

TOPIC 70 RESPONSIBLE EMPLOYER

70.1 GENERALLY

For social policy reasons, there is no apportionment of liability in successive or cumulative injury and occupational disease cases under the LHWCA. The last employer is generally held liable for all compensation due an injured worker, even though his work for prior employers contributed to the disability. Todd Shipyards Corp. v. Black, 717 F.2d 1280, 1284-85 (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984). The derivative liability of successive insurers follows the same principles as are applied to employers. (See **RESPONSIBLE CARRIER**, infra.)

Two judicially-created rules, which are sometimes treated as if they were one, determine which of the successive employers is held liable. The first, commonly known as the **Cardillo rule**, has also been called the last employer rule, the last-injurious-exposure rule, the occupational disease rule, or the disease rule. The second is called the **aggravation or two-injury rule**.

A **Ninth Circuit** opinion characterized the second rule as merely a "branch" which has "sprouted" off the first, chided the tendency to apply them both when in doubt, and instructed that **Cardillo** should be applied only in occupational disease cases, and the aggravation rule in successive injury or cumulative trauma cases. Foundation Constructors, Inc. v. Director, OWCP, 950 F.2d 621, 623-24 (9th Cir. 1991).

Because liability attaches at different times under the two rules, who among successive employers or carriers is last and therefore the liable or responsible employer, may depend on the classification of a given medical condition as an occupational disease or an injury, and the concomitant choice of either the **Cardillo** or the aggravation rule. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986).

If a claimant has a meritorious claim for benefits, the ALJ has the authority to address the issue of the responsible employer under the borrowed employee doctrine and this authority includes addressing ancillary contract issues. Schaubert v. Omega Services Industries, Inc., 31 BRBS 24 (1997). When the primary issue is one of responsible employer any issues related to insurance contracts are ancillary and may also be addressed. Schaubert v. Omega Services Industries, 32 BRBS 233(1998).

In Temporary Employment Services v. Trinity Marine Group, Inc., 261 F.3d 456 (5th Cir. 2001), the **Fifth Circuit** found that the ALJ did not have jurisdiction to determine the merits of certain contractual rights and liabilities arising from an indemnification agreement between the borrowing employer and the loaning employer. Additionally the court found that the ALJ did not have jurisdiction to address a waiver of subrogation by the loaning employer's carrier. The jurisdiction issue turned on the interpretation of that part of Section 19(a) of the LHWCA stating that an ALJ has authority "to hear and determine all questions in respect of such claims." The **Fifth**

Circuit concluded that the contract dispute was not integral to the longshore compensation claim and that the Board and the ALJ did not have the statutory authority to determine that issue.

In Weber v. S.C. Loveland Co. (Weber III), ___ BRBS ___ (BRB Nos. 00-838, 00-838A and 00-838B) (Jan. 30 2002), the Board distinguished Temporary Employment Services. The issue in Weber was which of two, if any insurers was on the risk for longshore benefits at the time of the claimant's injury and is liable for those benefits. In Weber, the claimant was injured in Jamaica and the Board found that the claimant was "covered under the LHWCA." There were two insurance policies in question.. One covered injuries within the United States and included Longshore coverage. The other covered injuries outside the U.S. and did not include Longshore coverage. The Board noted that in Temporary Employment Services, the **Fifth Circuit** held that contractual disputes between and among insurance carriers and employers which do not involve the claimant's entitlement to benefits or which party is responsible for paying those benefits, are beyond the scope of authority of the ALJ and the Board. However, the Board found that Weber "does not involve indemnification agreements among employers and carriers, but presents a traditional issue of which of employers' carriers is liable." Thus the Board found that the ALJ has the authority to address the issue.

[ED. NOTE: Schaubert, noted above (in both the 1997 and 1998 versions) provides a good example of the intermingling of employers, (borrowing and lending), carriers, and contractual agreements.]

70.2 OCCUPATIONAL DISEASES AND THE CARDILLO RULE

The Cardillo rule is:

[T]he employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award.

Travelers Ins. Co. v. Cardillo, 225 F.2d 137 (**2d Cir.**), cert. denied, 350 U.S. 913 (1955).

The **Second Circuit** announced its continuing adherence to Cardillo in General Dynamics Corp., Electric Boat Division v. Benefits Review Board, 565 F.2d 208 (**2d Cir.** 1977). It has not revisited the rule since other circuits engrafted modifications on to it.

The **Ninth Circuit** followed Cardillo in Cordero v. Triple A Machine Shop, 580 F.2d 1331, 1336 (**9th Cir.** 1978), cert. denied, 440 U.S. 911 (1979), but added a significant modification, i.e., that liability attaches on the date of onset of disability rather than the date of awareness. In Todd Shipyards Corp. v. Black, 717 F.2d 1280 (**9th Cir.** 1983), Cardillo was again modified by a holding that later exposure in employment not covered by the LHWCA does not relieve the last longshore employer of liability.

In Port of Portland v. Director, OWCP, 932 F.2d 836 (**9th Cir.** 1991), a hearing loss case, the **Ninth Circuit** reiterated that the employer's liability attaches on the date of disability, treated awareness as irrelevant, and ruled that "[l]iability should fall on the employer 'covering the risk at the time of the most recent injury that bears a casual [sic] relation to the disability.'" Id. at 840 (quoting Cordero, 580 F.2d at 1336). See also Todd Pac. Shipyards Corp. v. Director, OWCP, (Picinich), 914 F.2d 1317, 1319 (**9th Cir.** 1990).

The **Eleventh Circuit** followed Cardillo and Cordero in Argonaut Insurance Co. v. Patterson, 846 F.2d 715 (**11th Cir.** 1988). Although the court held that on the facts before it liability attached when disability commenced, it did not disturb Cardillo's awareness formulation of the rule. It held that liability attached on the date when the claimant became aware or should have become aware of the connection between his disability, his disease, and his employment, and that the requisite awareness occurred when the claimant "should have realized that he had developed an 'incapacity because of injury to earn the wages'... which he had previously received." Id. at 721. The court expressly noted that it was not deciding how it would rule in a case where "an employee might become aware, in advance of any disability, that he or she had contracted a disease which in its final stages would result in disability." Id. n.10.

