No. 01-60480
and 01-60508

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NEW ORLEANS STEVEDORES
and
SIGNAL MUTUAL ADMINISTRATION, LTD.,
Petitioners and Cross-Respondents

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,
Respondent
and
PEGGY IBOS,
Respondent and Cross-Petitioner

On Petition for Review of a Final Order
of the Benefits Review Board

BRIEF FOR RESPONDENT DIRECTOR, OWCP

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STATEMENT WITH RESPECT TO ORAL ARGUMENT

The Director, OWCP, requests oral argument. The principal issues presented by New Orleans Stevedores's petition and Ibos's cross-petition (the latter supported by the Director, OWCP) are issues of law with broad precedential significance. To the extent they are not regarded as controlled by existing precedents of this Court, they are particularly suited to examination in oral argument.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

This case is before the Court for review of a decision of the Benefits Review Board, affirming a decision of an administrative law judge ("ALJ"), holding that New Orleans Stevedores ("NOS") is liable for compensation owed to Bertrand and Peggy Ibos under the Longshore and Harbor Workers' Compensation Act ("LHWCA"),[1] but is entitled to credit against such liability for the net amounts

[1] Longshore and Harbor Workers' Compensation Act of Mar. 4, 1927, c. 509, 44 Stat. 1424, *as amended*, 33 U.S.C. §§ 901-950.

received by way of settlements from two of Bertrand Ibos's earlier longshore employers and their insurers.

The jurisdiction of the local "district director" of the Department of Labor's Office of Workers' Compensation Programs was invoked by Bertrand and Peggy Ibos's claims for benefits under the LHWCA. *See* LHWCA § 19(a), 33 U.S.C. § 919(a); 20 C.F.R. §§ 701.301(a)(7). When the parties were unable to resolve the dispute concerning their rights and liabilities under the Act through informal proceedings before the office of the district director, the Department's Office of Administrative Law Judges was vested with jurisdiction to resolve the claim, by "compensation order," after a formal hearing, upon referral by the district director. *See* LHWCA § 19(c)-(e), 33 U.S.C. § 919(c)-(e); 20 C.F.R. §§ 702.311, .316-.317, 702.331-.349. The Benefits Review Board had jurisdiction of the appeals from the ALJ's decision under LHWCA § 21(b)(3), 33 U.S.C. § 921(b)(3).

Section 21(c) of the Act, 33 U.S.C. § 921(c), provides for judicial review of a "final order of the Board" by the court of appeals for "the circuit in which the injury occurred," on petition for review filed within sixty days of the Board order by a "person adversely affected or aggrieved." The Iboses' claims were based on conditions of employment on the New Orleans waterfront (*e.g.*, Record Excerpts ("R.E.") # 4 at 4), within this Circuit. The Board's decision of May 9, 2001 (R.E. # 3) affirmed the ALJ's decision (R.E. # 4), and thereby ended the administrative

proceedings on the claim. Accordingly, it was a "final order" within the meaning of LHWCA § 21(c). *See*, *e.g.*, *Newpark Shipbuilding & Repair, Inc. v. Roundtree*, 723 F.2d 399 (5th Cir.) (*en banc*), *cert. denied*, 469 U.S. 818 (1984). NOS and its insurer Signal filed their petition for review in this Court on June 21, 2001 (R.E. # 2), and Peggy Ibos filed her petition for review on June 29, 2001, within 60 days after the Board's order. The Court thus has jurisdiction under § 21(c).

QUESTIONS PRESENTED

1. Whether NOS is liable for Ibos's mesothelioma under the LHWCA because it was the last LHWCA employer to expose him to asbestos, at a level capable of causing mesothelioma if experienced over a prolonged period, prior to the appearance of the disease, even if the exposure in its employ did not actually contribute to the compensable disease.

2. Whether NOS can reduce its liability by the amount Ibos received, before the determination of the compensability of the disability and the identity of the liable employer, in settlements with other employers who were potentially (but, as subsequently determined, not actually) liable for the same compensation under the Act.

