

Responsible Employer Determination in Cases Involving Multiple Traumatic Injuries: Seeking Analytical Clarity

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Relevant Precedent¹

Case precedent prescribes the rules for identifying the responsible employer/carrier in cases potentially involving multiple traumatic injuries or occupational exposures with sequential employers/carriers.² It is well-settled that, in cases involving traumatic injuries, the determination of the responsible employer turns on whether the claimant's disabling condition is the result of the natural progression of an initial injury or an aggravation due to a subsequent injury. If a claimant's disability results from the natural progression of a prior injury and would have occurred notwithstanding a subsequent injury, then the prior injury is compensable and claimant's employer at that time is responsible. If, however, claimant sustains a subsequent injury which aggravates, accelerates or combines with the earlier injury to result in a claimant's disability, then the subsequent injury is compensable and the subsequent employer is fully liable.³ See, e.g., *Foundation Constructors, Inc. v. Dir.*, OWCP, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991), *aff'g Vanover v. Foundation Constructors*, 22 BRBS 453 (1989);

¹ Several related topics are outside the purview of this commentary, e.g., determination of compensation payable by the responsible employer, see *Lake v. New Haven Terminal Corp.*, 337 F.3d 261 (2nd Cir. 2003); *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); timeliness under §§ 12 and 13, see *Reposky v. Int'l Transp. Sers.*, 40 BRBS 65 (2006); and availability of § 8(f) relief.

² The test to be applied turns on whether the case involves multiple traumatic injuries or an occupational disease. Compare *Foundation Constructors, Inc. v. Dir.*, OWCP, 950 F.2d 621, 25 BRBS 71(CRT) (9th Cir. 1991) with *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir), *cert. denied*, 350 U.S. 913 (1955).

³ Under the aggravation rule, where the employment aggravates, exacerbates or combines with a prior condition, the entire resulting disability is compensable. The relative contribution of the pre-existing condition and the aggravation injury are not weighed. *Indep. Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966).

Kelaita v. Dir., OWCP, 799 F.2d 1308 (9th Cir. 1986), *aff'g Kelaita v. Triple A Machine Shop*, 17 BRBS 10 (1984); *Buchanan v. Int'l Transp. Servs.*, 31 BRBS 81 (1997) (“*Buchanan I*”), and 33 BRBS 32 (1999) (“*Buchanan II*”), *aff'd mem. sub nom. Int'l Transp. Servs. v. Kaiser Permanente Hospital, Inc.*, 7 F. App'x 547 (9th Cir. 2001); *Crawford v. Equitable Shipyards, Inc.*, 11 BRBS 646 (1979), *aff'd per curiam sub nom. Employers National Ins. Co. v. Equitable Shipyards, Inc.*, 640 F.2d 383 (5th Cir. 1981) (table). The Board and the Ninth Circuit have allowed “defensive” use of the aggravation rule. *See, e.g., Reposky v. Int'l Transp. Servs.*, 40 BRBS 65 (2006); *Kelaita, supra*; *see also Emery v. Admiralty Coatings Corp.*, 228 F.3d 513 (4th Cir. 2000);⁴ *cf. Lake v. New Haven Terminal Corp.*, 337 F.3d 261 (2nd Cir. 2003).⁵

In *Buchanan I and II*, the Board laid out the following analytical framework for identifying the responsible employer in traumatic injury cases. In that case, claimant initially injured his back in 1993 during his employment with Metropolitan; in 1994, while working for ITS, he began to experience pain in his back after he repeatedly slipped on grease. Claimant filed a claim against each employer, and Kaiser intervened to recover the cost of medical services it provided to claimant. Claimant and ITS settled the claim. The ALJ initially applied the § 20(a) presumption to find the 1993 injury compensable, rejecting Metropolitan’s assertion that claimant’s back problem was due to a prior condition. However, the ALJ found ITS liable to Kaiser, as ITS failed to rebut the § 20(a) presumption with respect to the 1994 injury. In vacating this finding, the BRB held that “[§] 20(a) presumption aids a claimant in establishing the compensability of his claim, and does not apply to the issue of responsible employer.” *Buchanan I*, 31 BRBS at 84, citing *Lins v. Ingalls Shipbuilding, Inc.*, 26 BRBS 62, 65 (1992); *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149, 151 n. 2 (1986). The BRB reasoned that, as the ALJ found the initial injury to be work-related and as the second employer did not contest that claimant was injured in its employ, compensability of the claim was thereby established. “[T]he remaining issue is which employment injury caused claimant’s disabling condition. As this issue is relevant only to determining the responsible employer, the [§] 20(a)

⁴ Stating that “[t]he ‘aggravation rule’ might apply, if at all, to a situation where a second trauma occurs in an area first injured during the claimant’s prior employment, but since healed to the extent possible.” *Id.* at 518. Here, the employer asserted aggravation with a later employer not claimed against. The court noted the Director’s position that such use of the aggravation rule is improper as a matter of law, but did not reach this issue.