The **First Circuit** reviewed Cardillo at length in a successive insurer case in which it squarely confronted the vexing question whether liability attaches on "the date of disablement or the

date of awareness of potential disablement." Liberty Mut. Ins. Co. v. Commercial Union Ins. Co., 978 F.2d 750, 752 (1st Cir. 1992). The court's answer dispensed with awareness altogether:

[The last] employer during the period in which the claimant was exposed to the injurious stimuli and **prior to the date the claimant became disabled** by an occupational disease arising naturally out of his employment and exposure is ... the liable employer.

Id. at 756 (emphasis added).

The Board's current formulation of the Cardillo rule retains the awareness concept, but makes the date of disability the earliest date on which liability can attach:

In occupational disease cases, the responsible employer is the employer during the last employment where claimant was exposed to injurious stimuli prior to the date on which claimant was aware or should have been aware of the relationship between his **disability**, disease and his employment. ... Claimant cannot be held to be aware of the relationship between his occupational disease, employment and disability prior to the date he became disabled.

Carver v. Ingalls Shipbuilding, Inc., 24 BRBS 243, 246-47 (1991) (emphasis in original). Although the **First Circuit's** and the Board's formulations are different, the **First Circuit** cited Carver with approval in Liberty Mutual, 978 F.2d at 756, and characterized it as "holding that carrier liability attaches at the date of disablement." The Board dealt with Cardillo (after Liberty Mutual came down) in Maes v. Barrett & Hilp, 27 BRBS 128 (1993), but the opinion did not cite Liberty Mutual, and merely repeated an abbreviated version of Cardillo: "[T]he last employer or carrier to expose the employee to injurious stimuli prior to his awareness of his occupational disease is liable for compensation." Maes at 131.

The Board has held repeatedly that the awareness component of the rule is the same as the awareness requirement of Sections 12 and 13. Spear v. General Dynamics Corp., 25 BRBS 254, 257-58 (1991); Mauk v. Northwest Marine Iron Works, 25 BRBS 118, 124 (1991); Carver, 24 BRBS at 246; Ranks v. Bath Iron Works Corp., 22 BRBS 302, 307 (1989); Grace v. Bath Iron Works Corp., 21 BRBS 244 (1988); Gray & Co. v. Highland Ins. Co., 9 BRBS 424, 427 (1978).

The **Eleventh Circuit** agreed in Argonaut Insurance Co. v. Patterson, 846 F.2d 715 (11th Cir. 1988). But Port of Portland v. Director, OWCP, 932 F.2d 836, 841 (9th Cir. 1991) found no support for this conclusion and rejected the principle in broad language without limiting it to hearing loss situations with which the case dealt. (In Port of Portland, the **Ninth Circuit** found that the last responsible employer was the one to last expose the claimant to excessive noise before an audiogram diagnosed his hearing loss.)

A physician's diagnosis is not required for a finding of awareness. It merely establishes the latest date by which a claimant should have been aware of the work-relatedness of his condition. Todd v. Todd Shipyards Corp., 16 BRBS 163, 166 (1984).

The judge must make a finding of the date when the claimant became aware of the relationship of his employment, disease, and disability, so that the Board can perform its review function. Carver v. Ingalls Shipbuilding, Inc., 24 BRBS 243, 246 (1991); Blake v. Bethlehem Steel Corp., 21 BRBS 49, 54 (1988).

The Cardillo rule applies to occupational disease cases only. It does not apply to injuries, either cumulative or discrete. Foundation Constructors, Inc. v. Director, OWCP, 950 F.2d 621, 623 (9th Cir. 1991); Steed v. Container Stevedoring Co., 25 BRBS 210, 219 (1991); Rodriguez v. California Stevedore & Ballast Co., 16 BRBS 371 (1984).

Occupational disease is not defined in the LHWCA. Courts have defined it as "any disease arising out of exposure to harmful conditions of employment, when those conditions are present in a peculiar or increased degree by comparison with employment generally." Gencarelle v. General Dynamics Corp., 892 F.2d 173, 176 (2d Cir. 1989). The Gencarelle court expressly declined to rule that repetitive motion such as walking or stooping can be classified as a hazardous condition which can give rise to an occupational disease. Id. at 177. See Liberty Mut. Ins. Co. v. Commercial Union Ins. Co., 978 F.2d 750, 752 (1st Cir. 1992). Although gradual rather than sudden onset of the condition is required, gradual onset alone does not make it an occupational disease. A cumulative injury gradually developing over a long period of employment may be classified as accidental. Steed, 25 BRBS 210.

Diseases of the lungs and heart have been held to be occupational diseases. Liberty Mutual, 978 F.2d 750 (asbestosis); Argonaut Ins. Co. v. Patterson, 846 F.2d 715 (11th Cir. 1988) (silicosis); Crum v. General Adjustment Bureau, 738 F.2d 474 (D.C. Cir. 1984), aff'g in pertinent part 12 BRBS 458 (1980) (heart disease/angina); Cordero v. Triple A Mach. Shop, 580 F.2d 1331 (9th Cir. 1978), cert. denied, 440 U.S. 911 (1979) (chronic bronchitis and obstructive lung disease); General Dynamics Corp., Elec. Boat Div. v. Benefits Review Bd., 565 F.2d 208 (2d Cir. 1977) (lung cancer and asbestosis); Thorud v. Brady Hamilton Stevedore Co., 18 BRBS 232 (1986) (bronchial asthma).

Orthopedic conditions have generally been determined not to be occupational diseases. Gencarelle, 892 F.2d 173 (chronic synovitis and arthritis in knee); Director, OWCP v. General Dynamics Corp. (Morales), 769 F.2d 66, 68 (2d Cir. 1985) (osteoarthritis of knee); Steed, 25 BRBS 210 (lumbar stenosis); Lindsay v. Owens-Corning Fiberglass Sales, 13 BRBS 922, 927 (1981) (leg and foot pain). See generally 1B A. Larson, The Law of Workmen's Compensation §§ 41.30-41.44.

Disability due to an occupational disease commences when a worker first suffers diminution of his earning capacity caused by the disease, not when he has an out-of-pocket loss. This diminution of wage-earning capacity does not occur automatically when a disabling disease such as

asbestosis is diagnosed. When it occurs is a question of fact. It may occur in the absence of physical symptoms, and it may or may not coincide with the diagnosis. Liberty Mutual, 978 F.2d at 758.