STATEMENT OF THE CASE

A. Proceedings Below

Bertrand Ibos was a New Orleans longshoreman from 1947 until October 1995, when declining health forced him to stop working. He filed a claim for disability benefits under the LHWCA based on the occupational disease of mesothelioma, a cancer of the pleura resulting from asbestos exposure. The claim ran alternatively against his last three contracting-stevedore employers – Anchor Stevedoring, Valor Stevedores, and NOS. All three employers denied responsibility. He died in February 1996, without any of his former employers having accepted any responsibility for compensation or medical care under the Act. His widow, respondent Peggy Ibos, filed a claim for death benefits against the same three employers.

The district director with whom the claims were filed was unable to bring about agreement among the parties, and referred the claims for formal hearing and resolution by an ALJ. Peggy Ibos then entered into settlements with Anchor and Valor, and those settlements were approved by the ALJ pursuant to LHWCA § 8(i), 33 U.S.C. § 908(i), discharging any potential liability of those employers on the claims. After a hearing on the claims against NOS, the ALJ held in April 2000 that Bertrand Ibos's four months of total disability and his death were compensable under LHWCA §§ 8 and 9, 33 U.S.C. §§ 908, 909, on the ground that his disabling

and fatal cancer was indeed mesothelioma, resulting from exposure to asbestos in the course of his longshore work generally. He determined that New Orleans Stevedores was the last of Ibos's series of LHWCA employers to expose him to asbestos before the appearance of the disease, and as such bears full liability under the Act. R.E. # 4 at 18-24. He further held, however, that NOS was entitled to "credit" against this liability, for the net amount of the $150,000 in approved settlements under the Act paid by Anchor and Valor (and their insurers under the Act). *Id*. at 24. On appeals by both NOS and Peggy Ibos, the Benefits Review Board affirmed in all respects. *Ibos v. New Orleans Stevedores*, 35 B.R.B.S. 50, 2001 WL 618454 (R.E. # 3).

B. Statement of Facts

The facts relevant to the Court's review may be briefly stated and are essentially undisputed. Bertrand Ibos worked as a stevedoring clerk and superintendent from 1947 to 1995. R.E. # 4 at 4. He was employed by many employers during this career; the ALJ enumerated 39 stevedoring firms and shipping lines, as well as the local shipping-lines organization and the longshoring union, for whom he had worked. *Id*. He was employed by NOS from 1951 to 1954, and from September 1993 to October 1995. *Id*. He was exposed to potentially harmful concentrations of asbestos dust throughout this career, and NOS does not dispute that he had such exposure during his final tenure with it. *Id*.

at 20-21, 22; Pet. Br. 6. His disabling and fatal mesothelioma – a uniformly fatal cancer of the lining of the pleural cavity, uniquely associated with asbestos exposure – first became symptomatic, and was provisionally diagnosed, in August 1995. *E.g.*, R.E. # 4 at 4-5.

NOS presented medical-opinion evidence that mesothelioma has a "latency period" – a delay between the inhalation of the asbestos fibers that set the disease process in motion on the cellular level and the appearance of a detectable tumor – variously estimated as at least ten to more than forty years. R.E. # 4 at 12-13, 14. The ALJ made no finding with respect to the latency period, since he ruled that "[t]he case law is clear [that] injurious exposure alone renders NOS liable, regardless of whether that asbestos exposure was actually causative of Claimant's mesothelioma," taking "injurious exposure" to be exposure of a kind capable, if continued over time, of giving rise to the disease. *Id*. at 23, 24.

The Board affirmed on the basis of the same view of the law: even if NOS's medical-opinion evidence were taken to establish that Ibos's exposures to asbestos in the course of his work for NOS in 1993-95 made no causal contribution to the course of his illness or the timing of his death, "[a]s these medical opinions do not establish that the asbestos exposure experienced by decedent at NOS did not have *the potential to cause mesothelioma*, they are insufficient to relieve NOS of liability for this claim." R.E. # 3 at 7.

The facts relevant to the issue presented by cross-petitioner Ibos are even simpler. Peggy Ibos entered into settlements with Bertrand Ibos's next- and third-to-last employers, Anchor and Valor, and their LHWCA insurers, compromising and releasing their potential liabilities on the claims, for a combined gross amount of $150,000. The ALJ approved those settlements under § 8(i) of the Act, and thereby validated the releases, before the hearing. R.E. # 4 at 2. The ALJ held that NOS was entitled to credit the net amount of the settlements against its liability pursuant to an extrastatutory "general credit doctrine," intended to foreclose "double recovery," which he took to be established by Board authority and this Court's decision in *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986) (*en banc*). R.E. # 4 at 24. On the claimant's appeal, the Board affirmed on the same ground. R.E. # 3 at 7-8.

