. California Stevedore & Ballast Co*., 16 BRBS 371 (1984); *Lindsay v. Owens-Corning Fiber Glass Sales*, 13 BRBS 922 (1981). *See also Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991).

The last employer rule is "a rule of liability assessment, not of jurisdiction." *Fulks v. Avondale Shipyards, Inc.*, 10 BRBS 340, 345 (1979), *aff'd*, 637 F.2d 1008, 12 BRBS 975 (5th Cir. 1981)**,** *cert. denied*, 454 U.S. 1080 (1981)**.** Exposure to injurious stimuli in areas outside the Act's coverage which occurs subsequent to the covered exposure does not alter the responsible employer's liability; the last employer covered under the Act is responsible. *Newport News Shipbuilding & Dry Dock Co. v. Stilley*, 243 F.3d 179, 35 BRBS 12(CRT) (4th Cir. 2001), *aff'g* 33 BRBS 224 (2000); *Black*, 717 F.2d 1280, 16 BRBS 13(CRT); *Hughes v. Bethlehem Steel Corp*., 17 BRBS 153 (1985); *Green v. Newport News Shipbuilding & Dry Dock Co.*, 13 BRBS 562 (1981)(Smith, S., concurring), *vacated on other grounds*, 688 F.2d 833 (4th Cir. 1982)(*per curiam*), *opinion following remand*, 15 BRBS 465 (1983). *Cf. Bath Iron Works v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999)(First Circuit declines to resolve Director's argument that the last covered employer is liable where there is later exposure at a non-covered employer, as Commercial Union conceded that if claimant's claim is compensable, it is the liable carrier. The court expressed concern about the validity of the last *covered* employer rule, but stated that in this case, there are sound policy reasons for relying on the rule where claimant worked for the same employer for his entire career, but on both covered and non-covered sites).

It is irrelevant under *Cardillo* to show that claimant's disease existed while working for a previous employer, *Cordero v. Triple A Machine Shop*, 580 F.2d 1331, 8 BRBS 744 (9th cir. 1978), *cert. denied*, 440 U.S. 911(1979); *Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998); *Todd v. Todd Shipyards Corp.*, 16 BRBS 163 (1984), or that claimant did not sustain a distinct aggravation of his injury while working for the last covered employer.

See, e.g., New Orleans Stevedores v. Ibos, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied*, 540 U.S. 1141 (2004); *Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000), *cert. denied*, 531 U.S. 1112 (2001); *Franklin v. Dillingham Ship Repair*, 18 BRBS 198 (1986); *Tisdale v. Owens-Corning Fiber Glass Co.*, 13 BRBS 167 (1981); *Whitlock v. Lockheed Shipbuilding & Construction Co*, 12 BRBS 91 (1980); *Proffitt v. E. J. Bartells Co.*, 10 BRBS 435 (1979); *Compton v. Pennsylvania Gulf Service Center*, 9 BRBS 625 (1979). In *Franklin*, the Board rejected employer's argument that, although it was the last employer to expose claimant to asbestos, this exposure was not injurious. Declining to depart from *Cardillo*, the Board held the responsible employer is the last employer to expose claimant to injurious stimuli prior to awareness regardless of the actual medical relationship between claimant's exposure and the development of his occupational disease.

The injury at issue in *Cardillo* was a hearing loss. Thus, the last employer rule applies to hearing loss cases, and the last employer to expose claimant to noise is liable for the entire hearing loss claimed. *See, e.g., Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991); *Fishel v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 520 (1981)**,** *aff'd*, 694 F.2d 327 (4th Cir. 1982); *Primc v. Todd Shipyards Corp.*, 12 BRBS 190 (1980). To hold the last covered employer responsible, claimant need only show exposure to dangerous stimuli; evidence as to percentage of hearing loss suffered while working for a prior employer does not alter the result. *DiCarli v. General Dynamics Corp.*, 12 BRBS 946 (1980). *Compare Stevedoring Services of America v. Director, OWCP [Benjamin]*, 297 F.3d 797, 36 BRB 28(CRT) (9th Cir. 2002) (where claimant files two separate claims against consecutive employers, each claim should be adjudicated separately, with each employer liable for its share of the loss).

In *Whitlock*, 12 BRBS 91, the Board vacated the administrative law judge's responsible employer finding as it appeared to be based on claimant's lack of a distinct aggravation in her subsequent employment at Todd Shipyards and remanded the case for assessment of liability based solely on exposure to potentially harmful noise levels. On appeal a second time, Todd argued that the last employer rule as applied by the Board created a conclusive presumption of responsibility in violation of its due process rights. The Board rejected this argument on the basis that its previous decision on this issue established the law of the case. *Whitlock v. Lockheed Shipbuilding & Constr. Co.*, 15 BRBS 332 (1983) (Miller, J., concurring) (Ramsey, C.J., dissenting).

The Board's decision in *Whitlock*, 15 BRBS 332, also addressed the "awareness" component of the *Cardillo* standard, affirming the administrative law judge's conclusion that while claimant was aware of her loss of hearing at an earlier date, she did not become aware that it was work-related until after she began working for Todd. *See Sicker v. Muni Marine Co.*, 8 BRBS 268 (1978). This result is consistent with Sections 12 and 13 of the Act, 33 U.S.C. §§912, 913, which at that time required filings once claimant was aware of the relationship between her injury and her employment. Following the 1984

Amendments, the “awareness” standard for occupational disease provided that claimant must be aware of the relationship between the employment, the disease and the death or disability. 33 U.S.C. §§912, 913(b)(2). The Board therefore applied this standard, requiring that claimant be aware of an employment related disease which resulted in an actual disability. *See Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991); *Vanover v. Foundation Constructors,* 22 BRBS 453 (1989), *aff'd on other grounds sub nom. Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991).

The Eleventh Circuit reached a similar result in *Argonaut Insurance Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988), *rev'g in pert. part and aff'g on other grounds Patterson v. Savannah Machine & Shipyard*, 15 BRBS 38 (1982) (Ramsey, C.J., dissenting on other grounds), holding the carrier on the risk when claimant first missed work due to his occupational disease was liable. The court adopted the rule set forth in *Cordero,* 580 F.2d 1331, 8 BRBS 744, that the responsible employer/carrier is the last one to expose claimant to injurious stimuli prior to the onset of claimant's disability, even if claimant's work-related disease was diagnosed while he was working for a previous employer (or covered by a previous carrier). The court found this rule consistent with Sections 12(a), 13(b)(2), and 10(i) of the Act as amended in 1984, in that it views a claimant's "injury" as occurring only after he is "aware" of both the work-related nature of his disease and the disease's disabling effects.

While the Board’s reliance on the “awareness” standard of Sections 12 and 13 is consistent with *Cordero* in including the element of the onset of disability in the responsible employer formulation, the Board’s application of timeliness standards in hearing loss cases was not. In hearing loss cases, claimant's awareness for timeliness purposes does not occur until he receives an audiogram showing a hearing loss and knows of the causal nexus between his employment and the hearing loss. 33 U.S.C. §908(c)(13)(D). Reasoning that the awareness component under *Cardillo* is logically the same as that under Sections 12 and 13, the Board held that the responsible employer in a hearing loss case is the last employer to expose claimant to injurious stimuli prior to the date he receives an audiogram showing a hearing loss and has knowledge the loss is work-related. *Larson v. Jones Oregon Stevedoring Co.*, 17 BRBS 205 (1985). Based on this reasoning, the Board held an employer liable because it was the last employer to expose claimant to occupational noise prior to the date claimant received a copy of an audiogram even though the audiometric testing had been performed prior to the date claimant began working for that employer. *Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989). The Ninth Circuit reversed this decision, holding that claimant's receipt of an audiogram and accompanying report is not crucial outside the filing requirements of Sections 12 and 13 and reiterating the *Cordero* ruling that onset of disability is a key factor. Thus, in a hearing loss case, the responsible employer is the last one to expose claimant to injurious stimuli prior to the administration of the audiogram determinative of claimant’s disability. *Port of Portland v. Director, OWCP*, 932 F.2d

836, 24 BRBS 137(CRT) (9th Cir. 1991), *rev'g in pert. part and aff'g on other grounds Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989). The Board now follows the rule in *Port of Portland* and has overruled *Larson*. *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992).

Where the administrative law judge accepts employer's stipulation that it was the last employer to expose claimant to injurious stimuli, the Board will not rehear the responsible employer issue. Moreover, the fact employer is responsible does not entitle it to Section 8(f) relief; the requirements of Section 8(f) must be met. The Board therefore affirmed the denial of Section 8(f) relief where the exposure in employer's employ was too minimal to contribute to claimant's disability. *Stokes v. Jacksonville Shipyards, Inc.*, 18 BRBS 237 (1986), *aff'd sub nom. Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 21 BRBS 150(CRT) (11th Cir. 1988). Affirming the Board, the Eleventh Circuit also rejected employer's contention that Section 8(f) relief was available merely because it was the responsible employer who last exposed claimant to injurious stimuli under *Cardillo*. The court stated that the *Cardillo* rule is a rule for allocation of responsibility among employers for a particular injury and is not relevant to Section 8(f). *Jacksonville Shipyards, Inc. v. Director, OWCP*, 851 F.2d 1314, 21 BRBS 150(CRT) (11th Cir. 1988). *Accord Ronne v. Jones Oregon Stevedoring Co.*, 22 BRBS 344 (1989), *aff'd in part and rev'd in part sub nom. Port of Portland v. Director*, OWCP, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991).

Digests

Exposure and Employer's Burden

The Board held that the administrative law judge erred in denying the claim because claimant had not proven that he was not exposed to injurious stimuli after working for the named employer. If claimant establishes exposure with a covered employer, it is not also claimant's burden to prove that no other employer is liable. Employer can escape liability by rebutting the Section 20(a) presumption that the exposure to injurious stimuli did not cause the harm or, consistent with *Cardillo*, by demonstrating that the employee was exposed to injurious stimuli while working for a subsequent covered employer. Since the administrative law judge did not reach the issue of Section 20(a) rebuttal, the Board remanded the claim for consideration of this issue. *Susoeff v. The San Francisco Stevedoring Co.*, 19 BRBS 149 (1986); *see also Lustig v. Todd Shipyards Corp.*, 20 BRBS 207, 213 n.12 (1988), *aff'd in part and rev'd in part sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989).

Adopting the Board's decision in *Susoeff*, the Ninth Circuit held that the last employer to expose claimant to asbestos is liable for claimant's benefits. Where the evidence does not clearly indicate for which of the covered employers to expose him to injury claimant last

worked, the purposes of the Act are best served by assigning liability against the employer who is claimed against. To avoid liability, employer has the burden of showing that claimant was exposed to asbestos in subsequent covered employment. *General Ship Service v. Director, OWCP*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991).

The Board affirmed the administrative law judge's finding that employer did not establish that claimant was exposed to injurious stimuli in subsequent covered employment. The Board rejected employer's contentions that claimant is estopped from denying subsequent exposure where he filed a protective claim against the subsequent employer. The Board also rejected employer's contention that it should be able to use the Section 20(a) presumption against a subsequent employer. The Board held that claimant need not file his claims against all potentially liable employers beginning with the most recent and proceeding backwards. The Board noted that in *General Ship Service*, 938 F.2d 960, 25 BRBS 22(CRT) (9th Cir. 1991), the Ninth Circuit held that the purposes of the responsible employer rule are best served by assigning liability to the employer who is claimed against. *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62 (1992).