In Thorud v. Brady Hamilton Stevedore Co., 18 BRBS 232 (1986), the economically-pressed claimant worked for six months at his regular job after a physician diagnosed his asthma, advised against further exposure, and warned that he might have to retire if he continued working in grain dust. The Board held that the claimant was or should have been aware of the relationship between his injury, employment, and disability when he was diagnosed and warned, and that liability attached then. See Stevens v. Director, OWCP, 909 F.2d 1256, 1259 (9th Cir. 1990), cert. denied, 498 U.S. 1073 (1991); McBride v. Eastman Kodak Co., 844 F.2d 797 (D.C. Cir. 1988); Korineck v. General Dynamics Corp. Elec. Boat Div., 835 F.2d 42, 43 (2^d Cir. 1987); Fleetwood v. Newport News Shipbuilding & Dry Dock Co., 776 F.2d 1225, 1229 (4th Cir. 1985); Patterson v. Savannah Mach. & Shipyard, 15 BRBS 38 (1982).

A voluntary retiree may not be charged with the requisite awareness of his disability until he knows that a permanent impairment exists. Carver v. Ingalls Shipbuilding, Inc., 24 BRBS 243, 246 (1991); Lombardi v. General Dynamics Corp., 22 BRBS 323 (1989); Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). See also Hughes v. Bethlehem Steel Corp., 17 BRBS 153 (1985).

An aggravation to an initial asbestos-related injury by further exposure to pulmonary irritants can be a new injury. Bath Iron works Corp. v. Director, U.S. Dept. of Labor, (Jones), 193 F.3d 27 (1st Cir. 1999)(Initial asbestos-related injury was aggravated by further exposure to pulmonary irritants and was subsequently found to be a “new” injury resulting in an increase in benefits payable by a new carrier and based upon the average weekly wage at the time of the new injury).

While the last maritime employer rule has increasingly come under attack, it remains steadfast, the “law of the land.” Most recently in Newport News Shipbuilding & Dry Dock Co., v. Stille, 243 F.3d 179, (4th Cir. 2001), the employer petitioned the **Fourth Circuit** to reject or substantially modify the last maritime employer rule. In declining to alter the rule, the circuit court noted that the present rule is consistent with the LHWCA and passes constitutional muster. Here the worker was employed for Newport as an electrician’s helper for about nine months in the 1950’s, during which time he was exposed to airborne asbestos dust and fibers in sufficient quantity and duration to cause mesothelioma. After leaving Newport, he worked for nearly 30 years as an electronics technician at NASA where he was exposed to asbestos for substantial periods, again in sufficient quantity to cause lung disease. Once diagnosed, the worker had two options for seeking worker’s compensation benefits: he could file under the LHWCA or he could file under the FECA. He choose the LHWCA.

In addressing the question of whether the last maritime employer fully liable for a claimant’s injury even though a subsequent, non-maritime employer also contributed to the injury, the **Fourth Circuit** looked to Todd Shipyards v. Black, 717 F.2d 1280 (9th Cir. 1983). But cf. Bath Iron Works v. Brown, 194 F.3d 1, 7 (1st Cir. 1999)(criticizing the last maritime employer rule in dicta).

In Bath Iron Works Corp. v. Director , OWCP [Hutchins], 244 F.3d 222 (1st Cir. 2001), the First **Circuit** explained that it had adopted a modified version of the “last injurious exposure” and “last insurer” rule, holding that the date of disability, rather than the date of awareness of disease, is the key to determining the responsible insurer for disability.

70.3 SUCCESSIVE INJURIES AND THE AGGRAVATION RULE

[ED. NOTE: See also, Topic 8.7.2 Special Fund Relief–New Injury (or Aggravation) Required.]

The aggravation or two-injury rule is:

If the disability resulted from the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable and accordingly, the prior employer is responsible. If, on the other hand, the subsequent injury aggravated, accelerated or combined with the claimant's prior injury, thus resulting in claimant's disability, then the subsequent injury is the compensable injury, and the subsequent employer is responsible.

Foundation Constructors v. Director, OWCP, 950 F.2d 621, 624 (9th Cir. 1991), quoting Kelaita v. Director, OWCP, 799 F.2d 1308, 1311 (9th Cir. 1986); Strachan Shipping Co. v. Nash, 782 F.2d 513 (5th Cir. 1986) (en banc), aff'g 751 F.2d 1460 (5th Cir. 1985), aff'g 15 BRBS 386 (1983); Newport News Shipbuilding & Dry Dock Co. v. Fishel, 694 F.2d 327 (4th Cir. 1982); Independent Stevedore Co. v. O'Leary, 357 F.2d 812, 815 (9th Cir. 1966) Adam v. Nicholson Terminal & Dry Dock Co., 14 BRBS 735 (1981); Abbott v. Dillingham Marine & Mfg. Co., 14 BRBS 453 (1981), aff'd sub nom. Willamette Iron & Steel Co. v. OWCP, 698 F.2d 1235 (9th Cir. 1982) (table); Mulligan v. Haughton Elevator, 12 BRBS 99 (1980); Crawford v. Equitable Shipyards, Inc., 11 BRBS 646, 649-650 (1979), aff'd per curiam sub nom. Employers Nat'l Ins. Co. v. Equitable Shipyards, 640 F.2d 383 (5th Cir. 1981).

The aggravation rule, not Cardillo, applies to **discrete successive accidental injuries or aggravating episodes**. Liability in such cases attaches when the last injury or aggravating incident occurs. Strachan Shipping Co. v. Nash, 782 F.2d 513 (5th Cir. 1986) (en banc), aff'g 751 F.2d 1460 (5th Cir. 1985), aff'g 15 BRBS 386 (1983); Steed v. Container Stevedoring Co., 25 BRBS 210, 219-20 (1991); Pittman v. Jeffboat, Inc., 18 BRBS 212 (1986); Crawford v. Equitable Shipyards, 11 BRBS 646, 649-50 (1979), aff'd sub nom. Employers Nat'l Ins. Co. v. Equitable Shipyards, 640 F.2d 383 (5th Cir. 1981).