SUMMARY OF ARGUMENT

I. The LHWCA imposes liability on "[e]very employer," "irrespective of fault," for compensation for disability or death resulting from "such occupational disease as arises naturally out of such employment." LHWCA §§ 2(2), 4(a), (b). The assignment of liability under these provisions for a worker's occupational disease caused by hazards experienced in work for a series of employers, or under a series of insurance carriers, follows the "last employer rule." This rule was long established as a matter or administrative practice under the Act even before it was

first judicially approved in the landmark case of *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955). The *Cardillo* court found that congressional intent supported the administrative practice of assigning liability in full to the *last* employer that exposed the worker to the condition that led to the disease, prior to the time the disability resulting from the disease became manifest, even though the disease in the particular worker's case "may not have been attributable at all to the employment by the last employer." This principle has been repeatedly confirmed since then under the LHWCA, and has become well established as a matter of general workers'-compensation law in the absence of statutory provisions requiring a different approach.

The last-employer rule is thus not a "presumption" of actual causal contribution, subject to rebuttal by medical evidence, but a rule of law making inquiry into causation by particular exposures irrelevant and unnecessary. It attaches liability in an individual case to the worker's last "injurious exposure" before the onset of the disabling disease. The term "injurious exposure" does not connote exposure that actually causally contributed to the appearance of the disease in the claimant, but rather exposure to general dangerous working condition that can cause the disease. This rule thus avoids the need for medical speculation about causation by particular exposures in the individual case. The employer can, of course, rebut the presumption, under LHWCA § 20(a), that it is

liable as claimed, by showing that the disease is not of (general) occupational origin, or that it did not expose the worker to the relevant hazardous condition, or that a later maritime employer also so exposed the worker before the disease developed to the point of disability. But it cannot avoid liability by showing that its exposure of the worker to injurious levels or concentrations of the relevant substance or condition did not actually causally contribute to the appearance of the disabling disease thereafter, because such individualized causation is not the basis of liability. The ALJ and the Board correctly applied the last-exposure principle to hold NOS liable.

II. The Board erred in allowing the liable employer to take credit, against the amounts of liability prescribed by the Act, for the net amounts paid by the settling employers. Those employers would have had no liability under the ALJ's subsequent resolution of the claims. It based that reduction of liability on an unwarranted extension of the "*Nash* credit doctrine." That doctrine is properly applicable only in its own context – where the "aggravation rule" is applied to an on-the-job injury that worsens a *previous injury* for which the worker has received "scheduled" compensation under the Act. The Board has extended the extrastatutory allowance of credit from this narrow class of cases to the context of a single claim against multiple potentially liable employers, solely on the basis that the claimant should not be allowed to achieve a "double recovery." The Supreme

Court and other courts of appeals have recognized in several recent cases, however, that no rigid rule prohibits a claimant's receipt of more than a complete recovery of compensation, warranting the creation of an extrastatutory mechanism to release the liable employer from the compensation for which it is responsible under the Act simply because the claimant will otherwise recover "too much." *Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates)*, 519 U.S. 248, 261 (1997); *Todd Shipyards Corp. v. Director, OWCP (Chavez)*, 139 F.3d 1309, 1312-13 (9th Cir. 1998); *Taylor v. Director, OWCP*, 201 F.3d 1234 (9th Cir. 2000). As in the case of non-settling maritime tortfeasors (*McDermott v. AmClyde*, 511 U.S. 203 (1994)), the liable employer should be required to pay the same amount it would have owed absent any settlement with other potentially liable parties. The claimant undertakes a risk of undercompensation in the event he has released the only liable employer, and the liable employer has no reason to complain if the claimant receives something more, in the aggregate, than he or she would have if there had been no settlement, since the claimant does so without imposing any additional liability on the responsible party.