⁵ The court held that the first employer may not use the aggravation rule as a defense where claimant settled his claim against the subsequent employer and there was no evidence of full recovery from the first injury. However, the claimant bears the burden of showing that his current disability can be attributed to the first injury without the normal shifting of burdens, and the ALJ must consider whether the claimant entered into settlement in good faith and whether he attempted to manipulate the aggravation rule. *Cf. Oberts v. McDonnell Douglas Servs., et al.*, BRB No.05-0445 (2006) (unpub.) (distinguishing *Lake*).

presumption has no further role in this case.” *Id.* Each potential employer bears the burden of persuading the fact-finder that its evidence is entitled to greater weight. In this case, “Metropolitan bears the burden of proving, without benefit of further presumption, [citing *Lins, supra*], by a preponderance of the evidence that there was a new injury or aggravation with ITS in order to be relieved of its liability as responsible employer. See [*Dir., OWCP v. Greenwich Collieries*, 512 U.S. 267, 276, 28 BRBS 43, 46 (CRT) (1994)]. ITS, on the other hand, must prove that claimant’s condition is the result of the injury with Metropolitan in order to escape liability.” *Id.* at 85-86.⁶ In *Buchanan II*, the Board affirmed the ALJ’s finding on remand that ITS is responsible. It added that “[i]n the unlikely event that neither employer [is] able to persuade the [ALJ] that its evidence is entitled to greater weight [e.g., if neither employer put forth any credible evidence], ... the purposes of the Act would best be served by assigning liability to the later employer, consistent with case law defining responsible employer in an occupational disease context.”⁷ 33 BRBS at 36.

The Board has acknowledged that the interplay of causation and responsible employer issues has “result[ed] in confusion in many cases.”⁸ It attempted to clarify these issues in *McAllister*, an occupational disease case. *McAllister v. Lockheed Shipbuilding*, 39 BRBS 35 (2005) (“*McAllister I*”), decision after remand, 41 BRBS 28 (2007) (“*McAllister II*”), decision after second remand, *K. M. [McAllister] v. Lockheed Shipbuilding*, 42 BRBS 105 (2008), rev’d sub nom. *Albina Engine & Machine v. Dir., OWCP*, 627 F.3d 1293, 44 BRBS 89(CRT) (9th Cir. 2010) (“*Albina*”). The Board stated that the § 20(a) presumption is invoked only “on behalf of a claimant,” and not “against a particular employer.” *McAllister I*, 39 BRBS at 37. It reasoned that causation is necessary to establish the 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. Any employer may rebut the presumption by producing substantial evidence that claimant’s condition is not related to his employment. 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 the claimant bearing the burden of persuasion. Once causation is established, *i.e.*, that the claimant’s injury is related to an occupational exposure, then each employer bears the burden of establishing that it is not the responsible employer. Thus, “[c]laimant does not bear the burden of proving responsible employer; rather, each employer

⁶ ITS argued that, as Metropolitan advanced the possibility of a second injury as an affirmative defense to its liability, it bore the burden of persuasion on this issue. *Id.* at 84.

⁷ The BRB noted that if claimant alleged only one work-related injury, and the employer argued that a later traumatic event caused his disability, § 20(a) would apply to claimant’s benefit, as causation is a necessary element of a claim. *Buchanan II*, 33 BRBS at 37 n.6.

⁸ See BRB Longshore Deskbook at www.dol.gov/brb/References/Reference_works/lhca/lstdesk/dbemp.htm

bears the burden of establishing it is not the responsible employer.” *Id.* at 37 (cites omitted).⁹

In *McAllister II*, the Board elaborated 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, and is to be made without reference to § 20(a). Agreeing with the Director, OWCP, the Board found that, on remand, the ALJ “conflated compensability with liability in that, after finding the [§] 20(a) presumption unrebutted, he automatically held the last chronological employer liable for benefits.” The BRB concluded that “[i]nvocation of and failure to rebut the [§] 20(a) presumption mandate a finding that the claim is compensable, but they do not mandate the assessment of liability against any particular employer.” 41 BRBS at 30-32 (cites omitted). Rather, in occupational disease cases, as in traumatic injury cases, “each employer must persuade the fact-finder that the employee’s disability is due to his injury with another employer,” and the ALJ should consider the evidence with respect to all employers simultaneously. *Id.* at 32-33. The “ultimate burden of persuasion lies with the employer claimed against, or the later employer.” *Id.* at 33 (cites omitted).

The Ninth Circuit, however, overruled the *McAllister* decisions in *Albina*, holding that:

“[t]he Board erred in holding: (1) that the § 20(a) presumption is irrelevant to the question of liability in a multi-employer case; (2) that each employer must show by a preponderance of the evidence that it is not the last responsible employer; and (3) that the evidence regarding each employer should be analyzed simultaneously. We hold that in LHWCA occupational disease cases involving multiple employers: (1) the § 20(a) presumption must be invoked against each employer before that employer may be found liable for payment of benefits; (2) each employer may rebut the § 20(a) presumption with substantial evidence that it is not the last responsible employer; (3) once an employer has rebutted the § 20(a) presumption, it may be found liable only if a preponderance of the evidence supports a finding that that employer is responsible; and (4) the analysis with respect to each employer shall be applied sequentially, beginning with the last (most recent) employer, and need not be conducted for earlier employers once a responsible employer is found.”