In a case where it was undisputed that claimant had a work-related hearing loss involving two potentially responsible employers, the Ninth Circuit held that the administrative law judge erred in denying benefits on the basis that claimant did not establish exposure to injurious stimuli at the last employer. The court held that claimant’s testimony of exposure to injurious noise is sufficient to invoke the Section 20(a) presumption that working conditions existed at the last employer that could have caused his hearing loss. As employers failed to present rebuttal evidence, the presumption controls and the last employer is liable for claimant’s work-related hearing loss. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998).

Because the *Cardillo* standard focuses only upon a claimant's exposure to injurious stimuli, the Board rejected the contention that an employee's exposure to the injurious stimuli must actually contribute to or aggravate his disability before an employer may be held liable for the payment of benefits under the Act. The Board held that based on record evidence of minimal asbestos exposure on a ship at Todd Shipyards, claimant’s last employer, the "injurious stimuli" standard is met and that employer is liable. *Picinich v. Lockheed Shipbuilding*, 22 BRBS 289 (1989), *rev'd sub nom. Todd Pacific Shipyards Corp. v. Director, OWCP*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990).

The Ninth Circuit reversed the Board's decision, holding that where the administrative law judge determined that claimant's exposure to asbestos while working for employer was "minimal," and that claimant therefore had not been exposed to "injurious stimuli" while working for employer, the Board erred in concluding that employer was responsible for paying benefits under the Act. Citing its decision in *Black v. Todd Shipyards Corp.*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983), *cert. denied*, 466 U.S. 937 (1984), the court stated that a worker's exposure is not sufficient to render his

employer liable under the Act unless he has "been exposed to injurious stimuli in quantities which have the potential to cause his disease." In finding only "minimal" exposure, insufficient to be injurious, the administrative law judge relied on evidence that the ship on which claimant worked underwent an extensive asbestos removal project prior to claimant's employment, including testimony of a marine chemist who tested the air aboard ship, found the concentration of asbestos in the air was well within Naval limits and concluded the ship was free of a hazardous level of asbestos. As the administrative law judge's decision was thus supported by substantial evidence, his determination that the prior employer was responsible was reinstated. *Todd Shipyards Corp. v. Director, OWCP*, 914 F.2d 1317, 24 BRBS 36(CRT) (9th Cir. 1990), *rev'g Picinich v. Lockheed Shipbuilding*, 22 BRBS 289 (1989).

The Ninth Circuit distinguished *Todd Shipyards [Picinich]* and affirmed the finding that employer is liable as it last exposed claimant to injurious noise levels prior to the administration of the audiogram that formed the basis for the claim. The administrative law judge rationally credited claimant's testimony regarding the noise to which he was exposed, and this noise had the potential to damage claimant's hearing. Under the responsible employer rule, there need not be a demonstrated medical causal relationship between a claimant's exposure and his occupational disease. The fact that claimant reported ringing in his ears after working for his previous employer does not establish the "absence of proof" that the noise exposure at Jones had the potential to injure claimant. *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997).

The Fifth Circuit adopted *Susoeff*, holding that employer bears the burden of proving that claimant was exposed to injurious stimuli in subsequent covered employment if employer seeks to avoid liability. In this case, employer failed to meet its burden of proving subsequent injurious exposure, as the administrative law judge rationally credited claimant's testimony about the noise levels in subsequent employment over the testimony of a doctor which the administrative law judge found to be speculative. *Avondale Industries, Inc. v. Director, OWCP*, 977 F.2d 186, 26 BRBS 111(CRT) (5th Cir. 1992).

The Fifth Circuit holds that substantial evidence supports the administrative law judge's determination that employer is the responsible employer where decedent established a *prima facie* case that he sustained a harm and that he was exposed to asbestos during his employment with employer. Thus, conditions existed during the employment that could have caused the harm, and employer did not rebut the presumption, as it did not carry its burden of showing that the exposure did not cause the harm, or that decedent was exposed to asbestos during specific subsequent employment. *Cooper/T. Smith Stevedoring Co., Inc. v. Liuzza*, 293 F.3d 741, 36 BRBS 18(CRT) (5th Cir. 2002), *aff'g on other grounds* 35 BRBS 112 (2001).

The Fourth Circuit held that the last employer did not establish it was not liable for claimant's mesothelioma, which was diagnosed in 1996. He was employed by Norshipco as a shipfitter from 1978 to 1996, where he was exposed to asbestos at least one time. Previously, he spent six years working for Newport News Shipbuilding (NNS), where he was regularly exposed to asbestos. After holding that neither Norshipco nor NNS rebutted the Section 20(a) presumption, the Fourth Circuit held that Norshipco was the responsible employer as it was the last employer to expose claimant to asbestos, and it failed to establish that such exposure could not have caused claimant's disease. In so holding, the court refused to adopt a requirement that exposure to injurious stimuli be more than *de minimis* with regard to the issue of responsible employer, and held that even assuming the applicability of such a rule, Norshipco presented no evidence to establish that claimant's exposure was in fact *de minimis.* The court also rejected the contention that, because of the latency period characteristic of mesothelioma any exposure in its employ could not have caused claimant's disease, noting that claimant worked for employer for 18 years and was exposed to asbestos during this period. *Norfolk Shipbuilding & Drydock Corp. v. Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000), *cert. denied,* 531 U.S. 1112 (2001).

In this claim for compensation for decedent's mesothelioma caused by occupational exposure to asbestos, the Board affirmed the administrative law judge's finding that NOS is the responsible employer as it was the last employer to expose decedent to injurious stimuli prior to his mesothelioma diagnosis. Citing *Faulk*, 228 F.3d 378, 34 BRBS 71(CRT) (4th Cir. 2000), and *Lustig*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989), the Board rejected employer's contention that it satisfied its burden of establishing that it is not the responsible employer on the basis of medical opinions regarding the long latency period for the development of mesothelioma. The Board held that as the evidence does not establish that the asbestos exposure experienced by decedent at NOS did not have the potential to give rise to mesothelioma, employer is not relieved of liability for the claim. *Ibos v. New Orleans Stevedores*, 35 BRBS 50 (2001), *aff'd in pert. part and rev'd on other grounds,* 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *cert. denied,* 540 U.S. 1141 (2004).

The Fifth Circuit affirmed this result, initially rejecting employer's argument that, for purposes of liability, a true causal link between exposure and injury at a particular employer must be shown. Under Section 2(2), a compensable injury requires only that the conditions of the employment be *of a kind* that produces the occupational disease. However, the court held that the Board did not articulate the appropriate legal standard to be applied in determining the responsible employer in an occupational disease case when it reasoned that an employer can escape liability by establishing that its exposure did not have the potential to cause the disease. The court stated that the issue is not whether an employer can prove that a particular exposure with a particular employer did not have the potential to cause the disease, nor does it involve whether an employer can prove that there is no evidence of a true causal link between a particular exposure and the

development of the employee's disease. In order to meet its burden of establishing that it is not the responsible employer, an employer must prove either (1) that exposure to injurious stimuli did not cause the employee's occupational disease, or (2) that the employee was performing work covered under the Act for a subsequent employer when he was exposed to injurious stimuli. As NOS was the last employer here, the only issue for the administrative law judge was whether employer proved that exposure to asbestos did not cause decedent's mesothelioma regardless of whether the exposure decedent experienced at employer either caused or had the potential to cause decedent's mesothelioma. As employer failed to present specific medical evidence disproving that decedent's mesothelioma was caused by his exposure to *any* asbestos, it was the responsible employer. *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), *aff'g in part and rev'g in part* 35 BRBS 50 (2001), *cert. denied*, 540 U.S. 1141 (2004).

The administrative law judge's finding that the named employer is the responsible employer and that claimant did not receive injurious exposure to asbestos while working for a subsequent covered employer, is rational and based on substantial evidence, where the subsequent employer's representative, while conceding that he did not know whether asbestos was present on the vessel claimant worked on in 1984, testified that it was the company's policy since 1976 to contract out asbestos-related work and that claimant was not involved in any asbestos work and no asbestos work was being done on the vessel prior to or at the time claimant was assigned to work there. *Lewis v. Todd Pacific Shipyards Corp.*, 30 BRBS 154 (1996).

Where decedent was exposed to asbestos with two different maritime employers, the Board affirmed the administrative law judge's finding that the last employer for which decedent worked is the responsible employer under *Cardillo.* The administrative law judge credited claimant's testimony regarding his exposure and the last employer is liable even if decedent was exposed to less asbestos with that employer than he had been with his previous one. *Ricker v. Bath Iron Works Corp.*, 24 BRBS 201 (1991).

The First Circuit declined to resolve the Director's request to extend the last employer rule to impose liability on the last covered maritime employer where there is later exposure at a non-covered employer, as here, in this hearing loss case, based on Commercial Union's concession that if claimant's claim is compensable, it is the liable carrier. The court expressed concern about the validity of the last *covered* employer rule, but stated that in this case, there are sound policy reasons for relying on the rule where claimant worked for the same employer for his entire career, but on both covered and non-covered sites. *Bath Iron Works v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999).

The Board affirmed the administrative law judge's finding that employer is liable for claimant's benefits as the last employer covered under the Act to expose decedent to

injurious stimuli, citing *Black*, 717 F.2d 1280, 16 BRBS 13(CRT) (9th Cir. 1983). The Board rejected employer's contentions that the rule is inappropriate as it shifts a disproportionate share of liability to the maritime industry, that it is inconsistent with the rule utilized in traumatic injury cases, that claimant will not be harmed if employer is not held liable because other workers' compensation remedies are available, and that it violates employer's constitutional rights to equal protection and due process of law. *Justice v. Newport New Shipbuilding & Dry Dock Co.*, 34 BRBS 97 (2000); *see also Stilley v. Newport News Shipbuilding & Dry Dock Co.*, 33 BRBS 224 (2000), *aff'd*, 243 F.3d 179, 35 BRBS 12(CRT) (4th Cir. 2001); *Flanagan v. McAllister Brothers, Inc.*, 33 BRBS 209 (1999).

The Fourth Circuit affirmed the Board's decision assigning full liability for disability and death benefits to employer under the last maritime employer rule. The decedent had been exposed initially to asbestos at employer's facility and later in his non-maritime employment with NASA. The Fourth Circuit holds that the last maritime employer rule is reasonable and consistent with the Longshore Act, passes constitutional muster under the equal protection and due process clauses, and does not violate the Takings clause. The court rejects employer's contention that an employee must first file for compensation benefits against his later non-maritime if a remedy exists against this employer as contrary to the Act. *Newport News Shipbuilding & Dry Dock Co. v. Stilley*, 243 F.3d 179, 35 BRBS 12(CRT) (4th Cir. 2001), *aff'g* 33 BRBS 224 (2000).

The responsible employer under the 1928 D.C. Act is the last District of Columbia employer who exposed claimant to injurious stimuli prior to July 26, 1982, the effective date of the new 1982 Act, and prior to his date of awareness. *Pryor v. James McHugh Construction Co.*, 18 BRBS 273 (1986). The Board subsequently reaffirmed its prior determination that employer is the responsible employer because it was the last employer covered under the 1928 D.C. Act to expose claimant to injurious stimuli prior to claimant's awareness of his occupational disease, as this determination comports with applicable law, but it remanded the case for a determination of whether claimant is covered under the new D.C. Act or any other state act. *Pryor v. James McHugh Construction Co.*, 27 BRBS 47 (1993).