The aggravation rule, not Cardillo, also applies to injuries which are not caused by identifiable **incidents**, but which are **gradually produced by work activities or conditions not peculiar to claimant's employment**. Such cumulative injuries are classified as accidental injuries and not as occupational diseases, and liability attaches at the point of last exposure to injurious conditions or activities. Foundation Constructors, Inc. v. Director, OWCP, 950 F.2d 621, 624 (9th Cir. 1991) (back injury aggravated by jack-hammering and heavy lifting); Steed, 25 BRBS at 219-20 (lumbar stenosis aggravated by walking and standing); Pittman v. Jeffboat, Inc., 18 BRBS at 214 (hemorrhoids aggravated by lifting and straining).

In Buchanan v. International Transportation Services, 31 BRBS 81(1997), the Board held that an employer “may be relieved of liability for disability and/or medical benefits in a two-injury case by establishing that a subsequent work-related injury aggravated the employee’s condition.” It stated the following:

In this case...[Employer I] bears the burden of proving, without benefit of ...a presumption...by a preponderance of the evidence that there was a new injury or aggravation with [Employer II] in order to be relieved of its liability as responsible operator. (Citations omitted.). [Employer II], on the other hand, must prove that claimant’s condition is the result of the injury with [Employer I] in order to escape liability. A determination as to which employer is liable requires that the administrative law judge weigh the evidence.

In Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986), aff’g Kelaita v. Triple A Machine Shop, 17 BRBS 10 (1984), the claimant's attritional rotator cuff tear resulted from, or was aggravated by, repetitive pulling on a lathe at two similar jobs for two successive employers. The claimant had periodic flare-ups of shoulder pain in both jobs. The judge, the Board, and the **Ninth Circuit** viewed each pain flare-up as cumulative trauma which aggravated the underlying injury, and held that since working conditions which could have aggravated or contributed to the claimant's shoulder injury existed at both employers, the last employer was liable under the aggravation rule.

The Director argued in Gencarelle v. General Dynamics Corp., 892 F.2d 173 (2d Cir. 1983), that cumulative trauma can constitute an occupational disease, but the court found it unnecessary to decide that issue. However, it cited a number of state cases which did reach that holding. Id. at 177.

In any successive injury case, the **basic question** which must be faced is whether the disability was caused solely by the first injury and its "**natural progression**," or is due to the **combined effect** of the first injury, its "natural progression," **and** the later **aggravation**. The difficulties attendant to making that determination are illustrated by Jones v. Director, OWCP, 977 F.2d 1106 (7th Cir. 1992).

In Jones, the welder-claimant had an accidental lumbar disc injury. He continued to have back pain and other symptoms, and was advised that to avoid greater problems, one of his options was to avoid lifting more than 50 lbs. His symptoms increased at a subsequent job where he drove a delivery truck and regularly lifted 100 lbs. The judge found that the underlying disc condition was not changed by the heavy lifting, but that the lifting brought on changes in the level of the symptoms for which the claimant sought treatment, and that the increased symptoms were due to both the natural progression of the original injury, and the heavy lifting at the subsequent employment.

The judge reasoned that although it was foreseeable that a man of the claimant's limited qualifications would in the future have to do work requiring heavy lifting, it was nevertheless negligent of the claimant to do so. The judge held that the negligent lifting was an intervening cause which severed the causal link with the original injury, and that therefore the need to treat increased

symptoms was due to the aggravation which occurred in the service of the second employer who is therefore liable for it.

The Board affirmed, but the **Seventh Circuit** reversed in a thoughtful opinion which analyzed precedents dealing with causation, aggravation, intervening causes, and the application of the aggravation rule. The court expressed reservations about the Director's position that aggravation in the subsequent employment had to be by a specific, traumatic event, but in the end it declined to apply the aggravation rule. The court felt it should defer to the view of the Director, as the LHWCA's administrator, that "affirmative misconduct," not mere simple and foreseeable negligence, was necessary to "overpower and nullify" the causal link between the symptoms and the original disc injury.

Where the aggravation rule applies, awareness is irrelevant for last responsible employer purposes, though it may be significant for time bar questions. "[T]he responsible employer is the employer for whom claimant worked at the time of the injury (i.e. the last aggravation), regardless of the claimant's date of awareness." Steed v. Container Stevedoring Co., 25 BRBS 210, 219-20 (1991); Pittman v. Jeffboat, Inc., 18 BRBS 212, 215 (1986). The last aggravation in such a case occurs on the last day worked under the potentially injurious conditions or when the last aggravating accident occurs. Steed, 25 BRBS at 220. See also Thorud v. Brady Hamilton Stevedore Co., 18 BRBS 232, 234 (1986).

In injury cases, like in occupational disease cases, when the onset of disability is not simultaneous with the accident or the last aggravation or last exposure to injurious working conditions, the "date of injury" is not the date of the accident or aggravation or last exposure, but the date of onset of disability, which occurs when the claimant is "put on alert as to the likely impairment of his earning power..." Johnson v. Director, OWCP, 911 F.2d 247 (**9th Cir.** 1990), cert. denied, 499 U.S. 959 (1991). Although Johnson was dealing with the "date of injury" for purpose of fixing the average weekly wage under Section 10, the court's interpretation of the meaning of "injury" under other sections of the LHWCA, and its broad language, make the case pertinent to the date of injury concept under the last employer rule. See also Liberty Mut. Ins. Co. v. Commercial Union Ins. Co., 978 F.2d 750, 758 (**1st Cir.** 1992).

The last aggravation need not be the primary contributor to the resulting disability. Independent Stevedore Co. v. O'Leary, 357 F.2d 812 (**9th Cir.** 1966); Lopez v. Southern Stevedores, 23 BRBS 295, 297 (1990). Nor does the last aggravation need to interact with the pre-existing underlying condition itself to produce a worsening of the underlying impairment. It is enough that the last aggravation combined with the underlying condition merely in an additive way and resulted in greater overall impairment. The last employer is liable for the overall impairment regardless of whether the underlying condition was industrially caused. Port of Portland v. Director, OWCP, 932 F.2d 836, 839 (**9th Cir.** 1991).

Aggravation of a covered injury (as distinguished from disease) caused by a later injury which occurs after termination of covered longshore employment is not compensable under the

LHWCA. Leach v. Thompson's Dairy, Inc., 13 BRBS 231 (1981). See also Brown v. Bath Iron Works Corp., 22 BRBS 384, 388 (1989).