ARGUMENT

Scope of Review

The issues presented are exclusively questions of LHWCA law, not of record-based fact. With respect to such issues, judicial review of the ALJ's and Board's rulings is plenary. *E.g.*, *Pool Co. v. Cooper*, — F.3d —, 2001 WL 1485627 at *3, No. 99-60615 (5th Cir. Nov. 20, 2001). The Board's views are entitled to no deference, because its purely quasi-judicial role is distinct from the policy-making authority of the official charged with the administration of the Act. *E.g.*, *Potomac Electric Power Co. v. Director, OWCP,* 449 U.S. 268, 278 n.18 (1980).

This Court has long recognized that the views of the Director, as the administrator of the LHWCA, on questions of LHWCA law are entitled to deference. *E.g., Boudreaux v. American Workover, Inc.,* 680 F.2d 1034, 1046 & n.23 (5th Cir. 1982) (*en banc*), *cert. denied,* 459 U.S. 1170 (1983). It has recently clarified that, under the Supreme Court's approach in *United States v. Mead Corp.*, 533 U.S. —, 121 S. Ct. 2164, 2172 (2001), the deference due the Director's interpretations advanced in litigation is "not *Chevron* deference, but *Skidmore* deference," i.e., "'will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'"

Pool, 2001 WL 1485627 at *3 & n.3, *quoting Mead*, 121 S. Ct. at 2172, *quoting Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

The issue presented by petitioner NOS concerns the long-established "last employer rule" for determining which among several employers who exposed a worker to the working conditions that have led to the development of an occupational disease is liable under the Act (and which among the insurance carriers of the liable employer bears its liability). As explained hereinafter, the administrative construction relevant to this issue appears to have been adopted in the administration of the Act from its inception nearly seventy-five years ago, and in any event long predated its first judicial approval in 1955. It is thus of the most longstanding consistency, applied in tens of thousands of cases. NOS argues that the last such employer (or insurer) can avoid liability by showing that it is more likely than not that the particular worker's exposure in its employ (or while the insurer was on the risk), although of a kind to cause the disease over a prolonged period, was not medically causative of that worker's disease (even by way of material aggravation, acceleration, or worsening of symptoms). The Director's opposition to that argument is not only supported by the legislative history of the Act's passage in 1927, by decades of consistent administrative practice (and assertion of the construction in litigation presenting the question), and widespread judicial acceptance. It is also supported by practical considerations, which the

Director is particularly well situated by administrative experience to judge, concerning the effects of the contrary rule urged by NOS – the expense to all parties, and particularly the frustration of the legislative purpose of prompt provision of the Act's benefits to disabled workers and the families of deceased workers that is at the heart of the legislative trade-off that the workers'-compensation system constitutes. *Cf.*, *e.g.*, *Potomac Electric Power Co. v. Director, OWCP*, *supra* at p. 11, 449 U.S. at 281-82 & n.24, and authorities quoted therein. The Court owes deference not only because of the longstanding administrative construction and practice but also, and particularly, because of the Director's experience-based evaluation of the adverse effects of a contrary rule.

Likewise, the Director's position on the issue presented by cross-petitioner Peggy Ibos is a proper subject of particular judicial deference. The Director submits that the Board's recently established rule allowing the liable employer to reduce the full liability it bears under the statute by the net amount the claimant has received in settlements under the Act, from other former employers who were potentially liable instead of the non-settling employer, is contrary to law. *See* Part II *infra*. The Director's position is supported by the general legal proposition that remedies for which the Act explicitly provides only under some circumstances, should not be allowed under others. Moreover, the Supreme Court has rejected the Board's approach in the parallel situation in multiple-defendant maritime tort

cases. The Director's position is also based on his evaluation of the practical effects of the Board's rule on the complexity of proceedings and the promptness of payment of benefits under the Act in occupational-disease cases. The administrator of the Act is uniquely positioned to make that evaluation, and – to the extent the result is not dictated by entirely legal principles in any event – the Court should defer to it.