Decedent worked in the shipyards for 3 companies between 1956 and 1960, and he was exposed to asbestos which caused mesothelioma and his death. There is no dispute that Lockheed was, chronologically, his last maritime employer. Because the parties conflated the issues of responsible employer and causation, the Board thoroughly discussed the law on both issues in an attempt to provide guidance in its application. The Board stated that Section 20(a) is invoked on claimant's behalf if she establishes that decedent suffered a harm and was exposed to injurious stimuli, here asbestos, during the course of his shipyard employment. In a multiple employer case, any employer may rebut the presumption by producing substantial evidence that decedent's death was not related to or hastened by his work-related exposure. If any of the employers rebuts the

presumption, it no longer applies and the issue of causation must be resolved on the evidence of record as a whole, with claimant bearing the burden of persuasion. Once causation is found, then the employers must establish which of them is liable for benefits. The responsible employer is the last covered employer to expose the employee to injurious stimuli prior to the date he becomes aware of his occupational disease. Each employer bears the burden of showing that it is not the responsible employer and may do so by demonstrating either that the employee was not exposed to asbestos at its facility in sufficient quantities to cause his disease or that the employee was exposed while working for a subsequent covered employer. In this case, the Board vacated the administrative law judge's decision holding Lockheed liable and remanded the case for further consideration. *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005); *see also Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64 (2005), *modified in part on recon.*, 40 BRBS 1 (2005).

On remand, the administrative law judge again held Lockheed liable. The Board held that the administrative law judge erred in holding the last employer liable for benefits solely on the basis that it was the last. Following a thorough discussion of the law, the Board held that the determination of the responsible employer in an occupational disease case is based on the same weighing of evidence as it is in a traumatic injury case. The determination is to be made without reference to the Section 20(a) presumption, and the administrative law judge must weigh the relevant evidence to determine which employer last exposed the employee to potentially injurious stimuli. Each employer bears the burden of convincing the administrative law judge, by a preponderance of the evidence, that it did not last expose the employee. This burden is simultaneous, not consecutive. On remand, therefore, the administrative law judge must make a finding as to which employer "more likely than not" last exposed decedent to injurious amounts of asbestos. *McAllister v. Lockheed Shipbuilding*, 41 BRBS 28 (2007).

In a companion case, decedent was exposed to asbestos during shipyard employment for several employers. The administrative law judge found decedent's deposition testimony that he worked in a Foster Wheeler boiler in 1986 or 1987 established his date of last exposure to asbestos and found Dillingham liable, concluding that claimant's later employment did not expose him to asbestos. The Board held that decedent's death was work-related but vacated the administrative law judge's responsible employer determination. The Board found that the administrative law judge's weighing of the evidence was inconclusive, and he failed to address whether Dillingham established that decedent was not exposed to potentially injurious asbestos during the course of his employment with it. The Board remanded the case for definitive findings of fact. *Schuchardt v. Dillingham Ship Repair*, 39 BRBS 64 (2005), *modified in part on recon.*, 40 BRBS 1 (2005). On reconsideration, the Board held that Dillingham must continue paying benefits pending resolution of the responsible employer issue. On remand, should the administrative law judge find responsible an employer other than Dillingham, Dillingham is entitled to reimbursement from the liable employer for its prior payments

to claimant. Following remand, the Board affirmed the administrative law judge's decision that Dillingham was the responsible employer. The administrative law judge found that the evidence established decedent was not exposed to asbestos at his later employers and that Dillingham did not establish by a preponderance of the evidence that it did not expose him. The Board affirmed this decision as supported by substantial evidence. *Schuchardt v. Dillingham Ship Repair*, No. 06-906 (June 27, 2007) (unpublished), *appeal pending*, No. 07-13611 (9th Cir. 2007).

In finding that employer Plant Shipyard, not Bethlehem Steel, was the responsible employer, the administrative law judge relied on Social Security Administration records which indicated that decedent had earnings from employer in the first quarter of 1954, making it the last covered employer to expose claimant to asbestos. The administrative law judge discredited decedent's testimony that he did not recall working for employer in 1954, since decedent had trouble remembering other noteworthy events from this period. The Board affirmed the administrative law judge's finding, holding that the administrative law judge's reliance on the Social Security Administration records and his discrediting of decedent's testimony were rational. *Taylor v. Plant Shipyards Corp.*, 30 BRBS 90 (1996).

The Board held that in order for the injury to decedent to be compensable, his exposure to asbestos must have occurred, at least in part, on a covered situs, that is, a covered portion of employer's facility. Thus, while it is neither necessary that the last exposure nor the majority of the exposure comes from the covered areas, *some* exposure must have occurred within a covered area for employer to be held liable. Where there is conflicting testimony as to whether decedent was exposed to asbestos while working on the covered portions of employer's facility, the case must be remanded for a determination by the administrative law judge of where decedent's injury occurred and, thus, whether the injury is compensable. *Jones v. Aluminum Co. of America*, 35 BRBS 37 (2001).

Disability and Awareness

The Eleventh Circuit adopted the rule set forth in *Cordero* that the responsible employer/carrier is the last one to expose claimant to injurious stimuli prior to the onset of claimant's disability, even if claimant's work-related disease was diagnosed while he was working for a previous employer (or covered by a previous carrier). The court found this rule consistent with Sections 12(a), 13(b)(2), and 10(i) of the Act as amended in 1984, in that it views a claimant's "injury" as occurring only after he is "aware" of both the work-related nature of his disease and the disease's disabling effects. The court holds that Continental is the responsible carrier as it was on the risk when claimant first missed work due to his occupational disease. *Argonaut Insurance Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988), *rev'g in pert. part and aff'g on other grounds Patterson v. Savannah Machine & Shipyard*, 15 BRBS 38 (1982) (Ramsey, C.J., dissenting on other grounds). *See Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992) (First Circuit applies similar analysis to responsible carrier determination).

The administrative law judge erred in basing his determination on claimant's awareness of his work-related condition rather than on his awareness of the relationship between his disease, work, and disability. Moreover, where claimant is a voluntary retiree he may not be charged with awareness until he knows that a permanent impairment exists. Because claimant had no rateable permanent impairment at any time prior to his September 23, 1981 hospitalization, and the record established that claimant was not aware of the relationship between his disease, disability and employment prior to October 1981, the Board reversed the administrative law judge's finding that November 6, 1970 was claimant's date of awareness, which had resulted in Avondale's liability, and held Ingalls liable as a matter of law. *Carver v. Ingalls Shipbuilding, Inc.*, 24 BRBS 243 (1991).

The Board affirmed the administrative law judge's responsible employer determination, noting that the result would be the same whether claimant's back injuries are considered to be an occupational disease or repetitive traumas. If an occupational disease, the responsible employer is the last one to expose claimant to injurious stimuli prior to claimant's awareness of the relationship between his disease, disability and employment. The Board affirmed the finding that claimant was not "aware" of his disability until he discontinued his employment on the advice of his doctor, and that he was exposed to repetitive trauma until that time. As the administrative law judge also found that claimant's continued employment aggravated his back condition, employer would be liable on this theory as well. *Vanover v. Foundation Constructors*, 22 BRBS 453 (1989), *aff'd sub nom. Foundation Constructors, Inc. v. Director, OWCP*, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991). In affirming the Board's decision, the Ninth Circuit held that the multiple traumatic injury rule applied.

The Board found the administrative law judge's analysis of the responsible employer issue deficient where administrative law judge merely held Bethlehem Steel liable because it was the last employer in whose employ claimant was exposed to harmful stimuli prior to awareness, without making a determination as to claimant's date of awareness. On remand, if he finds that claimant was aware of his work-related lung condition prior to leaving Bethlehem in July 1980, he should reaffirm his prior determination that it was the responsible employer because subsequent exposure to harmful stimuli would be irrelevant since the last employer prior to claimant's awareness is liable. *Blake v. Bethlehem Steel Corp.*, 21 BRBS 49 (1988).

Hearing Loss

The Board held an employer liable because it was the last employer to expose claimant to occupational noise prior to the date claimant received a copy of an audiogram even though the audiometric testing had been performed prior to the date claimant began working for the employer. The Board found this result consistent with the *Cardillo* rule, reasoning that the time of awareness for purposes of determining the last employer must logically be the same as awareness for purposes of amended Sections 12 and 13. *Larson*, 17 BRBS 205. The Board also held that employer's liability is not contingent upon a showing of an actual medical causal relationship between claimant's exposure and his occupational disease. *Ronne v. Jones Oregon Stevedoring Co*., 22 BRBS 344 (1989), *rev'd in pert. part and aff'd on other grounds sub nom. Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991).

In reversing the Board's decision, the Ninth Circuit stated that claimant's receipt of an audiogram and accompanying report is not crucial outside the filing requirements of Sections 12 and 13. The court stated that when it adopted the *Cardillo* rule in *Cordero*, 580 F.2d 1331, 8 BRBS 744, "onset of disability" was emphasized as a key factor in assessing liability. Under *Cordero*, liability falls on the employer "covering the risk at the time of the most recent injury that bears a casual [sic] relation to the disability." The court agreed with the Board that *Cordero* does not require a demonstrated medical causal relationship between claimant's exposure and his occupational disease. However, in this case, it is factually impossible for claimant's employment with Port of Portland, which began four days after the audiometric testing showing hearing loss was performed, to have contributed to his disease. The audiogram that formed the basis for the claim reflected the extent of claimant's hearing loss as of the date the testing was performed, and the employer at that time is liable. The court accordingly found that responsibility for the claim must fall on Jones Oregon, the last employer claimant worked for prior to the June 22, 1981, audiometric test, as it was the last employer whose injurious exposure could have contributed to the hearing loss evidenced on the determinative audiogram. *Port of Portland v. Director, OWCP*, 932 F.2d 836, 24 BRBS 137(CRT) (9th Cir. 1991), *rev'g in pert. part and aff'g on other grounds Ronne v. Jones Oregon Stevedoring Co*., 22 BRBS 344 (1989).

In a subsequent case arising in the Ninth Circuit, the Board applied that court's decision in *Port of Portland*, 932 F.2d 841, 24 BRBS 137(CRT) (9th Cir. 1991), and held employer liable as it was the last employer to expose the employee to injurious stimuli prior to the administration of the determinative audiogram, *i.e.*, the audiogram that formed the basis of the claim. *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1991).

In a case arising in Ninth Circuit involving multiple employers, the Board affirmed the administrative law judge's responsible employer determination as consistent with *Port of*

Portland, 932 F.2d, 836, 841, 24 BRBS 137(CRT) (9th Cir. 1991), where the administrative law judge credited an earlier audiogram as determinative of claimant's disability. The employer in whose employ claimant was last exposed prior to the administration of this audiogram was therefore responsible, even though claimant was arguably exposed to injurious stimuli in subsequent employment. *Mauk v. Northwest Marine Iron Works*, 25 BRBS 118 (1991).

The Board overruled its decision in *Larson*, 17 BRBS 205 (1985), that the awareness component of the *Cardillo* standard must logically be the same as the awareness requirements of Sections 12 and 13, and thus claimant cannot be charged with awareness until he receives an audiogram and accompanying report showing a hearing loss and has knowledge of a causal connection between his work and his hearing impairment. The Board adopted the reasoning of *Port of Portland*, 932 F.2d 836, 24 BRBS 137(CRT) for application in all circuits, finding its rationale disassociating responsible employer determinations from claimant's initial receipt of an audiogram and accompanying report persuasive and consistent with *Cardillo*. Pursuant to *Port of Portland*, Board affirmed the administrative law judge's finding that Ingalls was the responsible employer under the Act as it was the last employer to expose claimant to injurious stimuli prior to the audiogram found by the administrative law judge to be determinative of the extent of claimant's hearing loss. *Good v. Ingalls Shipbuilding, Inc.*, 26 BRBS 159 (1992).