Albina Engine & Machine, 627 F.3d at 1304. At the same time, the court agreed with the BRB’s holding in *Lins* that the § 20(a) presumption cannot be invoked by one employer against a subsequent employer not claimed against. The court also stated that its disagreement with the BRB’s interpretation of § 20(a) would not affect the BRB’s holding in *Susoeff* that, where only one employer is claimed against, it is not the claimant’s burden to show that it was the last responsible employer.

⁹ Citing, *inter alia*, *Gen. Ship Serv. v. Dir., OWCP [Barnes]*, 938 F.2d 960, 25 BRBS 22 (CRT) (9th Cir. 1991).

Post-Albina Board decisions

In *Obadiaru v. I.T.T. Corp.*, 45 BRBS 17 (2011), the BRB affirmed the ALJ's finding that claimant's back injury was aggravated in 2006-2007 by his light-duty work with employer and was not due solely to the natural progression of his original 2005 work injury; thus, the second carrier was responsible. The work-relatedness of the 2005 injury was undisputed. The BRB first affirmed the ALJ's finding that claimant invoked the § 20(a) presumption that his back was aggravated by his employment in 2007 (after employer changed carriers), as it was supported by claimant's testimony regarding his job duties and changes in pain level, as well as medical evidence showing that claimant's duties aggravated his back condition. The BRB further affirmed the ALJ's finding that neither carrier rebutted the presumption, rejecting the second carrier's reliance on claimant's statements that his pain was due to the original injury and his questionable credibility. Thus, the ALJ properly found that claimant's back condition was work-related. Turning next to the responsible employer issue, the BRB affirmed the ALJ's determination that claimant's disability was the result of an aggravation and was not due solely to the natural progression of his original injury, focusing on claimant's testimony regarding changes in his pain level and his ability to work, and supporting medical evidence.

In recent unpublished decisions, the BRB has rejected arguments that *Albina* is applicable to traumatic injury cases.¹⁰ See *Palmer v. Marine Terminals Corp., et al.*, BRB Nos. 10-0650, 10-0650A (Sept. 30, 2011) (unpub.); *Miller v. Ceres Marine Terminals, Inc., et al.*, BRB Nos. 11-0227 and 11-0279 (Dec. 9, 2011). In *Palmer*, which arose in the 9th Circuit, claimant filed a claim against Marine Terminals based on a 1999 injury to her left arm and shoulder; she also filed a separate claim against her subsequent longshore employers (sequentially: ITS, Long Beach, Eagle Marine, SSAT and Maersk) for cumulative trauma injuries to her left arm/shoulder. Claimant then settled her claim with Marine Terminals as well as her claim for compensation (but not medical benefits) with Long Beach. The ALJ initially applied § 20(a) to determine that claimant sustained a work-related cumulative trauma to her left arm during the relevant period.¹¹ Next, citing *McAllister*, the ALJ found that Long Beach was the responsible employer, after analyzing with specificity claimant's work activities with each employer to identify the last aggravation.¹² The BRB affirmed, rejecting Marine Terminal's assertion that the ALJ erred in

¹⁰ Unpublished decisions are discussed to illuminate the BRB's reasoning in relevant published decisions.

¹¹ The ALJ stated that "the one day of lashing that Claimant did at [ITS] ... is nearly enough in itself to raise the presumption." *Id.* at 75. Claimant failed to establish compensability of her shoulder condition.

¹² The ALJ found that Eagle Marine, SSAT and Maersk each established that claimant's employment for them did not contribute to her present left arm condition; that ITS established

not analyzing the responsible employer issue sequentially in light of the intervening decision in *Albina*.

In *Miller*, claimant sustained a fall while working for Ceres in 2007, and she underwent a knee surgery in 2009. Ceres contested liability, asserting that claimant's injury was due to the natural progression of a prior non-work-related condition or was aggravated by her subsequent employment (for 4 hours) with Gulf. The ALJ found that the § 20(a) presumption was invoked against Ceres as claimant established that her knee injury could have resulted from the fall in 2007, and further found presumption to be un rebutted. The ALJ stated that the remaining issue was whether Ceres or Gulf is responsible for claimant's subsequent surgeries, and that the burden of proof had to be applied sequentially. The ALJ found that a preponderance of the evidence established that claimant's condition resulted from the natural progression of her 2007 injury. The BRB affirmed, rejecting Ceres' contention that, pursuant to *Albina*, the § 20(a) presumption should have applied against Gulf first.¹³ Regarding the ALJ's adoption of sequential analysis, the BRB distinguished *McAllister/Albina* as applicable to occupational disease cases. The BRB noted the ALJ's determination that Ceres may not invoke the § 20(a) presumption against Gulf pursuant to *Lins* and *Buchanan*; "[a]lthough he did not apply [§] 20(a) to Gulf, the [ALJ] stated that the evidence related to Gulf would be considered first, and he set forth the applicable law and addressed all the relevant evidence." *Miller, supra*, slip op. at 12.