70.4 HEARING LOSS

Noise-induced hearing loss has traditionally been treated under LHWCA as an occupational disease. Cardillo itself was a hearing loss case. The **Second Circuit** justified creating the last employer rule in the first place by viewing hearing loss as a disease which developed gradually over time, and one in which it was difficult to correlate the progression of the disease with specific industrial experience. Travelers Ins. Co. v. Cardillo, 225 F.2d 137, 144 (**2d Cir.**), cert. denied, 350 U.S. 913 (1955). The **Fifth Circuit** has recently treated hearing loss as an occupational disease in Avondale Industries v. Director, OWCP, 977 F.2d 186, 190 (**5th Cir.** 1992), and applied the Cardillo rule.

But the **Supreme Court** decision in Bath Iron Works v. Director, OWCP, 506 U.S. 153 (1993) has undercut Cardillo's rationale for classifying hearing loss as an occupational disease. In interpreting Section 10(i) of the LHWCA, the Court concluded that "[o]ccupational hearing loss, unlike a long-latency disease such as asbestosis, is not an occupational disease that does not 'immediately result in disability.'" Id. at 160. "The injury, loss of hearing, occurs simultaneously with the exposure to excessive noise. Moreover, the injury is complete when the exposure ceases." Id. at 162. And because hearing loss is "a scheduled injury, [it] is presumptively disabling, simultaneously with ... exposure." Id.

The **Ninth Circuit** has fashioned a new version of the Cardillo rule tailored for hearing loss cases in Port of Portland v. Director, OWCP, 932 F.2d 836, 841 (**9th Cir.** 1991). The court held that the last responsible employer is the last covered employer to expose the claimant to injurious noise prior to the "determinative audiogram;" that exposure to injurious noise after the "determinative audiogram" does not affect the liability of the employer at the time of the "determinative audiogram;" and that awareness of the "determinative audiogram" or the date of awareness of it, are irrelevant for last employer rule purposes, though they may be significant for time-bar provisions of Section 12 and 13. The court did not define "determinative audiogram."

The Board adopted the Port of Portland formula, abandoned its previous date of awareness rule expounded in a line of cases following Larson v. Jones Oregon Stevedoring Co., 17 BRBS 205 (1985), and decided to impose liability on "**the last employer to expose claimant to injurious stimuli prior to the determinative... audiogram and the filing of the claim.**" Good v. Ingalls Shipbuilding, Inc., 26 BRBS 159, 163-64 (1992); Mauk v. Northwest Marine Iron Works, 25 BRBS 118, 125 (1991); Cox v. Brady-Hamilton Stevedore Co., 25 BRBS 203, 208 (1991); Spear v. General Dynamics Corp., 25 BRBS 254, 259 n.3 (1991).

The Board referred to the "determinative audiogram" variously as the one "relied upon by the administrative law judge in awarding benefits," Good, 26 BRBS at 163; the one "that forms the basis of the claim," Spear, 25 BRBS at 259 n.3; the one that "best reflected the loss of hearing caused by claimant's employment with the responsible employer," Cox, 25 BRBS at 208; and the one which is "the best measure of the claimant's occupational hearing loss," Mauk, 25 BRBS at 125.

Neither the Board nor the **Ninth Circuit** have addressed what might be the "determinative audiogram" in a case such as Avondale Industries v. Director, OWCP, 977 F.2d 186, 189 (**5th Cir.** 1992), where two audiograms done two years apart were averaged to arrive at the percentage of loss. An administrative law judge decision noted this and other problems in applying the new "determinative audiogram" standard, analyzed Port of Portland in light of Bath Iron Works, and concluded that the "determinative audiogram" must be the first audiogram to establish a permanent work-related hearing loss. Bellmer v. Jones Oregon Stevedoring Co., 27 BRBS 317 (ALJ) (1993).

The responsible employer is liable for the entire hearing loss, including presbycusis, the portion due to aging. Port of Portland, 932 F.2d at 839-40, aff'g Ronne v. Jones Oregon Stevedoring Co., 22 BRBS 344, 346 (1989); Argonaut Ins. Co. v. Patterson, 846 F.2d 715, 722 (**11th Cir.** 1988); Worthington v. Newport News Shipbuilding & Dry Dock Co., 18 BRBS 200 (1986); Prime v. Todd Shipyards Corp., 12 BRBS 190 (1980). See generally Strachan Shipping Co. v. Nash, 782 F.2d 513 (**5th Cir.** 1986) (en banc), aff'g 751 F.2d 1460 (**5th Cir.** 1985), aff'g 15 BRBS 386 (1983); Lambert's Point Docks v. Harris, 718 F.2d 644 (**4th Cir.** 1983).

The fact that the percentage of hearing lost while working for a prior employer is known or demonstrable does not exonerate or diminish the last employer's liability for the entire loss. DiCarli v. General Dynamics Corp., 12 BRBS 946 (1980).

If the prior loss resulted in an award, however, the last employer or carrier may be entitled to credit for such a prior award. Strachan Shipping Co. v. Nash, 782 F.2d 513; Bracey v. John T. Clark & Son, 12 BRBS 110 (1980). See **Credits for Prior Awards**, *infra*.

70.5 BURDENS OF PROOF

[ED. NOTE: See also, Topic 20–Presumptions.]

The Section 20(a) presumption of compensability does not aid a claimant in establishing that he was exposed to injurious stimuli or working conditions. Martin v. Kaiser Co., 24 BRBS 112, 118 (1990).

Nor does the Section 20(a) presumption aid the employer in its efforts to shift liability to a later covered employer. Lins v. Ingalls Shipbuilding, Inc., 26 BRBS 62, 65 (1992).

The Section 20(a) presumption does aid the claimant once harm and working conditions (which were capable of causing it) are shown. To establish liability, the claimant does not have to prove an actual injury by the working conditions, or that exposure to injurious stimuli caused or aggravated the occupational disease. Good v. Ingalls Shipbuilding, Inc., 26 BRBS 159, 163-64 n.2 (1992); Lustig v. Todd Shipyards Corp., 20 BRBS 207 (1988), aff'd in part and rev'd in part sub nom. Lustig v. U.S. Dep't of Labor, 881 F.2d 593 (9th Cir. 1989); Hughes v. Bethlehem Steel Corp., 17 BRBS 153, 155 (1985).

The claimant only needs to show that he sustained physical harm and that conditions existed at work which could have caused that harm. Such a showing constitutes a *prima facie* case which prevails in the absence of other evidence.