I

NOS IS THE LIABLE EMPLOYER UNDER THE ACT BECAUSE IT EXPOSED IBOS TO ASBESTOS, AT A LEVEL THAT HAS NOT BEEN SHOWN TO BE INCAPABLE OF CAUSING MESOTHELIOMA IF EXPERIENCED OVER A PROLONGED PERIOD, AND WAS THE LAST LHWCA EMPLOYER SO TO EXPOSE HIM PRIOR TO THE APPEARANCE OF THE DISEASE, WHETHER OR NOT, AS A MATTER OF MEDICAL CAUSATION, THE EXPOSURE IN ITS EMPLOY ACTUALLY CONTRIBUTED TO THE COMPENSABLE DISEASE.

A. The Statutory Provisions and the *Cardillo* Formulation

Section 3(a) of the LHWCA, entitled "Coverage," provides generally that "compensation shall be payable under this Act in respect of disability or death of an employee[[2]] . . . result[ing] from an injury occurring upon the navigable waters of the United States (including [maritime-use areas ashore])." 33 U.S.C. § 903(a).

[2] "Employee" is defined in the Act generally as a "person engaged in maritime employment," with certain specific inclusions and exclusions. LHWCA § 2(3), 33 U.S.C. § 902(3).

The Act defines "injury" as an "accidental injury arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury[.]" LHWCA § 2(2), 33 U.S.C. § 902(2). Finally, LHWCA § 4, 33 U.S.C. § 904, "Liability for Compensation," states that "[e]very employer shall be liable for and shall secure [through insurance or authorization to act as a 'self-insurer'] the payment to his employees of the compensation payable" under the Act, "irrespective of fault as a cause for the injury."

The statute does not address how the liable employer or employers, and insurer or insurers, are to be identified where an "occupational disease . . . arises naturally out of . . . employment" with multiple covered employers, or while an employer is insured serially by multiple carriers. The first reported decision to consider that question, *Travelers Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955), involved three shipyard workers who, as a result of their noisy work environments over the course of years, had suffered permanent hearing losses, which had become substantial by the time they were recognized. 225 F.2d at 139-42. Although only one of the three had worked for more than one shipyard, and that one had been employed by only two, the employers had been insured by a series of insurance carriers over the years of the claimants' work, and in one of the cases the final carrier was on the employer's risk only for the last

week before the hearing loss became manifest (and quantified) by medical testing. *Id*. As the court recounted,

> The nature of occupational diseases and the dearth of medical certainty with respect to the time that is required for them to develop and the permanence and extent of the resultant injurious effects at different stages of the diseases' evolution, make it exceedingly difficult, if not practically impossible, to correlate the progression of the disease with specific points in time or specific industrial experiences. Realizing this difficulty, and in the absence of a specific legislative provision indicating an appropriate method for allocating liability, the various Deputy Commissioners sought a formula which they believed would be administratively feasible and would at the same time effectuate the beneficial purposes of the Act. The method selected was that used in these three cases, namely, holding "the employer in the last employment during which the injurious and cumulative effects of the occupational exposure manifested themselves" principally liable, and holding "the carrier or carriers covering the employer during such last employment jointly, severally and equally responsible for the discharge of the duties and obligations of the last employer in respect of such liability."

Id. at 144.

The court then found the already long-established administrative approach to the liable-employer question to be just what Congress understood and intended to be the effect of the Act's provisions. It held that a parallel approach to the insurer-liability problem was appropriate, placing full liability on the last insurer instead of splitting the liability among all the carriers who insured the liable employer during

the worker's final tenure before the manifestation of the disease. The Court noted the "absence of any reference in the statute to the precise point" and turned to the legislative history "for such light as it may afford." *Id.* at 145.

> That the Congress was not unaware of the difficulty that might arise with respect to occupational disease seems clear. During the course of the hearings which preceded the passage of the Act, an employer representative suggested that the Act should contain a provision limiting the proportion of the total award for which a particular employer could be held liable, to the same ratio as the extent of the damage done during the period worked for that employer bore to the total disability. It was acknowledged that, absent such a provision, a "last employer" would be liable for the full amount recoverable, *even if the length of employment was so slight that, medically, the injury would, in all probability, not be attributable to that "last employment."* Nevertheless, the Congress evidently declined to adopt the suggestion thus proffered; and it would seem a fair inference that the failure to amend was based upon a realization of the difficulties and delays which would inhere in the administration of the Act, were such a provision incorporated into it. Thus we conclude that the Congress intended that the 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.