Claimant's arguably greater exposure to industrial noise while engaged in the "non-maritime" aspect of his employment did not detract from the administrative law judge's finding that claimant was injured on a covered situs where he credibly testified that he was exposed to noise while participating in barge unloading operations. Employer did not demonstrate that there was no exposure to noise in the barge area. *Meardry v. Int'l Paper Co.*, 30 BRBS 160 (1996).

In a hearing loss case where the administrative law judge averaged the results of two audiograms in awarding benefits, both audiograms are "determinative" of claimant's disability. Pursuant to *Port of Portland*, *Patterson*, and *Cordero*, the Board holds that the carrier on the risk prior to the onset of disability is the liable party. In this case, onset is prior to the first audiogram as this audiogram was higher than the later one. Thus, the exposure between the two audiograms could not have contributed causally, even theoretically, to the compensable hearing loss. *Roberts v. Alabama Dry Dock & Shipbuilding Corp.*, 30 BRBS 229 (1997).

In a case where it was undisputed that claimant had a work-related hearing loss involving two potentially responsible employers, the Ninth Circuit held that the administrative law judge erred in denying benefits because claimant did not establish injurious stimuli at the last employer. The court held that claimant's testimony of exposure to injurious noise is sufficient to invoke the Section 20(a) presumption that working conditions existed at the last employer that could have caused his hearing loss. As employers failed to present

rebuttal evidence, the presumption controls and the last employer is liable for claimant's work-related hearing loss. *Ramey v. Stevedoring Services of America*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998).

The Ninth Circuit affirmed the finding that employer last exposed claimant to injurious noise levels prior to the administration of the audiogram that formed the basis for the claim. The administrative law judge rationally credited claimant's testimony regarding the noise to which he was exposed, and this noise had the potential to damage claimant's hearing. Under the responsible employer rule, there need not be a demonstrated medical causal relationship between a claimant's exposure and his occupational disease. The court distinguished *Todd Shipyards [Picinich]*, 914 F.2d 1317, 24 BRBS 36(CRT), and stated that the fact that claimant reported ringing in his ears after working for his previous employer does not establish the "absence of proof" that the noise exposure at Jones had the potential to injure claimant. *Jones Stevedoring Co. v. Director, OWCP [Taylor]*, 133 F.3d 683, 31 BRBS 178(CRT) (9th Cir. 1997).

The Board rejected employer's argument which confused the issue of causation with whether it is the responsible employer and affirmed the administrative law judge's finding that employer is liable as it did not establish either that, during his work for employer, the employee was not exposed to loud noise in sufficient quantities to have the potential to cause his hearing loss or that the employee was exposed to loud noise while working for a subsequent covered employer. The administrative law judge properly noted that it is irrelevant under *Cardillo*, 225 F.2d 137, to show that claimant's hearing loss existed while working for a previous employer. Moreover, the fact that employer had hearing protection available but that claimant did not use it is irrelevant as it does not establish that claimant's hearing loss is not work-related or that claimant was not exposed to loud noise in its employ. *Zeringue v. McDermott, Inc.*, 32 BRBS 275 (1998).

In this hearing loss case, the Board affirmed the administrative law judge's finding that employer is the responsible employer. The administrative law judge's finding that claimant was last exposed to injurious noise while working aboard steam winch vessels in the mid-1980's was unchallenged on appeal. While there was no evidence in the record indicating whether employer or another longshore employer was claimant's last employer on that occasion, the administrative law judge credited claimant's testimony that he worked for employer 90 percent of the time during this period, and rationally found that it was more likely than not that employer was the last employer to expose claimant to injurious noise. Thus, the Board held that employer failed to meet its burden of establishing that it did not expose claimant to potentially injurious stimuli. *Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999).

In this hearing loss case, the administrative law judge merged claimant's two hearing loss claims: one filed in 1991 against Container, which had never been adjudicated and was based on an audiogram demonstrating a 28.5 percent loss, and a second filed in 1996

against SSA based on an audiogram demonstrating a 34 percent loss, and held SSA liable for claimant's entire hearing loss. The Board affirmed the administrative law judge's finding that SSA is the responsible employer, as it was the last employer to expose claimant to injurious stimuli prior to the 1996 audiogram, which the administrative law judge found was the "determinative audiogram." The Board rejected the contentions of SSA and the Director that the administrative law judge should have adjudicated claimant's claims against Container Stevedoring and SSA separately, holding that the administrative law judge properly treated claimant's two claims as one and that apportioning liability would run counter to the aggravation rule and the "last employer rule" of *Cardillo*. *Benjamin v. Container Stevedoring Co.*, 34 BRBS 189 (2001), *rev'd sub nom. Stevedoring Services of America v. Director, OWCP*, 297 F.3d 797, 36 BRBS 28(CRT) (9th Cir. 2002).

The Ninth Circuit reversed the Board's decision, holding that there was nothing in *Cardillo* implying that there can be only one last employer for every worker. The court stated that there is no case holding that two entirely separate injuries are to be treated as one; thus, the claims were to be adjudicated separately, with Container liable for the loss demonstrated on the first audiogram and SSA liable for the difference between the later and the former losses. The court distinguishes the case from *Ramey*, 134 F.3d 954, 31 BRBS 206(CRT) (9th Cir. 1998), in that here there are two valid audiograms whereas the administrative law judge in *Ramey* found only one of the audiograms to be valid. *Stevedoring Services of America v. Director, OWCP [Benjamin]*, 297 F.3d 797, 36 BRB 28(CRT) (9th Cir. 2002), *rev'g Benjamin v. Container Stevedoring Co.*, 34 BRBS 189 (2001).

The Board considered a hearing loss case in which claimant filed two claims against two different employers following two valid audiograms and found that the Ninth Circuit's decision in *Benjamin*, 297 F.3d 797, 36 BRBS 28(CRT), is controlling. Thus, the Board reversed the administrative law judge's finding that the two claims should be merged for adjudication and held the first employer is liable for the hearing loss demonstrated on the first audiogram, at the average weekly wage in effect at the time of that injury. The first employer also is liable for medical benefits incurred prior to the second injury. The second employer is liable for claimant's full hearing loss, as the aggravation rule still is applicable, based on the average weekly wage at the time of the second injury, but the second employer is entitled to a credit for the dollar amount of the benefits claimant receives for his prior hearing loss claim. Moreover, as there was an earlier hearing loss claim settled under Section 8(i) prior to the two under review, the Board discussed the application of Section 8(f) and the credit for prior claims for each employer and the Special Fund. *Giacalone v. Matson Terminals, Inc.*, 37 BRBS 87 (2003).

Claimant first had a measurable hearing loss in 1991 and was prescribed hearing aids. In 1998, he filed a hearing loss claim against two employers which was settled, with Jones agreeing to pay future medical expenses. Jones thereafter denied liability for claimant's

new hearing aids, arguing that claimant's hearing loss was established in 1991 when it was not the responsible employer. The Board rejected this argument based on the plain language of the settlement. In a footnote, the Board discussed the fact that Jones's argument rested on an erroneous legal premise. The last employer is not absolved from liability for replacement hearing aids regardless of whether claimant previously had hearing aids or whether claimant's hearing loss progressed from the date of the initial audiogram to the date of the filing audiogram. A distinct aggravation need not be shown in hearing loss cases in order to establish the responsible employer. The responsible employer is the last one to expose claimant to potentially injurious stimuli prior to the administration of the determinative audiogram, and it is employer's burden to establish that claimant was not exposed to potentially injurious stimuli while in its employ. In this case, it is undisputed that employer was claimant's last longshore employer prior to the date of the filing audiogram, and there is no evidence that claimant was not exposed to potentially injurious stimuli while in its employ. *Jeschke v. Jones Stevedoring Co.*, 36 BRBS 35, 37 n.2 (2002).

The Fourth Circuit held that a labor union cannot be the responsible employer in this hearing loss case because claimant's job as the president of the union local was not maritime employment. The case was remanded for consideration of whether the previous maritime employer could be held liable for benefits. *Sidwell v. Virginia Int'l Terminals, Inc.*, 372 F.2d 238, 38 BRBS 19(CRT) (4th Cir. 2004).

Responsible Carrier

By providing compensation insurance under the Act, an insurance carrier becomes bound for the full obligation of the employer. 33 U.S.C. §935; 20 C.F.R. §703.115. *Crawford v. Equitable Shipyards, Inc.*, 11 BRBS 646 (1979), *aff'd per curiam sub nom. Employers National Insurance Co. v. Equitable Shipyards, Inc*., 640 F.2d 383 (5th Cir. 1981).

The carrier at the time of a traumatic injury is liable for employer's obligations resulting from that injury. With multiple traumatic injuries, designation of the responsible carrier is based upon the same analysis used in determining the responsible employer. The administrative law judge must determine whether claimant's disability resulted from the natural progression of his first injury or if claimant's subsequent injury aggravated, accelerated or combined with the earlier injury to result in claimant's disability. *Adam v. Nicholson Terminal & Dry Dock Co.*, 14 BRBS 735 (1981); *Crawford*, 11 BRBS 646.

In occupational disease cases, the method for determining the responsible carrier also requires application of *Travelers lnsurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). After establishing the "last employer" rule, the court stated:

> the treatment of carrier liability was intended to be handled in the same manner as employer liability, and that the carrier who last insured the "liable" employer during claimant's tenure of employment, prior to the date claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be held responsible for the discharge of the duties and obligations of the "liable" employer.

225 F.2d at 145. This rule has since been consistently followed. *See, e.g., General Dynamics v. BRB*, 565 F.2d 208, 7 BRBS 831 (2d Cir. 1977). Although the carrier rule does not explicitly refer to the last *exposure* prior to awareness, a majority of the Board held that the last carrier rule should be applied in the same manner as the employer rule. *Perry v. Jacksonville Shipyards, Inc*., 18 BRBS 219 (1986) (Brown, J., dissenting). Thus, the Board held that the administrative law judge erred in holding the last insurer prior to claimant's awareness liable without determining whether claimant was exposed to injurious stimuli while it was on the risk. The Board remanded for a determination of the carrier insuring employer during claimant's last exposure to injurious stimuli prior to awareness.

As with the responsible employer, it is irrelevant that claimant's condition existed while a prior carrier was on the risk. *Todd v. Todd Shipyards Corp.*, 16 BRBS 163 (1984). *See Lustig v. Todd Shipyards Corp.*, 20 BRBS 207 (1988), *aff'd in pert. part sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159 (CRT) (9th Cir. 1989). *See generally*

Argonaut Insurance Co. v. Patterson, 846 F.2d 715, 21 BRBS 51 (CRT) (11th Cir. 1988); *Brown v. General Dynamics Corp.*, 7 BRBS 561 (1978); *Eleazer v. General Dynamics Corp.*, 7 BRBS 75 (1977).

The Board has affirmed an administrative law judge's finding of responsible carrier where the insurance policies were no longer in existence, and the only available evidence indicated the carrier was the last carrier. The burden was on the named carrier to show it was not the liable insurer. *Dolowich v. West Side Iron Works*, 17 BRBS 197 (1985). *See Blanding v. Oldam Shipping Co.*, 32 BRBS 174 (1998), *rev'd on other grounds sub nom. Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999) (finding that Commercial Union is the responsible carrier affirmed even though the decedent continued to work for employer after the carrier's coverage with employer ended, as the record did not clearly indicate which carrier was on the risk during the decedent's last injurious exposure and as the purposes of the Act are best served by assigning liability against Commercial Union).