Burden of Proof -- Section 20(a) Presumption

Board precedent discussed above seeks to separate the issues of causation/compensability (*i.e.*, whether claimant established a work-related injury) and liability (*i.e.*, identifying responsible employer). The BRB and the 7th Circuit have held that the § 20(a) presumption aids a claimant in establishing the compensability of his claim, but does not apply in identifying the responsible employer. See *Marinette Marine Corp. v. Dir., OWCP*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Cir. 2005); *Buchanan I and II, aff'd Kaiser*; *McAllister I and II*. In traumatic injury cases, the BRB evidently applies its holding in *McAllister* that the § 20(a) presumption applies only to the compensability of a claim and not to individual employers, and that "[i]nvocation of and failure to rebut the [§] 20(a) presumption mandate a finding that the claim is compensable, but they do not mandate the assessment of liability against any particular

that claimant's work for a later employer, Long Beach, aggravated her condition; but that Long Beach failed to meet its burden of establishing either no aggravation in its employ or an aggravation with a later employer.

¹³ While Ceres asserted that aggravation occurred with various employers, the BRB stated that, since prior to working for Gulf, claimant most recently worked for Ceres, only aggravation with Gulf could relieve Ceres of liability.

employer.” *McAllister II*, 41 BRBS at 30-32 (citing *McAllister I* and *Marinette Marine*).¹⁴ Under a literal application of this approach, a finding or stipulation that claimant sustained a work-related injury (e.g., with the initial employer) resolves the issue of compensability, leaving only the issue of liability to be decided, with each employer bearing the burden of proof. See, e.g., *Oberts v. McDonnell Douglas Servs., et al.*, BRB No.05-0445 (2006) (unpub.);¹⁵ see also *Avant v. Nat. Steel and Shipbuilding Co., et al.*, BRB No. 03-0414 (Mar. 8, 2004) (unpub);¹⁶ *Holmes v. Worldwide Labor Support, Inc., et al.*, BRB No. 04-0914 (Aug. 24, 2005) (unpub);¹⁷ *Ramey v. Jones Stevedoring Co., et al.*, BRB Nos. 05-0578 and 05-0578A (Mar. 30, 2006) (unpub.);¹⁸ *Palmer, supra*.

¹⁴ Cf. *Buchanan II*, 33 BRBS at 35 (“Once, as here, the existence of work-related injuries with more than one covered employer is established, the inquiry is whether the claimant’s disability is due to the natural progression of the first injury or is due instead to the aggravating or accelerating effects of the second injury.”)

¹⁵ The BRB noted that

“[c]ontrary to [the first employer’s] argument that the Section 20(a) ... presumption should have been invoked against [the second employer] on the aggravation claim, in a multiple-injury case where the issue is responsible employer, Section 20(a) is applied on behalf of claimant and not against each employer. Once the presumption is invoked on a claimant’s behalf, either employer could rebut it. Once a causal relationship between a claimant’s injury and his employment is established, it is up to each employer to prove it is not the responsible employer. It is not claimant’s burden to prove which employer is liable.”

Slip op. at 9 n.3, citing *McAllister I*. The BRB vacated the ALJ’s finding of no aggravation; the first employer would remain liable for the benefits awarded unless, and until, the second employer is held liable.

¹⁶ In *Avant*, claimant’s knee injury with NASSCO was undisputed, and he alleged an aggravation with Southwest Marine. The BRB rejected claimant’s and NASSCO’s contention that the ALJ erred by not applying the § 20(a) presumption to find Southwest Marine liable, stating that claimant was not seeking to establish that his knee injury was work-related, but that Southwest Marine was liable for the resulting disability.

¹⁷ The BRB stated that “[§]20(a) applies to whether claimant’s neck condition arose from his employment and there is no dispute in this case that claimant has a work-related injury. The presumption thus is not applicable in this responsible employer case” (citing *McAllister*).

¹⁸ In *Ramey*, the initial shoulder injury was undisputed and employer joined two later employers. The BRB stated that “[§] 20(a) is inapplicable because there was no issue regarding whether

There appears to be a dearth of circuit court precedent expressly addressing the burden of proof in responsible employer analysis.¹⁹ In *Albina*, however, the 9th Circuit disagreed with the BRB’s position that the § 20(a) presumption applies only to the compensability of a claim and not to individual employers, and with placing the burden “on all employers based on evidence relevant only to one,” *Albina, supra*, at 1300. Instead, the court adopted sequential § 20(a) analysis starting with the last employer. Underlying this holding is the 9th Circuit’s rejection of the Director’s and Board’s position that each employer bears the burden of proof as it is the proponent of a rule or order that it is not the responsible employer. The court reasoned that

“[t]he Board in this case held that each employer bears a burden of proof in the determination of liability in a multi-employer suit. But it is unclear where that burden of proof can come from if not the § 20(a) presumption. If the burden is imposed other than pursuant to statute, it is invalid under APA § 7(c) and *Greenwich Collieries*.”

Id. at 1299. There are several indications that the 9th Circuit may be inclined to extend this interpretation of the § 20(a) presumption to traumatic injury cases, including the court’s reliance on such general principles as the “nature of the prima facie case that a claimant is required to make under § 20(a),”²⁰ the allocation of the burden of proof pursuant to the APA and *Greenwich*

claimant’s injury is work-related, but only which employer is liable for claimant’s disabling condition” (citing *McAllister*).