The burden then shifts to the employer, who can rebut the Section 20(a) presumption of liability by showing that exposure to injurious stimuli or working conditions did not cause the harm, or that the employee was exposed to injurious stimuli or working conditions while performing work covered under the LHWCA for a subsequent employer. Avondale Indus. v. Director, OWCP, 977 F.2d 186 (5th Cir. 1992); Port of Portland v. Director, OWCP, 932 F.2d 836 (9th Cir. 1991); Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986), aff'g Kelaita v. Triple A Mach. Shop, 17 BRBS 10 (1984); Peterson v. General Dynamics Corp., 25 BRBS 71, 77-78 (1991); Ricker v. Bath Iron Works Corp., 24 BRBS 201, 204 (1991); Blake v. Bethlehem Steel Corp., 21 BRBS 49, 53 (1988); Tisdale v. Owen-Corning Fiber Glass Co., 13 BRBS 167, 170 (1981), aff'd sub nom. Tisdale v. Director, OWCP, 698 F.2d 1233 (9th Cir. 1982), cert. denied, 462 U.S. 1106 (1983).

If the employer presents specific and comprehensive evidence sufficient to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. Hughes v. Bethlehem Steel Corp., 17 BRBS 153, 155 (1985); Kier v. Bethlehem Steel Corp., 16 BRBS 128, 129 (1984).

The Board has held that there is no *de minimis* standard for exposure to injurious stimuli. In Picinich v. Lockheed Shipbuilding, 22 BRBS 289 (1989), rev'd sub nom. Todd Pacific Shipyards Corp. v. Director, OWCP, 914 F.2d 1317 (9th Cir. 1990), it ruled that exposure to even minimal

amounts of injurious stimuli, such as asbestos, is enough to make out a *prima facie* case of liability. See also Corwin v. Arthur Tickle Eng'g Works, 8 BRBS 170 (1978); McCabe v. Sun Shipbuilding & Dry Dock Co., 1 BRBS 509, 515 (1975).

The **Ninth Circuit** reversed the Board's Picinich holding in Todd Pacific Shipyards Corp. v. Director, OWCP (Picinich), 914 F.2d 1317 (**9th Cir.** 1990). Relying on its earlier decision in Todd Shipyards Corp. v. Black, 717 F.2d 1280 (**9th Cir.** 1983), cert. denied, 466 U.S. 937 (1984), the court held that the claimant has the burden of showing that the exposure to injurious stimuli was more than minimal, and was in sufficient quantities to cause the disease. Whether the Board will adhere to its Picinich view outside the **Ninth Circuit** is unclear.

In the **Ninth Circuit**, because the aggrieved worker must show exposure in sufficient quantities to cause disease in order to establish a *prima facie* case, it follows that the employer attempting to shift liability to a later employer has an identical burden.

The **Fifth Circuit** appears to agree with the Board's Picinich position as to the claimant's burden, but imposes a higher burden on the employer. In Avondale Industries v. Director, OWCP, 977 F.2d 186, 190 (**5th Cir.** 1992), the court noted that regardless of the brevity of the exposure, if it has the potential to cause the disease, it is considered injurious. But it disagreed with the argument of an employer attempting to shift liability to a later covered employer that its burden is "featherweight" and no greater than the claimant's.

In Avondale, the **Fifth Circuit** wrote that the employer's burden in rebutting the presumption of liability by showing later exposure is higher than the claimant's when making a *prima facie* case. Id. at 190. Although the court did not spell it out, the opinion appears to suggest that a showing of minimal exposure is enough for a claimant's *prima facie* case, but that an employer trying to shift liability to a later employer has the heavier burden of proving later exposure to stimuli in sufficient quantities to cause injury. See also Fulks v. Avondale Shipyards, 637 F.2d 1008, 1012 (**5th Cir.** 1981), cert. denied, 454 U.S. 1080 (1981).

When evidence does not show which of the covered employers last exposed the claimant to injurious stimuli, the exposing employer claimed against is liable. General Ship Serv. v. Director, OWCP, 938 F.2d 960 (**9th Cir.** 1991); Kelaita v. Director, OWCP, 799 F.2d 1308, 1311 (**9th Cir.** 1986), aff'g Kelaita v. Triple A Mach. Shop, 17 BRBS 10 (1984); Lins v. Ingalls Shipbuilding, Inc., 26 BRBS 62, 65 (1992); Good v. Ingalls Shipbuilding, Inc., 26 BRBS 159, 164 (1992).

70.6 EMPLOYER'S DEFENSES

[ED. NOTE: See also, Topic 2.2.16 Occupational Diseases & the Responsible Employer/Carrier.]

An exposing employer cannot avoid liability by showing that because of the long latency of a disease, the exposure at its employment was superfluous in causing it because the disease would have inexorably developed anyway without the last exposure. Lustig v. U.S. Dep't of Labor, 881 F.2d 593, 596 (9th Cir. 1989).

The last employer cannot avoid liability by showing that the worker did not incur the greater part of his disability with that particular employer. Port of Portland v. Director, OWCP, 932 F.2d 836 (9th Cir. 1991); Sicker v. Muni Marine Co., 8 BRBS 268, 272 (1978); McCabe v. Sun Shipbuilding & Dry Dock Co., 1 BRBS 509, 515 (1975). See also Proffit v. E.J. Bartells Co., 10 BRBS 435, 441 (1979); Corwin v. Arthur Tickle Eng'g Works, 8 BRBS 170 (1978).

Thus, where a back injury was due to a lifetime of hard work and degeneration, but was harmfully affected by the strenuous work during a brief last employment, the last employer was held responsible for the entire disability. Foundation Constructors v. Director, OWCP, 950 F.2d 621 (9th Cir. 1991); Adam v. Nicholson Terminal & Dry Dock Co., Inc., 14 BRBS 735 (1981); Abbott v. Dillingham Marine & Mfg. 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, 649-50 (1979), aff'd per curiam sub nom. Employers Nat'l Ins. Co. v. Equitable Shipyards, Inc., 640 F.2d 383 (5th Cir. 1981).