The administrative law judge must make the findings necessary to determine the responsible carrier. *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986) (administrative law judge erred in remanding this issue to the district director). Where necessary to resolve a claim for compensation benefits, the administrative law judge may adjudicate insurance contract disputes. *See, e.g., Schaubert v. Omega Services Industri*es, *Inc.*, 31 BRBS 24 (1997); *Rodman v. Bethlehem Steel Corp.*, 16 BRBS 123 (1984); *Valdez v. Bethlehem Steel Corp.*, 16 BRBS 143 (1984); *Brady v. Hall Bros. Marine Corp. of Gloucester*, 13 BRBS 854 (1981); *Droogsma v. Pensacola Stevedoring Co., Inc.*, 11 BRBS 1 (1979). *Cf. Temporary Employment Services v. Trinity Marine Group, Inc.*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001) (parties' claims regarding insurance contract indemnification are not questions in respect of a claim under Section 19). Where there is no active compensation claim, however, the administrative law judge lacks jurisdiction. *Busby v. Atlantic Dry Dock Corp.*, 13 BRBS 222 (1981). *See Rodman*, 16 BRBS 123 (on remand, if claim is withdrawn, administrative law judge will lack jurisdiction to resolve insurance dispute). This issue is also addressed in Section 19, Powers of the Administrative Law Judge.

A carrier covering non-occupational injuries can intervene under the Act and recover amounts mistakenly paid out for work-related injuries. *Aetna Life Insurance Co. v. Harris*, 578 F.2d 52 (3d Cir. 1978). *Cf. Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190 (1984) (where Aetna's claim for reimbursement was not based on the same injury as the claim at issue, administrative law judge erred in allowing Aetna to intervene).

Digests

In General

In the absence of a "cut-through" endorsement, LIGA cannot be held liable for the insolvent carrier's liability, and employer is primarily liable under Section 4. *Deville v. Oilfield Industries*, 26 BRBS 123 (1992).

The Board rejected employer's argument that Travelers waived its right to contest liability by virtue of a letter it sent to employer. In this letter, Travelers noted its agreement with employer's counsel that the last date that an employee was exposed to injurious stimuli would determine the party responsible for defending and indemnifying the claims. Travelers further indicated that any worker last exposed past May 24, 1988, would be covered by Travelers, but anyone whose last exposure occurred prior to this time would not. The Board found that Travelers' letter could not logically be viewed as a voluntary and intentional surrender or relinquishment of the insurer's responsible carrier defense and accordingly affirmed the administrative law judge's determination that Travelers did not waive its right to contest liability in this case. *Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993).

Since there was never any allegation that employer was at any time uninsured, it was improper to hold only employer liable on the ground that there was insufficient evidence regarding the carrier on the risk on the relevant date. The administrative law judge also erred in remanding this issue to the district director, as only the administrative law judge can hold hearings and resolve disputed issues. Since Hanover Insurance Company was not a party before the administrative law judge, none of the administrative law judge's findings is binding on Hanover. Hanover must have the opportunity for a rehearing to present its own evidence on the issue of date of last exposure. *Sans v. Todd Shipyards Corp.*, 19 BRBS 24 (1986).

The Board held that the administrative law judge properly addressed the responsible carrier issue although the carrier first raised it before him on remand as it is an issue which is fundamental to the administration of justice. *Blanding v. Oldam Shipping Co.*, 32 BRBS 174 (1998), *rev'd on other grounds sub nom. Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 111(CRT) (2d Cir. 1999).

The administrative law judge found that Wausau, the carrier providing representation for employer at the initial hearing, could not be liable as it came on the risk after claimant's exposure to asbestos ended and held employer liable for benefits. Employer sought modification in order to establish claimant's date of last exposure and the responsible carrier, which the administrative law judge denied. The Board held that the administrative law judge erred in denying modification, as the date of last exposure is a question of fact, and thus modification based on a mistake of fact encompasses this issue.

Moreover, employer was insured at all times, and it was incumbent upon the administrative law judge to determine the responsible carrier. Accordingly, the administrative law judge's decision was vacated and the case remanded for findings regarding the responsible carrier. The carriers newly joined must also be allowed a hearing on the merits of the claim. *Jourdan v. Equitable Equipment Co.*, 25 BRBS 317 (1992) (Dolder, J., dissenting).

The Board affirmed the administrative law judge's denial of employer's and its current carrier's motion for modification in order to address the issue of responsible carrier. In distinguishing *Jourdan*, 25 BRBS 317 (1992), from the instant case, the administrative law judge found that although employer and its carrier, Homeport, were represented by the same counsel at the initial hearing, Homeport's status as responsible carrier was not challenged until well after the administrative law judge issued his decision. The Board held that since claimant was alleging many years of injurious noise exposure, employer and Homeport committed error by failing to raise and litigate the issue of responsible carrier at the initial hearing, and this error cannot be cured by invoking the modification provisions under Section 22 of the Act. *Everson v. Stevedoring Services of America*, 33 BRBS 149 (1999).

In absence of evidence that carrier provided Longshore coverage rather than state workers' compensation insurance, Longshore coverage cannot be inferred from its selection as employer's carrier because at the time carrier was selected, the Act had been interpreted as not extending to employees injured while engaged in new ship construction. Board therefore reversed administrative law judge's finding that carrier was responsible for payment of benefits. *Shaller v. Cramp Shipbuilding & Dry Dock Co.*, 23 BRBS 140 (1989).

Liberty Mutual came on the risk after claimant had transferred to a facility that failed to satisfy the Section 3(a) situs test. Accordingly, it is not responsible for any hearing loss claimant sustained at employer's shipyard before it was on the risk. *Brown v. Bath Iron Works Corp.*, 22 BRBS 384 (1989).

The administrative law judge erred by finding SAIF and Transamerica jointly and severally liable, as the uncontradicted evidence is sufficient to establish that decedent's last covered employment occurred at the Vancouver shipyard which was insured by Transamerica. Moreover, the Board noted that the assignment of joint liability has generally been limited to those situations where the employee worked for two employers at the same time. Accordingly, the Board found that Transamerica was the responsible carrier, and the Decision and Order was modified to reflect this finding. *Martin v. Kaiser Co., Inc.*, 24 BRBS 112 (1990) (Dolder, J., concurring in the result only).

The Board holds it is unnecessary to resolve the conflict as to whether Precision Valve or Sea Lion VII, Inc. is the responsible employer in this case because the result is the same,

i.e., National Fire Insurance Company is responsible for the payment of benefits because it holds a workers' compensation policy covering employees of the *Sea Lion VII*, including claimant, and there is no evidence that the *Sea Lion VII* holds a workers' compensation policy covering its employees. *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990).

Traumatic Injuries

While recognizing that the Board has previously rejected the concept of apportionment among carriers and has adopted the general rule that the second employer or carrier is liable for the full consequences of any aggravation of a pre-existing condition in a multiple traumatic injury case, employer urged the Board to reconsider its position and argued that the D.C. Circuit's decision in *United Painters v. Britton*, 301 F.2d 560 (D.C. Cir. 1962), mandates apportionment in this case under the doctrine of *stare decisis*. The Board distinguished *Britton* and reaffirmed its prior position that the Act does not allow for apportionment, noting that Section 8(f) was intended to relieve the harshness of the aggravation rule. As it is undisputed that the last injury aggravated claimant's condition, the Board affirms the administrative law judge's finding that Hartford is liable. *Brooks v. Smith's Moving and Storage Co*., 20 BRBS 147 (1987).

The administrative law judge's finding that carrier was liable for claimant's entire disability resulting from the combined effects of the 1980 and 1983 injuries is affirmed as the administrative law judge's finding of two distinct injuries is supported by substantial evidence and carrier was on the risk at the time of the 1983 injury. This allocation of liability results from the aggravation rule. *Kooley v. Marine Industries Northwest*, 22 BRBS 142 (1989).

In discussing causation/aggravation based on the record as a whole, the administrative law judge relied on the opinion of claimant's treating physician, which he found credible and well-reasoned, in which the physician stated that claimant's back disability is wholly attributable to the industrial injury, thus establishing a causal connection. As claimant sustained an aggravating injury while the later carrier was on the risk, claimant's current back condition is not the natural progression of his degenerative back condition, and the administrative law judge's finding that the later carrier is responsible is affirmed. *Price v. Stevedoring Services of America*, 36 BRBS 56 (2002), *aff'd in pert. part and rev'd on other grounds*, No. 02-71207, 2004 WL 1064126, 38 BRBS 34(CRT) (9th Cir. May 11, 2004), and *aff'd and rev'd on other grounds*, 382 F.3d 878, 38 BRBS 51(CRT) (9th Cir. 2004), *cert. denied*, 544 U.S. 960 (2005).

The Seventh Circuit holds that Section 20(a) applies to the compensability of an injury and does not apply in determining the responsible employer/carrier. The administrative law judge properly addressed the liability issue based on the record as a whole, without reference to Section 20(a). The Seventh Circuit held that the aggravation rule does not require that a later injury fundamentally alter a prior condition, but that it is enough that it produces or contributes to a worsening of symptoms. The administrative law judge weighed the evidence and found that the later injury contributed to claimant's condition. Thus, the court affirmed the administrative law judge's finding that the carrier at the time of the second injury was liable for benefits. *Marinette Marine Corp. v. Director, OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005).

Occupational Disease

The Board rejects Aetna's "actual causation" argument, citing *Franklin*, 18 BRBS 198 (1986), and affirms the determination that Aetna is the responsible carrier because it was the carrier on the risk when claimant was last exposed to injurious stimuli prior to awareness. *Lustig v. Todd Shipyards Corp*., 20 BRBS 207 (1988), *aff'd in pert. part sub nom. Lustig v. U.S. Dept. of Labor*, 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989). On appeal, the Ninth Circuit affirmed the Board's responsible carrier finding under *Cardillo.* The court rejected Aetna's argument that because asbestos-related cancer has a ten year latency period, any exposure after that date, while it was on the risk, would not have contributed to the disability, noting that this argument constitutes an "unwarranted" change from *Cardillo*. *Lustig v. U.S. Dept. of Labor,* 881 F.2d 593, 22 BRBS 159(CRT) (9th Cir. 1989).

The Eleventh Circuit adopted the Ninth Circuit's holding in *Cordero* that the responsible employer/carrier is that at the time of claimant last exposure to injurious stimuli prior to the onset of claimant's disability, even if claimant's work-related disease was diagnosed while he was working for a previous employer (or covered by a previous carrier). The court noted that this rule is consistent with Sections 12(a), 13(b)(2), and 10(i) of the Act as amended in 1984, in that the rule views a claimant's "injury" as occurring only after he is "aware" of both the work-related nature of his disease and the disease's disabling effects. Of the carriers insuring employer during claimant's exposure to asbestos, the court holds that Continental is liable, as it was on the risk when claimant first missed work due to his occupational disease. *Argonaut Insurance Co. v. Patterson*, 846 F.2d 715, 21 BRBS 51(CRT) (11th Cir. 1988), *rev'g in pert. part and aff'g on other grounds Patterson v. Savannah Machine & Shipyard*, 15 BRBS 38 (1982) (Ramsey, C.J., dissenting on other grounds).

The First Circuit reached a similar conclusion, holding that the responsible carrier is that which last insured the liable employer during the period in which claimant was exposed to injurious stimuli prior to the date claimant became disabled by his disease. The date on which a worker suffers a diminution in wage-earning capacity is the date of disability for assigning the responsible carrier. *Liberty Mutual Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992).