¹⁹ See *Delaware River*, 279 F.3d 233, 35 BRBS 154(CRT) (the parties agreed that *Buchanan* provides the governing law). In *Albina*, the court discussed only *Marinette Marine* on this point; and the Director’s brief (2010 WL 2675299 at *8) stated that “[n]either this Court nor any other has addressed in any depth how the burden of persuasion ... should be allocated among several potentially liable employers.”

²⁰ The court stated that

“[t]he presumption is invoked only if a claimant alleges that his injury arose out of and in the course of his employment. It is implicit in this language that the employment referred to is employment with a particular employer, against whom a claim has been filed. Where only a single employer is claimed against, the claimant would of course not be able successfully to assert a claim that fell within the § 20(a) presumption on the basis of evidence relating to employment with some other employer that was not claimed against. Similarly, in a claim against multiple employers, the claimant should be expected to make out a prima facie case against all of the employers; if the claimant fails to make such a case against one employer, the presumption should not apply against that employer.”

Collieries, and the “rational connection” rule.²¹ It is also telling that the court expressly disagreed with *Marinette Marine* (a traumatic injury case) and distinguished *Buchanan* on the ground that “the Board’s interpretation of the proper application of § 20(a) did not determine the outcome” in that case,²² as “there was no question as to whether the claimant had sustained an injury in the employ of all employer parties” (*id.* at 1300). The court did not elaborate whether and how its interpretation of § 20(a) would affect responsible employer analysis in traumatic injury cases.²³ Notably, however, the court stated in *dicta* that sequential analysis of the evidence would not be appropriate in traumatic injury cases, as “[i]t would be irrational to attempt [natural progression/aggravation] analysis without consideration of the evidence regarding working conditions at both employers, and thus a simultaneous analysis is called for in injury cases.” *Albina*, 627 F.3d at 1302.

At the same time, in some cases, the Board has accepted the ALJs’ application of the § 20(a) framework to determine whether a claimant established an aggravation injury with a subsequent employer (even where compensability was undisputed²⁴), followed by responsible employer analysis under the aggravation/natural progression standard. See, e.g., *Price v. Metropolitan Stevedore Co., et al.*, BRB No. 00-1017 (July 16, 2001) (unpub.), *aff’d mem. sub nom. 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); *Obadiaru*, 45 BRBS 17; *Carpenter v. California United Terminals, et al.*, 37 BRBS 149 (2003); *Lopez v. Southern*

Id. at 1298-99.

²¹ It would seem that, under the BRB’s approach, the rational connection rule would be ultimately satisfied in a traumatic injury case once evidence as a whole is weighed on the issue of liability.

²² The court also distinguished *Susoeff* and *Lins* on this basis.

²³ See generally *Lopez v. Stevedoring Servs. of Am.*, 39 BRBS 85 (2005), *aff’d mem.*, 377 F.App’x 640 (9th Cir. 2010) (unpub.). In *Lopez*, the ALJ found that the claimant sustained cumulative trauma with several employers, and identified the responsible employer without referencing § 20(a); the BRB and the 9th Circuit affirmed.

²⁴ Cf. *Baumler v. Marinette Marine Corp.*, BRB No. 03-0380 (Feb. 24, 2004) (ALJ properly applied § 20(a) to aggravation injury where one physician opined that claimant’s back condition was not work-related), *aff’d Marinette Marine*, 431 F.3d 1032, 39 BRBS 82(CRT) (7th Circuit did not acknowledge this portion of ALJ’s analysis).

Stevedores, 23 BRBS 295 (1990); *Kooley v. Marine Indus. Northwest*, 22 BRBS 142 (1989);²⁵ see also *Tate v. Walashek Indus. and Marine*, BRB No. 98-238 (Sept. 28, 1998).²⁶ It is difficult to say whether *Obadiaru* signals the Board’s recognition of concerns raised in *Albina*. In *Palmer and Miller*, the BRB rejected *Albina*’s applicability, and, in another recent unpublished decision, the BRB cited *Albina* for the proposition that, in a traumatic injury case, each employer bears the burden of establishing that it is not responsible.²⁷

Despite the Board’s attempts to clarify its approach to causation and liability analysis in cases involving sequential employers, ALJs’ decisions reflect lack of uniformity in analytical approach. In some instances, the judges have adhered to the BRB’s instructions by first addressing whether claimant established compensability under the § 20(a) framework with respect to any/some of several employers, and then separately identifying responsible employer under the aggravation/natural progression rule by balancing evidence as a whole, with the burden of proof on employers.²⁸ See, e.g., *Palmer, supra*; see also *Oberts, supra* (where first injury undisputed, ALJ properly did not apply § 20(a) in addressing aggravation); *Avant, supra* (same). In other cases, however, the judges have “conflated” the issues of causation and liability and have applied the § 20(a) presumption in identifying the responsible employer. Thus, some ALJs have applied the § 20(a) framework to the alleged aggravation injury, incorporating analysis of

²⁵ In *Kooley*, claimant sustained two unrelated cervical injuries with different employers. The BRB stated that “[t]his case involves a second injury due to a aggravation of the same part of the body as the first injury, requiring that the Board apply the aggravation rule”

²⁶ The BRB reasoned that “[w]hile claimant is entitled to the benefit of the [§] 20(a) presumption to aid in establishing that he sustained a work-related [subsequent] injury on [5/11/95], the presumption does not assist one carrier rather than another once the issue involves determining which injury caused claimant’s economic disability and thus which carrier is responsible for claimant’s benefits. [Citing *Buchanan* and *Kooley*.] Thus, as the [ALJ] did not ascertain whether the 1992 injury, the 1995 injury or both injuries caused claimant’s disability, his analysis is incomplete and the case must be remanded for further findings.” More recent case law (*infra*) evidently moved away from using loss of wage-earning capacity as the standard for determining responsible employer in two-injury cases.