In occupational disease cases, later exposure in employment not covered by the LHWCA does not relieve the last covered employer of liability. Todd Shipyards Corp. v. Black, 717 F.2d 1280 (9th Cir. 1983), cert. denied, 466 U.S. 937 (1984); Pryor v. James McHugh Constr. Co., 18 BRBS 273, 276 (1986) Green v. Newport New Shipbuilding & Dry Dock Co., 13 BRBS 562, 565 (1981), vacated and remanded, 688 F.2d 833 (4th Cir. 1982), on remand, 15 BRBS 465 (1983).

Where a worker was disabled by an occupational disease which developed during his work for one employer but in employment which was sometimes covered by the LHWCA and sometimes by a state statute, the employer was held liable under the LHWCA even though the last exposure to injurious stimuli was in employment covered by the state statute. Fulks v. Avondale Shipyards, Inc., 10 BRBS 340, 345 (1979), aff'd, 637 F.2d 1008 (5th Cir. 1981), cert. denied, 454 U.S. 1080 (1981). But see Brown v. Bath Iron Works Corp., 22 BRBS 384, 388 (1989).

In hearing loss cases, however, under the "determinative audiogram" rule espoused by the Board, exposure to injurious noise even in covered employment after the "determinative audiogram" is no defense. Although the later exposure may be the subject of a later claim, it does not affect the liability of the employer at the time of the "determinative audiogram." Port of Portland v. Director, OWCP, 932 F.2d 836 (9th Cir. 1991); Good v. Ingalls Shipbuilding, Inc., 26 BRBS 159, 163 (1992); Brown v. Bath Iron Works Corp., 22 BRBS 384.

Aggravation of a covered injury (as distinguished from disease), caused by an injury which occurs after termination of covered longshore employment, is not compensable under the LHWCA. Leach v. Thompson's Dairy, Inc., 13 BRBS 231 (1981). See also Jones v. Director, OWCP, 977 F.2d 1106 (7th Cir. 1992).

In a cumulative injury case, later exposure to injurious working conditions in covered employment by an employer who could no longer be held liable because the claimant improvidently dismissed him from the suit, is a good defense by the earlier exposing employer. Kelaita v. Director, OWCP, 799 F.2d 1308 (9th Cir. 1986), aff'g Kelaita V. Triple A Mach. Shop, 17 BRBS 10 (1984).

70.7 CREDITS FOR PRIOR AWARDS

[ED. NOTE: See also, Topic 3.4 Credit For Prior Awards.]

To avoid double recovery, if the claimant previously received a state compensation award, a scheduled LHWCA award, or a Jones Act judgment, for any injury which was a partial cause of the underlying disability, the last aggravating employer or carrier may be entitled to credits for these prior awards. There is no credit, however, for any previous injury for which the claimant may have been entitled to receive an award, but in fact did not get it. 33 U.S.C. § 3(e); Strachan Shipping Co. v. Nash, 782 F.2d 513 (5th Cir. 1986) (en banc), aff'g 751 F.2d 1460 (5th Cir. 1985), aff'g 15 BRBS 386 (1983); Bracey v. John T. Clark & Son of Maryland, 12 BRBS 110 (1980).

The last responsible employer or carrier who is held liable for a disability caused by a non-scheduled injury of a worker who had a previous scheduled injury contributing to the disability, may also be entitled to have its liability reduced by having the effects of a prior scheduled injury "factored out." Frye v. Potomac Elec. Power Co., 21 BRBS 194, 198 (1988); Turney v. Bethlehem Steel Corp., 17 BRBS 232 (1985).

70.8 PROCEDURAL CONSIDERATIONS

The claimant may freely choose which employer to sue. There is no requirement to file against the last employer or to sue employers in any particular order. Lins v. Ingalls Shipbuilding, Inc., 26 BRBS 62, 65 (1992). The Director has recently asked the **Fifth Circuit** to require the joinder of any alleged subsequent causative employers, but the court declined to do so and left the problem to be resolved by administrative law judges or the DOL. Avondale Indus., Inc. v. Director, OWCP, 977 F.2d 186, 192 (**5th Cir.** 1992).

If the claimant chooses his target unwisely, however, the resolution of the case may be delayed. The Board has indicated that when the potential liability of a later covered employer becomes apparent in the course of a trial, the judge must halt the trial and require the claimant to file a claim against the newly discovered potential defendant, who may then request a new trial. Susoeff v. San Francisco Stevedoring Co., 19 BRBS 149, 152 (1986) (cited with approval in Avondale Indus., 977 F.2d at 190).

In cases involving two potentially liable employers, one of the alleged employers and the claimant cannot unilaterally withdraw controversy as to the responsible employer issue. It must be litigated. Edwards v. Willamette Western Corp., 13 BRBS 800 (1981).

70.9**SECTION 8(f) PETITIONS OF LAST RESPONSIBLE EMPLOYERS**

The fact that an employer or insurer is the last responsible employer or carrier does not *ipso facto* entitle it to Section 8(f) relief. The requirements of Section 8(f) must be independently met. The Board and the **Eleventh Circuit** affirmed a denial of Section 8(f) relief to a self-confessed last responsible employer where the judge found the exposure in the last employment too minimal to have contributed to the ultimate disability. Stokes v. Jacksonville Shipyards, 18 BRBS 237 (1986), rev'd sub nom. Jacksonville Shipyards v. Director, OWCP, 851 F.2d 1314 (**11th Cir.** 1988) reh'g denied, en banc, 859 F.2d 928 (**11th Cir.** 1988).

70.10 INSOLVENCY OF LAST RESPONSIBLE EMPLOYER OR CARRIER

Where the last responsible employer is insolvent, and no insurer for the defunct employer can be identified, the application of the last employer principle is not affected. The claimant's recourse then is against the Special Fund under Section 18(b), and not against the next prior solvent covered employer. Ricker v. Bath Iron Works Corp., 24 BRBS 201 (1991).

Where the last responsible employer is solvent but its carrier is not, the employer is liable. B.S. Costello, Inc. v. Meagher, 867 F.2d 722 (1st Cir. 1989). In such cases the applicable state guarantee association may be a party to the proceeding. See also the discussion at Topic 19.10 Bankruptcy.

70.11 SIMULTANEOUS EMPLOYERS

_____ In the rare case where the claimant is found to be employed by two employers at the same time, both employers are jointly and severally liable. Oilfield Safety & Mach. Specialties v. Harman Unlimited, Inc., 625 F.2d 1248 (5th Cir. 1980), aff'g Hansen v. Oilfield Safety, Inc., 8 BRBS 835 (1978) and 9 BRBS 490 (1978). See also Martin v. Kaiser Co., Inc., 24 BRBS 112, 120 (1990).