The Board rejects employer's request that it be allowed to join a prior carrier to the proceedings based on the holding of the Ninth Circuit it *Todd Pacific Shipyards Corp. [Picinich]*, 914 F.2d 1314, 24 BRBS 36(CRT) (9th Cir. 1990). At no time during the proceedings did employer allege that it did not expose claimant to substances in quantities sufficient to potentially cause his disease and that it was not the responsible employer. Moreover, it is uncontroverted that carrier was on the risk during claimant's last employment with employer. *Wayland v. Moore Dry Dock*, 25 BRBS 53 (1991).

Where substantial credible evidence of record exists that carrier was on the risk during the two-week period in 1943 when decedent was exposed to asbestos while working for employer, the administrative law judge properly placed the burden on the carrier to show that it was not the responsible carrier, pursuant to *General Ship* and *Susoeff*. *Maes v. Barrett & Hilp*, 27 BRBS 128 (1993).

Where claimant worked for employer from June 1964 through December 1967, and Commercial Union provided insurance coverage through March 31, 1967, the Board affirmed the administrative law judge's finding that Commercial Union is the responsible carrier. Although the decedent continued to work for employer after the carrier's coverage with employer ended, Commercial Union did not establish that another carrier was on the risk during the decedent's last injurious exposure. Under these circumstances, the purposes of the Act are best served by assigning liability against Commercial Union. *Blanding v. Oldam Shipping Co.*, 32 BRBS 174 (1998), *rev'd on other grounds sub nom. Blanding v. Director, OWCP*, 186 F.3d 232, 33 BRBS 114(CRT) (2d Cir. 1999) (court held claim was timely filed, reversing the Board's decision that it was untimely).

The Board rejects carrier's contention that a claimant's exposure to injurious stimuli must actually contribute to his disability before a carrier or employer may be held liable pursuant to *Cardillo*. The Board followed its decision in *Larson*, 17 BRBS 205, and held that the responsible carrier in hearing loss cases is the carrier on the risk during the last employment in which claimant was exposed to the injurious stimuli prior to the date on which he received an audiogram showing a hearing loss and had knowledge of the causal connection between his work and hearing impairment. *Grace v. Bath Iron Works Corp.*, 21 BRBS 244 (1988); *Ranks v. Bath Iron Works Corp*., 22 BRBS 301 (1989).

The Board reversed the administrative law judge's finding that the date claimant became aware of a work-related hearing loss was in 1980, when employer in its self-insured capacity was the responsible carrier, and held that the date of awareness was in 1986, when an audiogram indicated that claimant's hearing impairment had increased to its greatest extent, and INA was the carrier on the risk. The Board noted that when claimant sustains a new injury, including a distinct aggravation, the time limitations in Sections 12 and 13 do not begin to run until claimant is aware of the full extent, character and impact of the new harm that has occurred. Since the date of claimant's awareness is the same for purposes of Sections 12 and 13 and the determination of the responsible employer and carrier under *Larson*, 17 BRBS 205, it follows that claimant must have a new date of awareness after the "new" injury occurred, and that the last carrier on the risk during which period claimant was exposed to injurious stimuli prior to this date is the responsible carrier. The Board notes that the holding in this case is consistent with *Port of Portland*, and thus declines to determine whether it will follow that case outside of the Ninth Circuit. *Spear v. General Dynamics Corp.*, 25 BRBS 254 (1991).

In *Good*, 26 BRBS 159, the Board adopted *Port of Portland* for application in all circuits and overruled *Larson.* Although in the present case, the administrative law judge applied *Larson*, the administrative law judge's determination that employer is liable in its self-insured capacity is upheld, as there is only one audiogram in the record and employer was self-insured at that time. Any subsequent exposure the employee may have had during the period of time that carrier provided insurance coverage is irrelevant because no part of the claim was based on such exposure. *Barnes v. Alabama Dry Dock & Shipbuilding Corp.*, 27 BRBS 188 (1993).

In a hearing loss case where the administrative law judge averaged the results of two audiograms in awarding benefits, both audiograms are "determinative" of claimant's disability. Pursuant to *Port of Portland, Patterson,* and *Cordero*, the Board holds that the carrier on the risk prior to the onset of disability is the liable party. In this case, onset is prior to the first audiogram as this audiogram was higher than the later one. Thus, the exposure between the two audiograms could not have contributed causally, even theoretically, to the compensable hearing loss. *Roberts v. Alabama Dry Dock & Shipbuilding Corp.*, 30 BRBS 229 (1997).

The administrative law judge found claimant's date of awareness under Section 10(i) occurred in 1987 when he was restricted from work involving vibratory tools and transferred to other jobs rather than the 1992 date when he was terminated after his suitable job was eliminated. The First Circuit affirmed the administrative law judge's awareness finding and consequently held the carrier which was employer's insurer at this time responsible for claimant's benefits. *Leathers v. Bath Iron Works & Birmingham Fire Ins.*, 135 F.3d 78, 32 BRBS 169(CRT) (1st Cir. 1998).

The First Circuit declines to resolve the Director's request to extend the last employer rule to impose liability on the last covered maritime employer where there is later exposure at a non-covered employer, as here, in this hearing loss case, based on Commercial Union's concession that if claimant's claim is compensable, it is the liable carrier. The court expressed concern about the validity of the last *covered* employer rule, but stated that in this case, there are sound policy reasons for relying on the rule where claimant worked for the same employer for his entire career, but on both covered and non-covered sites. *Bath Iron Works v. Brown*, 194 F.3d 1, 33 BRBS 162(CRT) (1st Cir. 1999).

Applying its holding in *Liberty Mutual*, 978 F.2d 750, 26 BRBS 85(CRT) (1st Cir. 1992), the First Circuit affirmed as supported by substantial evidence the administrative law judge's finding on modification that the self-insured employer is responsible for claimant's compensation benefits notwithstanding that in the initial decision claimant was awarded medical benefits for his occupational disease, payable by a prior insurer. As claimant continued to work for employer with no loss of wage-earning capacity after obtaining medical benefits and liability for compensation is determined by the date of

disability, *i.e.*, the date of decreased earning capacity, the administrative law judge properly determined liability based on the party covering the risk at the last time claimant was exposed to harmful stimuli prior to his sustaining a loss of wage-earning capacity. The finding that claimant continued to be exposed to harmful stimuli is supported by substantial evidence. *Bath Iron Works v. Director, OWCP [Hutchins]*, 244 F.3d 222, 35 BRBS 35(CRT) (1st Cir. 2001).

Administrative Law Judge's Authority on Insurance Issues

Although the administrative law judge has the authority to hear and resolve insurance disputes necessary to the resolution of the claim, in this case LIGA is not entitled to a *de novo* hearing on the issue of its liability for benefits. The administrative law judge properly held LIGA liable, based on Louisiana law holding LIGA liable on the basis of carrier's insolvency and the existence of a "cut-through" endorsement in carrier's policy. *Abbott v. Universal Iron Works, Inc.*, 23 BRBS 196 (1990), *aff'd in pert. part on recon.*, 24 BRBS 169 (1991).

The administrative law judge has the power to hear and resolve insurance disputes which are necessary to the resolution of the claim under the Act. Although the administrative law judge in the present case did not address the contractual rights of the parties, his failure to do so is harmless because the contractual language states an exposure rule consistent with *Cardillo*. Moreover, because employer purchased its standard form Workers' Compensation and Liability Policy from Travelers with the Longshore endorsement prescribed by 20 C.F.R. §703.109, the contractual language must be interpreted consistent with the relevant precedent under the Act, specifically *Cardillo*, *Port of Portland* and *Good*. The Board affirmed the administrative law judge's responsible carrier determination as consistent with the aforementioned case precedent. *Barnes v. Alabama Dry Dock & Shipbuilding Corp*, 27 BRBS 188 (1993).

The Board held that the administrative law judge erred in relying on *Busby*, 13 BRBS 222, and *Rodman*, 16 BRBS 123, to find that he did not have jurisdiction to determine whether Omega's carrier, INA, is entitled to reimbursement from the alleged borrowing employer, Elf, because claimant was no longer an active litigant, having settled a third-party suit and relinquishing any rights for compensation from Omega pursuant thereto. The Board holds that the administrative law judge erred in viewing this case as involving solely contractual issues between INA and Elf, when in fact it is a responsible employer case involving application of the borrowed employee principles. This is an issue arising under the Act which an administrative law judge is empowered to resolve; any contractual issues are ancillary issues raised by Elf in response to Omega's responsible employer claim. Moreover, the case is distinguishable from *Busby* and *Rodman*, as it involves a meritorious claim for benefits, as evidenced by the fact that claimant has been fully paid for his work-related injury to a scheduled member. *Schaubert v. Omega Services Industri*es, *Inc.*, 31 BRBS 24 (1997).

Following remand, the Board reversed the administrative law judge's determination that INA, the lending employer's insurer, is entitled to reimbursement from Elf, the borrowing employer. The Board resolved this case without addressing the nuances of the insurance policy as it held that the contract between the borrowing and lending employers is dispositive of the issue. Specifically, that contract, on which Elf had a right to rely, provided that Omega, the lending employer, would indemnify Elf from all claims by

Omega employees and that Omega would comply with all workers' compensation laws and obtain sufficient endorsements to waive all claims of the insurers against Elf. Consistent with *Total Marine*, 87 F.3d 774, 30 BRBS 62(CRT) (5th Cir. 1996), discussed, *infra*, which states that the lending employer and its insurer may be liable to claimant under a contract indemnifying the borrowing employer, INA, Omega's insurer, may not receive reimbursement from Elf. *Schaubert v. Omega Services Industries*, 32 BRBS 233 (1998).

The administrative law judge has the power to hear and resolve insurance issues which are necessary to the resolution of a claim under the Act, including issues ancillary to the responsible employer issue. The administrative law judge's failure to do so in the instant case is harmless error as he sufficiently reviewed the contractual provisions of record and made factual determinations by which the Board could modify his decision to hold one entity solely liable to claimant. *Pilipovich v. CPS Staff Leasing, Inc.*, 31 BRBS 169 (1997).

The Board held that TESI, a lending employer, indemnified Trinity, the borrowing employer, for liability for claimant's claim, pursuant to the TESI/Trinity contract. The Board further held that TESI agreed to carry workers' compensation insurance, which, by virtue of the parties' stipulation, contained a sufficient endorsement waiving any claims Maryland Casualty, TESI's carrier, may have against Trinity. Accordingly, the Board affirmed the administrative law judge's finding on remand that TESI, not Trinity, is liable for claimant's compensation and that Maryland is not entitled to reimbursement for payment of claimant's compensation. *Ricks v. Temporary Employment Services, Inc.*, 33 BRBS 81 (1999), *rev'd sub nom. Temporary Employment Services v. Trinity Marine Group, Inc.*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001).

The Fifth Circuit reversed, holding that the parties' claims regarding their indemnification contractual provisions are not "questions in respect of" a longshore claim pursuant to Section 19(a) of the Act, and therefore neither the administrative law judge nor the Board had the authority to adjudicate the contractual dispute involving contractual indemnity and insurance issues among the lending employer, its insurer, and the borrowing employer in this case. The court stated that the parties' claims may be filed in a court of general jurisdiction. *Temporary Employment Services v. Trinity Marine Group, Inc. [Ricks]*, 261 F.3d 456, 35 BRBS 92(CRT) (5th Cir. 2001), *rev'g Ricks v. Temporary Employment Services, Inc.*, 33 BRBS 81 (1999).