²⁷ *Lyons v. Eagle Marine Servs.*, BRB No. 09-0579 (Dec. 1, 2011) (unpub.)

²⁸ In *Fisher v. Marine Terminals Corp.*, BRB No. 03-0825 (Sept. 8, 2004) (unpub), claimant filed claims against MTC and CSS and took a “moral” rather than “medical” position that MTC is liable; the ALJ stated that “[b]ecause Claimant does not allege that she suffered an injury while working for [CSS], MTC cannot invoke the [§] 20(a) presumption to prove that Claimant suffered a new injury while employed by [CSS].” The BRB does not appear to recognize this distinction.

natural progression/aggravation to determine the responsible employer. *See, e.g., ITO Corp. v. Dir., OWCP*, 883 F.2d 422 (5th Cir. 1989);²⁹ *Outland v. Cooper/T. Smith Stevedoring, et. al.*, BRB No. 06-0642 (Mar. 21, 2007) (harmless error, as all evidence weighed, citing *McAllister I*). Others have applied this same methodology to the initial injury. *See, e.g., Reposky*, 40 BRBS 65;³⁰ *Ramey, supra* (harmless error as all evidence weighed); *Holmes, supra* (same). As noted above, still others have applied the § 20(a) analysis to the alleged aggravation, and then separately addressed the issue of responsible employer. The BRB has found harmless error and affirmed responsible employer determinations derived from § 20(a) analysis, as long as evidence as a whole is weighed on the issue of natural progression/aggravation. Thus, while the Board envisions compensability and liability as separate issues and has attempted to delineate a neatly bifurcated analytical framework, this distinction is often blurred.³¹ While it may be true that, in many cases, variations in the mode of analysis would not affect the outcome, greater analytical clarity would likely enhance the efficiency of the administrative process.

Aggravation vs. Natural Progression: Identifying the Cause(s) of Disability

Case law provides guidance as to what constitutes an “aggravation” for purposes of responsible employer analysis. The BRB has recognized the 9th Circuit precedent holding that the later employer may be held liable even when the aggravating injury is not the primary factor in claimant’s resulting disability. *See Lopez v. Stevedoring Servs. of Am.*, 39 BRBS 85 (2005) (citing, e.g., *Foundation Constructors*); *Reposky*, 40 BRBS 65. The relevant inquiry is whether claimant’s disability is due at least in part to an aggravating injury with the later employer; a

²⁹ The 5th Circuit rejected the second employer’s assertion that the ALJ improperly based his finding of aggravation on the § 20(a) presumption; rather the ALJ found that the second employer rebutted the presumption with evidence that claimant’s impairment was due solely to the natural progression of the first injury and then weighed the entire body of evidence on the cause of impairment.

³⁰ The ALJ stated that, once the presumption was rebutted with evidence of aggravation, evidence had to be weighed as a whole under the framework of the last responsible employer rule. The BRB affirmed the ALJ’s conclusion that claimant sustained work-related aggravations that increased the extent of her disability and contributed to her need for surgery, most recently with ITS (but not during subsequent employment with MTC).

³¹ As the case law evolved, the issues of whether claimant sustained a work-related injury with a later employer and whether that employer is liable for claimant’s disability have increasingly overlapped. *See, e.g., Price*, 339 F.3d 1102, 37 BRBS 89(CRT) (rejecting use of diminished earning capacity or need for surgery as the standard for determining responsible employer; distinguishing occupational disease cases); *see also Miller*, 2009-LHC-00408 (collecting cases recognizing that “tiny aggravations” may be sufficient).

medical opinion that surgery would be required regardless of the effect on claimant's condition of his employment with the later employer is not dispositive of the responsible employer issue. *See, e.g., Avant, supra* (citing *Price, Foundation Constructors*, and *Kelaita*). Notably, in *Price*, 339 F.3d 1102, 37 BRBS 89(CRT), the 9th Circuit rejected 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 straightforward.