70.12 RESPONSIBLE CARRIER

Rules for allocating liability among insurance carriers follow the rules allocating liability among employers. See RESPONSIBLE EMPLOYER, supra. A determination as to which employer is liable, and when liability attaches under the applicable last employer rule, determines which carrier is liable. The carrier on the risk when the employer's liability attaches is responsible. Although the primary issue in a case may be that of determining the responsible employer, any issue related to insurance contracts are ancillary and can be addressed. Schaubert v. Omega Services Industries, 32 BRBS 233 (1998).

In occupational disease or cumulative injury cases where exposure to injurious conditions occurred in the service of a last responsible employer who was covered by multiple insurers, the last carrier during the exposure period is the responsible carrier. Liberty Mut. Ins. Co. v. Commercial Union Ins. Co., 978 F.2d 750, 752 (1st Cir. 1992); Argonaut Ins. Co. v. Patterson, 846 F.2d 715, 718 (11th Cir. 1988); Travelers Ins. Co. v. Cardillo, 225 F.2d 137 (2d Cir.) cert. denied, 350 U.S. 913 (1955); Perry v. Jacksonville Shipyards, Inc., 18 BRBS 219, 221 (1986); Warren v. Jacksonville Shipyards, Inc., 1 BRBS 184, 187 (1974).

By providing compensation insurance under the LHWCA, the insurer becomes bound for the full obligation which the insured employer incurs for any injury which occurs when the carrier is on the risk. Adam v. Nicholson Terminal & Dry Dock Co., 14 BRBS 735 738 (1981); Crawford v. Equitable Shipyards, Inc., 11 BRBS 646, 649-50 (1979), aff'd per curiam sub nom. Employers Nat'l Ins. Co. v. Equitable Shipyards, Inc., 640 F.2d 383 (5th Cir. 1981); 33 U.S.C. § 935; 20 C.F.R. § 703.115.

A self-insured employer is treated as an insurer when liability is allocated among successive insurers. Jacksonville Shipyards v. Director, OWCP, 851 F.2d 1314, 1317 (11th Cir. 1988); General Dynamics Corp. Elec. Boat Div. v. Benefits Review Bd., 565 F.2d 208, 211 (2d Cir. 1977).

The last carrier cannot avoid liability on grounds that the claimant's condition existed while a prior carrier was on the risk. Todd v. Todd Shipyards Corp., 16 BRBS 163 (1984). See generally, Patterson v. Savannah Mach. & Shipyard, 15 BRBS 38 (1982); Brown v. General Dynamics Corp., 7 BRBS 561 (1978); Eleazer v. General Dynamics Corp., 7 BRBS 75 (1977).

Where insurance policies are no longer in existence, the judge must determine who was the responsible carrier even on the basis of very meager evidence, and hold the carrier liable for all benefits when the terms of the policy cannot be ascertained. **The burden is on the carrier to show the inapplicability of the policy or that it was not the last insurer.** Dolowich v. West Side Iron Works, 17 BRBS 197 (1985).

The **Ninth Circuit** and the Board affirmed a finding that a carrier was responsible based solely on inferences drawn from government records listing the carrier as the employer's insurer. General Ship Serv. v. Director, OWCP, 938 F.2d 960, 962 (9th Cir. 1991); Maes v. Barrett & Hilp,

27 BRBS 128 (1993). But references in correspondence to state compensation insurance which did not specifically mention the LHWCA were held insufficient to support a finding of longshore coverage. Shaller v. Cramp Shipbuilding & Dry Dock Co., 23 BRBS 140, 143 (1989).

The judge must determine which of an employer's carriers is liable. An insured employer may not be held liable simply because there is insufficient evidence as to which of its insurers was on the risk. When it is determined that the carrier providing the employer's defense is not the responsible carrier, it is incumbent on the judge to ascertain whether the employer may have been covered by some other insurer. Where the employer and carrier are represented by the same counsel, and it becomes apparent that a conflict of interest exists because the carrier is disputing coverage of the risk, the judge has an affirmative duty under 20 C.F.R. § 702.336 to reopen the record and identify potentially liable carriers, notify them of the evidentiary gap and their potential liabilities, and to allow them the opportunity to present additional evidence. Jourdan v. Equitable Equip. Co., 25 BRBS 317, 324 (1992); Sans v. Todd Shipyards Corp., 19 BRBS 24 (1986).

Nor can the judge avoid deciding the responsible carrier issue by remanding it for a decision by the deputy commissioner. Sans v. Todd Shipyards Corp., 19 BRBS at 28.

Where necessary to resolve a claim for compensation benefits, the judge may adjudicate insurance contract disputes. Rodman v. Bethlehem Steel Corp., 16 BRBS 123, 125-26 (1984); Valdez v. Bethlehem Steel Corp., 16 BRBS 144, 145-46 (1984); Brady v. Hall Bros. Marine Corp., 13 BRBS 854, 857-58 (1981); Droogsma v. Pensacola Stevedoring Co., 11 BRBS 1 (1979).

In Pilipovich v. CPS Staff Leasing, Inc., 31 BRBS 169 (1997), the Board held that the ALJ “has the power to hear and resolve insurance issues which are necessary to the resolution of a claim under the Act.” The Board concluded that the ALJ erred in finding two employers liable for Claimant’s attorney’s fees where “CPS has no longshore workers itself, but merely provides workers to longshore employers, [and Carrier] was on the risk not for CPS itself, but for ... other employers to whom CPS loaned employees.” The Board held that “[b]y virtue of the contractual agreements, [Carrier] is solely liable to claimant as the insurance carrier, as its policy insures [the longshore employer] for injuries covered under the Longshore Act and as it waived its right to seek reimbursement from [the longshore employer].”

The “last carrier” for purposes of disability payments may not be the same “last carrier” responsible for medical benefits. Bath Iron Works Corp. v. Director, OWCP [Hutchins], 244 F.3d 222 (1st Cir. 2001). In Hutchins, the First **Circuit** explained that it had adopted a modified version of the “last injurious exposure” and “last insurer” rule, holding that the date of disability, rather than the date of awareness of disease, is the key to determining the responsible insurer for disability.