Claimant was injured in an office on a fixed platform off the coast of Louisiana. At the time of the injury, employer had two carriers on the risk for injuries occurring on the Outer Continental Shelf. For injuries occurring off the coast of Texas, Houston General was at risk. For injuries occurring off the coast of Louisiana, INA was at risk. After discussing the terms of the insurance contracts and rejecting INA's argument that claimant's presence on the platform was temporary such that liability lies with Houston

General, the Board held that INA is liable for benefits as claimant's injury occurred off the coast of Louisiana. Because Houston General mistakenly paid benefits for 12 years, Houston General is entitled to reimbursement from INA. The Board held that the case is analogous to the Fifth Circuit's decision in *Total Marine*, 87 F.3d 884, 30 BRBS 62(CRT), and is distinguishable from *Ricks*, 261 F.3d 456, 35 BRBS 92(CRT), as there is no contract dispute to resolve as between the two insurers, so the reimbursement would be similar to that between a borrowing and lending employer. Consequently, although the Board affirmed the administrative law judge's finding that INA is liable for benefits, it held that he should have addressed the issue of reimbursement, and it remanded the case for him to do so. *Kirkpatrick v. B.B.I., Inc.*, 38 BRBS 27 (2004).

Where INA settled with claimant after the administrative law judge's decision on remand, the Board held that the post-adjudication settlement, resolving all issues pertaining to claimant, does not constitute a change of the underlying circumstances warranting an exception to the law of the case rule or divest the administrative law judge or the Board of the authority to address the responsible carrier and reimbursement issues raised herein. The Board reiterated its opinion that this case, which involves a dispute between two carriers, both of whom were on the risk at the time of claimant's injury, does not involve a contract dispute separate from claimant's claim for benefits. Rather, the reimbursement issue is "in respect of" claimant's claim and was properly resolved by the administrative law judge and the Board. As INA, one of the carriers, did not establish any exception to the use of the law of the case doctrine, it remains the carrier responsible for claimant's benefits. Similarly, because it established no error in the administrative law judge's determination that it must reimburse Houston General, the Board affirmed the finding. *Kirkpatrick v. B.B.I., Inc.*, 39 BRBS 69 (2005).

In determining the carrier responsible for benefits under the Act, the Board analyzed two insurance policies held by employer. By virtue of the fact that one policy specifically limited any longshore coverage to work occurring in specified states, the Board affirmed the administrative law judge's determination that Aetna could not be held liable for longshore benefits for claimant's injury which occurred in the port of Kingston, Jamaica. The Board reversed the administrative law judge's determination that Chubb is liable for these benefits, holding that Chubb's policy contained no longshore endorsement, as required by Section 35 of the Act, and although the policy covers injuries occurring "worldwide," it clearly limits Chubb's liability to benefits payable under the Pennsylvania workers' compensation law, as if the injury occurred in Pennsylvania. Accordingly, the Board held that neither Chubb nor Aetna was liable for longshore benefits, leaving employer responsible for them. *Weber v. S.C. Loveland Co.*, 35 BRBS 75 (2001), *aff'd and modified on recon.*, 35 BRBS 190 (2002).

On reconsideration, the Board held that the administrative law judge erred in interpreting the absence of a specific exclusion of longshore coverage from one part of an insurance policy as inherently meaning that longshore coverage is included in another part of that

same policy. To accept the administrative law judge's interpretation would be to read longshore coverage into policies where it is not provided. Under Sections 32, 35, and 36, an employer is required to secure payment of compensation and any insurance policy it obtains to do so must contain a longshore endorsement. Because employer's policy with Chubb did not contain a longshore endorsement, the Board reaffirmed its conclusion that Chubb cannot be held liable for benefits under the Act. The Board rejected the assertion that, because it initially remanded the case to the administrative law judge to decide the responsible carrier issue, it may not now hold that neither carrier is liable. Although the underlying facts did not change, acceptance of such a position would divest the Board of its statutory review authority. Accordingly, the Board distinguished this case and *Ricks*, 261 F.3d 456, 35 BRBS 92(CRT) (issue involved indemnification agreements among employers and carriers), and affirmed its determination that the administrative law judge erred in resolving this traditional responsible carrier issue. Thus, the Board affirmed its conclusion that neither carrier is liable for benefits under the Act. However, the Board clarified that its initial decision does not affect Chubb's liability under Pennsylvania law pursuant to its policy with employer. *Weber v. S.C. Loveland Co.*, 35 BRBS 190 (2002), *aff'g and modifying on recon.* 35 BRBS 75 (2001).

Employer-Employee Relationship

A worker must be an "employee" in order for the individual to be entitled to workers' compensation benefits and for the employer to be entitled to the immunity against suits in tort provided by Section 5(a) of the Act. It is well-established that the Act does not cover claimants who are independent contractors rather than employees. *See, e.g., Gordon v. Commissioned Officers' Mess, Open*, 8 BRBS 441 (1978); *Cardillo v. Mockabee*, 102 F.2d 620 (D.C. Cir. 1939). It is the true nature of the relationship that is determinative rather than the label placed on it by a contract. *Burbank v. K.G.S., Inc*, 12 BRBS 776 (1980). The employer-employee relationship is also crucial in determining which of two employers is liable under the borrowed servant doctrine.

The Board has held that the Section 20(a) presumption does not apply to this issue. *Holmes v. Seafood Specialist Boat Works*, 14 BRBS 141 (1981) (Miller, J., dissenting). It is for the administrative law judge as the trier-of-fact to evaluate the evidence and apply the relevant legal test in order to determine whether an employment relationship is demonstrated. *Id.*

Several tests have been utilized in cases under the Act to determine whether an employer-employee relationship exists. The Board has held that an administrative law judge may apply whichever test is best suited to the facts of a particular case. *See Herold v. Stevedoring Services of* America, 31 BRBS 127 (1997); *Tanis v. Rainbow Skylights*, 19 BRBS 153 (1986); *Holmes*, 14 BRBS 141, n.4; *Carle v. Georgetown Builders*, 14 BRBS 45 (1981)**;** *Burbank*, 12 BRBS 776.

The Board initially addressed cases where the administrative law judge analyzed the facts under the nine-factor test enunciated in the Restatement (Second) of Agency, Section 220, Subsection 2, which include the extent of control, kind of occupation and method of payment. *See Holmes v. Seafood Specialist Boat Works*, 14 BRBS 141 (1981) (Miller, J., dissenting) (affirming holding that claimant and employer were not in an employer-employee relationship); *Melech v. Keys*, 12 BRBS 748 (1980) (carpenter was not entitled to benefits as he was an independent contractor); *Hansen v. Oilfield Safety, Inc.*, 8 BRBS 835, *reaff'd on recon*. 9 BRBS 490 (1978), *aff'd sub nom. Oilfield Safety and Machine Specialties, Inc. v. Harman Unlimited, Inc.*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980) (affirming holding that claimant was an employee of two employers at the time of his injury); *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).

The Board has also held that the "right to control details of work" test is also an appropriate method. This test requires application of four factors: 1) the right to control the details of the job; 2) the method of payment; 3) the furnishing of equipment; and 4) the right to fire. *See Burbank v. K.G.S., Inc.*, 12 BRBS 776 (1980) (reversing

administrative law judge's conclusion that a go-go dancer was an independent contractor)**;** *Gordon*, 8 BRBS 441 (affirming holding that a musician was an independent contractor); *Wise v. Horace Allen Excavating Co.*, 7 BRBS 1052 (1978) (diver was an employee).

A third test, adopted by the Fifth Circuit, is the "relative nature of the work" test. In *Oilfield Safety and Machine Specialties, Inc. v. Harman Unlimited, Inc.*, 625 F.2d 1248, 14 BRBS 356 (5th Cir. 1980), the court held that this test rather than the "right to control" test best suits the principles of the Act. 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 court held that the administrative law judge and the Board properly applied these factors to find that claimant was an employee of two employers at the time of injury, and that the dual employers were thus jointly and severally liable. In *Haynie v. Tideland Welding Service*, 631 F.2d 1242, 12 BRBS 689 (5th Cir. 1980), the court vacated the Board's affirmance of an administrative law judge's decision finding claimant, a wireline specialist who performed work for various employees, was not an employee of Tideland under the right to control test and remanded the case for application of the relative nature of the work test. On remand, the Board again affirmed the administrative law judge's finding that claimant was not an employee. *Haynie v. Tideland Welding Service*, 18 BRBS 17 (1985), *aff'd mem. sub nom. Haynie v. U.S. Dept. of Labor*, 797 F.2d 975 (5th Cir. 1986).

While the Fifth Circuit affirmed the conclusion that a claimant was an employee of two employers at the time of his injury and thus the employers were jointly and severally liable in *Oilfield Safety*, 625 F.2d 1248, 14 BRBS 356, this case is the an exception to the rule that a claimant generally has one liable employer/carrier. In *Edwards v. Willamette Western Corp.*, 13 BRBS 800 (1981) (Miller, dissenting), 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 administrative law judge must utilize a rational test in making this finding, stating that the 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 Capps v. N. L. Baroid-NL Industries, Inc.*, 784 F.2d 615 (5th Cir. 1986), *cert. denied*, 479 U.S. 838 (1986).

The Board has subsequently applied the *Ruiz-Gaudet* test in cases involving the borrowed servant doctrine. *See, e.g., Arabie v. C.P.S. Staff Leasing*, 28 BRBS 66 (1994), *aff'd sub nom. Total Marine Services, Inc. v. Director, OWCP*, 87 F.3d 774, 30 BRBS 62(CRT) (5th Cir. 1996); *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994). In *Arabie*, the primary issue was whether a borrowing employee remains liable to claimant under the 1984 Amendments to Section 4(a). The Board held that it did, and concluded that the stipulation that Total Marine was claimant's borrowing employer was consistent with the applicable law. In this regard, the Board stated that the principal

focus of the *Ruiz-Gaudet* test is on whether the second employer itself was responsible for the working conditions experienced by the employee, and whether the employment was of sufficient duration that the employee could reasonably be presumed to have evaluated the risks of the work situation and acquiesced thereto.

The Fourth Circuit has adopted the "authoritative direction and control" test for determining whether an employee is a borrowed employee. This test requires a court to determine whose work is being performed by determining who has the power to control and direct the individual in the performance of his work. The court rejected the nine-factor test, finding it provides insufficient guidance to prospective litigants. Finding claimant was a borrowed servant of the named employer, the court affirmed the district court's dismissal of claimant's tort action, holding that plaintiff's exclusive remedy was the Longshore Act. *White v. Bethlehem Steel Corp.*, 222 F.3d 146, 34 BRBS 61(CRT) (4th Cir. 2000). The court followed its decision in *Huff v. Marine Tank Testing Corp.*, 631 F.2d 1140 (4th Cir. 1980), where the plaintiff was technically an employee of one company but did all of his actual labor for another, Allied Towing. Holding Huff was a borrowed servant of Allied, the court relied on the facts that the jobs performed involved Allied's work, Allied supervised Huff's work, he could be discharged by Allied and he worked exclusively at Allied during his entire employment. *See also E.B. v. Atlantico, Inc.,* BRBS (2008).

Thus, while the Board has held the administrative law judge may apply the test most appropriate to the facts, the Fourth and Fifth Circuits have found specific tests more appropriate. In affirming a finding that a shop steward was an employee of the employer rather than the union, the Second Circuit noted the Board's policy and discussed the various tests. The court found that the "relative nature of the work test" was best suited to the facts in that case. *American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001).

The Act 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 interests. *Symanowicz v. Army and Air Force Exchange Service*, 672 F.2d 638, 14 BRBS 651 (7th Cir. 1982), *cert. denied*, 459 U.S. 1016 (1982), *aff'g* 12 BRBS 961 (1980) (Miller, J., dissenting).