The Board has held that a finding of an aggravation does not require "any progression of an underlying condition; rather, an 'aggravation' may occur where there is an increase in symptoms due to the claimant's employment." *Oberts*, BRB No. 05-0445, slip op. at 3 (collecting cases). Where claimant's work results in an exacerbation of his symptoms, even if no permanent harm results, the claimant has sustained an injury and the employer at the time of the work events resulting in the exacerbation is responsible for any resulting disability. *See, e.g., Blue v. Tacoma Narrows Constructors, et al.*, BRB No. 10-0692 (Feb. 24, 2011), slip op. at 4 (citing *Marinette Marine*,³² *Delaware River*, and *Kelaita*); *Oberts, supra* at 4;³³ *Outland*, BRB No. 06-0642 (claimant's back pain was a continuing symptom of his initial 2002 injury, was not due to an aggravation, and did not contribute to his 2005 surgery; "[i]t is insufficient to show merely that claimant's condition was symptomatic while he was working, nor was the [ALJ] required to find that claimant sustained a new injury with a subsequent employer based on this record," citing *Delaware River*); *Miller v. Ceres Marine Terminals, Inc., et al.*, 2009-LHC-00408 (ALJ Nov. 24, 2010) (collecting cases holding earlier employer liable for ultimate disability where claimant experienced symptom "flare ups" with subsequent employer). Further, "[t]hat the symptoms could have developed anywhere does not negate the fact that the claimant's symptoms developed while he was working for his employer; if the work played any role in the manifestation of a symptom, any disability due to the symptom is compensable. Moreover, the occurrence of an unusual event is unnecessary if the conditions of employment caused the

³² The 7th Circuit stated that

"[[t]he second carrier and employer] insist that the locking of Baumler's back in May 2001 caused only temporary pain and was therefore not an 'injury' for which they can be liable. But Baumler isn't seeking compensation for his back locking up – he's seeking the cost of the surgery to get rid of the chronic pain he suffered in the months that followed. The petitioners can question whether the May 2001 incident actually contributed to that pain, but they can't realistically say that Baumler didn't suffer an injury."

431 F.3d 1032, 39 BRBS 82, 84(CRT).

³³ Acknowledging lack of 2nd Circuit precedent directly on point, the BRB followed *Delaware River*.

claimant to become symptomatic.” *Oberts, supra*, slip op. at 3 (citations omitted) (work event and/or conditions need not be the *sole* or primary cause of a disability; they need only be *a* cause, citing *Dir., OWCP v. Vessel Repair, Inc.*, 168 F.3d 190, 33 BRBS 65(CRT) (5th Cir. 1999)).

Thus, where claimant’s work results in a temporary exacerbation of symptoms, the employer at the time of the work events leading to this exacerbation is responsible for any resulting temporary disability. *Outland, supra*, slip op. at 5 n.3 (citing *Delaware River*). The Board has cautioned that

“the fact that the claimant sustained a temporary exacerbation with a subsequent employer is not determinative of the responsible employer issue. Rather, in cases involving multiple traumatic injuries, the responsible employer determination depends on the cause of the claimant’s *ultimate disability*; only if the disability is at least partially the result of trauma sustained in employment with a subsequent employer is the subsequent employer liable. If, on the other hand, the ultimate disability results from the natural progression of the initial injury, and not from any subsequent trauma, the first employer remains liable.”

Morrison v. Operators and Consulting Servs., Inc., BRB 03-0541 (May 14, 2004) (unpub.), slip op. at 5, n.3 (emphasis in original) (cites omitted), *aff’d Operators & Consulting Servs., Inc. v. Dir., OWCP [Morrison]*, 170 Fed.Appx. 931 (5th Cir. 2006) (unpub.); *see also Carpenter*, 37 BRBS 149 (rejecting assertion that, even if claimant suffered an aggravating injury, his condition later returned to “baseline level” without any permanent increase in disability).

As reflected in the case law, responsible employer analysis involves consideration of evidence addressing the causality of claimant’s injury/harm and his/her disability. This may include, *inter alia*, evidence addressing the mechanism of claimant’s diagnosed condition;³⁴ the level and underlying cause of symptoms;³⁵ the nature of claimant’s duties and conditions of employment with each employer;³⁶ the occurrence of specific accidents with each employer;³⁷

³⁴ *See, e.g., Siminski v. Ceres Marine Terminals*, 35 BRBS 136 (2001) (arthroscopy showed chronic changes consistent with direct trauma with first employer); *McKnight v. Carolina Shipping Co.*, 32 BRBS 165, *aff’d on recon. en banc*, 32 BRBS 251 (1998); *Price*, 339 F.3d 1102, 37 BRBS 89(CRT) (claimant’s single day of employment prior to a pre-scheduled surgery caused a minor but permanent increase in the extent of his knee disability, and increased the need for pre-scheduled surgery, due to “gradual wearing away of the bone even on the last day before surgery”).

³⁵ *See, e.g., Reposky*, 40 BRBS 65; *Obadiaru, supra*.

³⁶ *See, e.g., Kelaita*, 799 F.2d 1308 (aggravation found based on similar duties with both employers and medical opinions that flare-ups of pain were cumulative trauma which aggravated

the extent of claimant's physical impairment and recovery after the initial injury;³⁸ claimant's need for treatment before and after the alleged aggravation;³⁹ claimant's ability to work and earnings before and after the alleged aggravation;⁴⁰ and the permanency of disability caused by any aggravation.

Sequential vs. Simultaneous Consideration of Evidence

In the context of an occupational disease case, the 9th Circuit rejected the Board's simultaneous analysis of the evidence on the issue of responsible employer and instead adopted

the underlying condition, *i.e.*, a rotator cuff tear); *Foundation Constructors*, 950 F.2d 621, 25 BRBS 71(CRT) (aggravation of back condition found where work with both employers included operating jackhammer and heavy lifting); *Lopez*, 39 BRBS 85 (2005) (signal work contributed to shoulder and knee conditions); *Delaware River*, 279 F.3d 233, 35 BRBS 154(CRT) (finding of no aggravation vacated where claimant had pain flare-ups and credited physician was unaware of his long hours with later employer); *Buchanan II* (aggravation found based on medical opinion attributing separation of the disc and excruciating pain to more strenuous work with second employer); *Obadiaru*, *supra*.