In *Clauss v. The Washington Post Co.,* 13 BRBS 525 (1981)**,** *aff'd mem*., 684 F.2d 1032 (D.C. Cir. 1982), the Board affirmed a finding that an employee who was on strike at the time of his death was not in an employment relationship with employer at that time.

Corporate officers and shareholders are not precluded from being employees under the Act if injured when performing the duties of an employee. *Cooper v. Cooper Associates, Inc.,* 7 BRBS 853 (1978), *rev'd on other grounds sub nom. Director, OWCP v. Cooper,* 607 F.2d 1385 (D.C. Cir. 1979). However, a partner in a business 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).

Digests

Employee/Independent Contractor

Considering all relevant factors, including those involved in applying the "right-to-control" test, the Board held that the administrative law judge erred in finding that claimant was not an "employee" under the Act and reversed this determination. The administrative law judge erred in narrowly construing employer's control over claimant's work; it is the right or power to control that is determinative of claimant's status. Employer supplied valuable tools and equipment, claimant was presented with the plans he was to work from and claimant was paid on time rather than by the project. (Good discussion of the "right to control" and "relative nature of the work" tests). *Tanis v. Rainbow Skylights*, 19 BRBS 153 (1986).

The Board affirmed the administrative law judge's determination that claimant is an employee of the uninsured subcontractor and that the contractor is thus liable for compensation payable pursuant to 33 U.S.C. §904(a). The administrative law judge properly applied the relative nature of the work test to determine that claimant, a roofer, was not an independent contractor at the time of injury. Claimant's work was not highly specialized and constituted a regular part of the subcontractor's business, the subcontractor remained responsible for the work and claimant was paid from funds originating with employer. Further, claimant typifies the type of employee intended to be covered under the Act because employer had reason to know that its subcontractor (claimant's employer) was uninsured and employer could have avoided compensation liability. *Carle v. Georgetown Builders, Inc.*, 19 BRBS 158 (1986).

The Board reversed the administrative law judge's finding that claimant was not an "employee" of WMATA during a trial period of return to work. The Board held that even though the claimant continued to receive temporary total disability benefits in lieu of a regular salary during this trial period, he was an employee within the meaning of the Act under all three tests used to determine the existence of an employer-employee relationship. Claimant was offered and he accepted a job as a track inspector, a job which benefited employer, claimant was under employer's control and was not working casually or gratuitously. *Reilly v. Washington Metropolitan Area Transit Authority*, 20 BRBS 8 (1987).

The administrative law judge found that Costello rather than Massport was claimant’s employer based on the contract between the two entities and the facts that Costello directly supervised claimant, controlled the details of his work and performed the normal

functions of an employer. The administrative law judge rejected the argument Massport was the employer because it oversaw aspects of terminal operations and retained authority over some personnel decisions. The Board affirmed the administrative law judge's determination that Costello was claimant's statutory employer as it was responsible for dealing with workers like claimant on a day-to-day basis. *Meagher v. B.S. Costello, Inc.*, 20 BRBS 151 (1987), *aff'd*, 867 F.2d 722, 22 BRBS 24(CRT) (1st Cir. 1989).

The Board affirmed the administrative law judge's finding that claimant, who was hired to offload fish from the *Sea Lion VII*, was an employee rather than an independent contractor under the Act under the "relative nature of the work" test and The Restatement (Second) of Agency §220, subsection 2. Claimant's work was unskilled, he performed under the direction of the ship's captain, employer supplied most of the equipment, and off-loading is performed as a regular part of employer's business. *Brien v. Precision Valve/Bayley Marine*, 23 BRBS 207 (1990).

The Board affirmed the administrative law judge's finding that an employer-employee relationship existed under the factors set forth in The Restatement (Second) of Agency. In this case, claimant's work was directed by his supervisor, he did not independently determine his work schedule and he used employer's tools. *Eckhoff v. Dog River Marina & Boat Works, Inc.*, 28 BRBS 51 (1994).

Borrowed Employee

In this case arising under the jurisdiction of the Fifth Circuit, the Board followed the nine-factor test set forth 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), *cert. denied*, 436 U.S. 913 (1978), and determined that the stipulation that Total Marine was claimant's borrowing employer was supported by substantial evidence. The Board noted that the principal focus of the *Ruiz-Gaudet* test is on whether the second employer itself was responsible for the working conditions experienced by the employee, and whether the employment was of sufficient duration that employee could reasonably be presumed to have evaluated the risks of the work situation and acquiesced thereto. *Arabie v. C.P.S. Staff Leasing*, 28 BRBS 66 (1994), *aff'd sub nom. Total Marine Services, Inc. v. Director, OWCP*, 87 F.3d 774, 30 BRBS 62(CRT) (5th Cir. 1996).

The Board noted that the nine-factor test set forth 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), *cert. denied*, 436 U.S. 913 (1978), is one acceptable method for determining employer liability in the borrowed employee situation. The Board also affirmed the administrative law judge's determination that this was not a dual or joint employment situation, and it affirmed the finding that Pac Fish is claimant's employer giving collateral estoppel effect to the state court's finding to this effect. *Vodanovich v. Fishing Vessel Owners Marine Ways, Inc.*, 27 BRBS 286 (1994).

The Board held that the administrative law judge erred in relying on *Busby*, 13 BRBS 222, and *Rodman*, 16 BRBS 123, to find that he did not have jurisdiction to determine whether Omega's carrier, INA, is entitled to reimbursement from the alleged borrowing employer, Elf, because claimant was no longer an active litigant, having settled a third-party suit and relinquishing any rights for compensation from Omega pursuant thereto. The Board held that the administrative law judge erred in viewing this case as involving solely contractual issues between INA and Elf, when in fact it is a responsible employer case involving application of the borrowed employee principles. This issue arises under the Act and is one which an administrative law judge is empowered to resolve; any contractual issues are ancillary issues raised by Elf in response to Omega's responsible employer claim. Moreover, the case is distinguishable from *Busby* and *Rodman*, as it involves a meritorious claim for benefits, as evidenced by the fact that claimant has been fully paid for his work-related injury to a scheduled member. *Schaubert v. Omega Services Industri*es, *Inc.*, 31 BRBS 24 (1997).

In this case arising under the jurisdiction of the Fifth Circuit, the Board followed the nine-factor test set forth 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), *cert. denied*, 436 U.S. 913 (1978), and determined that the administrative law judge's finding that Avondale, rather than CPS, is claimant's borrowing employer is supported by substantial evidence. The administrative

law judge erred, however, in finding Avondale and Wausau, the nominal employer's insurance carrier, jointly liable for claimant's benefits. Based on the administrative law judge's evaluation of the contracts among the parties, the Board modified the decision to hold Wausau solely liable to claimant. *Pilipovich v. CPS Staff Leasing, Inc.*, 31 BRBS169 (1997).

The Board affirmed the administrative law judge's finding that the Port of Astoria and not Stevedoring Services of America 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. Although the method of payment was not dispositive and the right to fire was a neutral factor, the Port had the right to control the details of claimant's work and furnished equipment for the tie-up services. Because the Board affirmed the administrative law judge's application of the "right to control the details of the work" test, it did not have to address the administrative law judge's application of two other tests - the "relative nature of the work" test and the "borrowed employee" test. *Herold v. Stevedoring Services of Ameri*ca, 31 BRBS 127 (1997).

The Board affirmed the administrative law judge's determination that claimant, a union shop steward, was the employee of employer, a stevedoring company, and not the union. The administrative law judge considered two factors listed in the Restatement of Agency, the method of payment and control over the details of work, and determined that the fact that claimant received his wages from employer rather than the union pursuant to a collective bargaining agreement outweighed any consideration of which entity controlled the details of claimant's work. The Board affirmed these findings as within the administrative law judge's discretion. *Marinelli v. American Stevedoring, Ltd.*, 34 BRBS 112 (2000), *aff'd*, 248 F.3d 54, 35 BRBS 41(CRT) (2d Cir. 2001). In affirming, the Second Circuit first stated that the "right to control the details of the work" and the "borrowed employee" tests are not well-suited to this case because they emphasize the control factor. The court found that the "relative nature of the work test" was best suited to a consideration of the employment relationship in this case. The court stated that claimant's position did not constitute a calling or enterprise separate from employer's operation, claimant held the shop steward position for around 10 years, his duties were a regular part of the stevedoring work, and employer paid claimant's wages. Under these circumstances, he was properly found an employee of employer. *American Stevedoring Ltd. v. Marinelli*, 248 F.3d 54, 35 BRBS 41(CRT) (2^{d} Cir. 2001).

The Fourth Circuit adopted the "authoritative direction and control" test for determining whether an employee is a borrowed employee. In doing so, it rejected the nine-factor test. In applying the test to this case, the Fourth Circuit held that the plaintiff was a borrowed servant of employer's because, in practice, he worked as if he were an employee of employer's for 26 years: he was supervised by employer, assigned to jobs by employer, paid by employer in pass-through form, and he could have been terminated by employer. Thus, the court affirmed the district court's dismissal of the tort action,

holding that plaintiff's exclusive remedy was the LHWCA. *White v. Bethlehem Steel Corp.*, 222 F.3d 146, 34 BRBS 61(CRT) (4th Cir. 2000).

In a case arising in the Fourth Circuit, the Board affirmed the administrative law judge's use of the "authoritative direction and control" test adopted in *White*, 222 F.3d 146, 34 BRBS 61(CRT), rather than the nine-factor test set forth by the Fifth Circuit in *Ruiz*, 413 F.2d 310, and *Gaudet*, 562 F.2d 351. The Board further affirmed the administrative law judge's determination that, as the interactions between claimant's employer and Magann reflected nothing more than the parties' practical need to coordinate various aspects of the contracted work, Magann was not claimant's borrowing employer since claimant was neither directly nor indirectly under the authoritative direction and control of Magann. Thus, Magann is not liable for claimant's benefits. *E.B. v. Atlantico, Inc.*, __ BRBS ___ (2008).

Claimant, who worked for Georgia Ports Authority (GPA), was injured during his assignment to work for SSA. The Board rejected SSA's contention that Section 3(b) of the Act prevents liability from being shifted from a governmental subdivision to a statutory employer, as the determination as to whether claimant is excluded from coverage under Section 3(b) is dependent on whether the administrative law judge properly determined that SSA was claimant's borrowing employer at the time of injury. In this regard, the Board affirmed the administrative law judge's determination that SSA was claimant's borrowing employer at the time of injury as the administrative law judge conducted a thorough analysis under the nine-factor *Ruiz-Gaudet* test, and his findings were supported by substantial evidence and in accordance with law. *Fitzgerald v. Stevedoring Services of America*, 34 BRBS 202 (2001).

Claimant was injured while working for a borrowing employer. Claimant filed a claim under the Act against the nominal (lending) employer, which they settled pursuant to Section 8(i). Claimant then filed a claim against the borrowing employer for benefits under the Act after his lawsuit in federal district court was dismissed. The Board affirmed the administrative law judge's finding that as the statutory (borrowing) employer was not a party to the claim that was settled, the settlement does not discharge its liability. This result is consistent with *Alexander*, 297 F.3d 805, 36 BRBS 25(CRT) (9th Cir. 2002) and *Ibos*, 317 F.3d 480, 36 BRBS 93(CRT) (5th Cir. 2003), which stand for the proposition that the responsible employer is fully liable to the claimant notwithstanding his recovery in settlement from other potentially liable employers. Thus, the award of benefits against the borrowing employer is affirmed. *Sears v. Norquest Seafoods, Inc.*, 40 BRBS 51 (2006).

Additional cases on borrowed employee status and joint ventures are located in Section 5(a) of the deskbook.