³⁷ See, e.g., *McKnight*, *supra*; *Reposky*, *supra*.

³⁸ See, e.g., *Lake*, 337 F.3d 261 (no evidence that claimant had fully recovered from the first injury before the second injury occurred); *Price*, *supra* (ALJ found that "[s]ince Price was still able to do his job to some extent the day before the surgery, he had not progressed to the point of maximum disability, *i.e.*, total inability to use his legs.).

³⁹ See, e.g., *Price*, *supra*; *Reposky*, *supra*; *Willsey, Jr., v. Jones Oregon Stevedoring Co.*, BRB Nos. 01-319 and 01-319A (Dec. 4, 2001) (unpub.) (vacating ALJ's finding that second employer was liable for disability due to temporary aggravation but not wrist surgery; while credited physicians opined that the second injury did not affect the mechanics of claimant's condition, they also stated that it may have increased symptoms; as the surgery was performed to alleviate increased pain, these opinions may suffice to establish aggravation).

⁴⁰ See, e.g., *Obadiaru*, *supra*; *Lopez*, *supra* (lay testimony regarding claimant's ability to work after each injury and corresponding earnings record supported ALJ's finding of aggravation and also refuted the second employer's argument that claimant was totally disabled before the second injury); *Tate*, *supra* (addressing economic disability/sheltered employment after first injury); *Lake*, 337 F.3d 261, 267 (claimant showed he was partially disabled in medical and economic terms following his first injury); *cf.* *Price* (rejecting the Director's argument that diminished earning capacity should be used as the standard for determining responsible employer in two-injury cases).

sequential § 20(a) analysis starting with the last employer.⁴¹ *Albina*, 627 F.3d at 1301. The court acknowledged the Director’s position that simultaneous imposition of burdens results in uncertainty and confusion, may lead to anomalous or inconsistent results, and does not allocate the risk of non-persuasion between any two potentially liable employers. *Id.* The court further noted that compelling policy arguments support sequential analysis. In particular, this approach serves to “simplify the ALJ’s analytical task,” because it “establishes clearly which of the potentially liable employers bears the burden of proof and because, if the last employer claimed against is determined to be a responsible employer, the ALJ need not analyze the evidence regarding earlier employers.” *Id.* Further, “the sequential approach also makes it easier for a potential employer to anticipate its potential liability, based on its position in the sequence.” *Id.* The court observed in *dicta* that

“[w]hat this court in [*Kaiser*] calls ‘the ‘last employer’ rule or ‘aggravation’ rule’ is actually a different test from the last employer rule applied in occupational disease cases. The rule applied in injury or cumulative trauma cases involves an analysis of whether the claimant's disability is the result of a natural progression of an injury that occurred at an earlier employer, or was aggravated or accelerated by conditions at a later employer. It would be irrational to attempt such an analysis without consideration of the evidence regarding working conditions at *both* employers, and thus a simultaneous analysis is called for in injury cases.”

Albina, 627 F.3d at 1302, 44 BRBS 93(CRT) (cites omitted; emphasis in original).

Like occupational disease cases, multiple traumatic injury cases may involve multiple employers and voluminous evidence, e.g., where cumulative trauma is alleged.⁴² In *Palmer*, the BRB rejected the argument that sequential analysis should be applied in traumatic injury cases, relying on the *dictum* in *Albina*. It also rejected the argument that the *dictum* was limited to cases involving two employers, as this would result in the possibility of different tests being applied dependent upon the number of employers claimed against. It appears that some cases have in effect applied a version of sequential analysis of the evidence by focusing on the initial injury and the alleged aggravation with the most recent employer. *See generally Price*, 339 F.3d 1102, 37 BRBS 89(CRT) (focusing on evidence pertaining to the last of five employers); *see also Lopez*, 39 BRBS 85 (focusing on the one day of work for last employer prior to surgery).

⁴¹ The court observed that a sequential analysis does not affect the burdens of proof already in place, since “once the 20(a) presumption is established, all potentially responsible employers have a burden to disprove liability.”

⁴² Injuries which are not caused by identifiable incidents, but which are gradually produced by work activities or conditions not peculiar to claimant’s employment are classified as accidental injuries and not as occupational diseases. *See, e.g., Foundation Constructors*, 950 F.2d 621, 25 BRBS 71(CRT).

This paper sought to highlight the uncertainties that complicate responsible employer analysis in traumatic injury cases. Despite the BRB's repeated attempts to clarify the applicable analytical framework, methodological inconsistencies persist, although any errors have been deemed harmless by the Board. A clarification, or perhaps a re-examination, of the Board's approach is also appropriate in light of the 9th Circuit's and the BRB's recent statements highlighting the differences between responsible employer rules in occupational disease vs. traumatic injury cases, as prior case law often cross-referenced the two standards.