Id. (footnote omitted; emphasis added).

The colloquy between members of the committee that drafted and reported the bill that became the Act and an industry witness on which *Cardillo* relied fully

supports not only the *Cardillo* court's view but also the heretofore settled reading of "injurious stimuli" in its formulation to mean conditions capable, if experienced over a prolonged period, of giving rise to the disease in question. *To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Employments: Hearing before the House Judiciary Committee on H.R. 9498*, 69th Cong., 1st Sess. 72-75 (1926) ("*1926 Hearings*"). After some discussion, all those involved in the hearing accepted that, as the witness complained, in the absence of a provision providing a different rule, "if a disability [resulting from an occupational disease] occurs during his employment [involving exposure to the hazard that produces the disease in general], that is enough to put upon the employer at the time that disability occurred the entire expense" – even though the disease in the particular worker's case "may not have been attributable *at all* to the employment by the last employer." *Id*. at 74 (emphasis added).[3] When pressed on the impracticality of requiring the worker with an occupational disease to show "where he got it," the witness urged adoption of a provision modeled (like much of the rest of the LHWCA as adopted in 1927) on a provision of the New York workers'-compensation law, which limited the inquiry to the worker's

[3] *See also id*. at 72 (where a long-term "painter, for instance, would work for an employer for one day and would be taken ill and would be suffering from lead poisoning, . . . that particular employer [would be liable] because he happened to have this man in his employ for a few hours of a day for what occurs to this man which was contracted in an entirely different employment under an entirely different employer").

exposures during the one year before the disease became manifest, and apportioned liability among the employers who exposed him or her during that year. The New York law ignored earlier exposures, not because they were any less causative than those in the final year, but apparently because of the practical problems presented by proof of earlier working conditions and of the involvement of what could be a very large number of previous employers. A member of the committee responded,

> Why not [leave full liability on the last employer before manifestation]? It is a rule of employment, and the [workers] are coming in and going out all the time. Why not provide that the present employer shall bear the burden of the man who is suddenly seized with this disease, which everyone knows is incident to his employment [generally], but which has its culmination suddenly[?]

Id. at 74-75. Although the Act was understood to create a "rule of employment," independent of actual causal contribution in the individual case, absent the addition of a provision such as that suggested by the witness, the drafting committee made no such change. Just as the *Cardillo* court reasoned, the apparent congressional intent in adopting the Act without a special provision on the point was that the last employer to expose the worker to the harmful working condition, before the disease resulting from his or her overall occupational exposure becomes manifest in disabling degree, is liable in full, without regard to whether the exposure with that employer has actually contributed to the disease.

NOS repeatedly characterizes the rule approved in *Cardillo* as "the *Cardillo* presumption" – that is, as merely establishing that causal contribution by the exposure in the last employment is "presumed," subject to rebuttal by evidence of lack of contribution. *E.g.*, Pet. Br. 2 (first Question Presented), 16-17 (Summary of Argument), 21-24, 29-30 & *passim*. On the contrary, the last-employer rule cannot fairly be characterized as in the nature of a "presumption" at all. The *Cardillo* decision did not even use the word, or otherwise introduce the concept, of a "presumption." Instead, it found, as a matter of "legislative interpretation," that full liability was intended by Congress to rest on the last exposing employer regardless of the absence of actual causal contribution by the final exposure. 225 F.2d at 145. Inquiry into causation by particular exposures would be flatly inconsistent with the plain reasoning of *Cardillo*. The understanding of the drafters of the Act, implemented by the Act's administrators and confirmed by the *Cardillo* court, was clear: where the worker's overall "occupational" exposure to a hazardous working condition, in the course of work for any number of employers over an extended period, produces a disease, the last employer to expose the worker to that condition bears full liability *even if* it is proved that "medically, the injury would, in all probability, *not be attributable* to that 'last employment,'" *Cardillo*, 225 F.2d at 145, or that it was "*not . . . attributable at all* to the employment by the last employer," *1926 Hearings*, at 74 (emphases added).

NOS's argument proceeds from the premise that § 2(2) absolutely requires that liability of a particular employer for an individual worker's occupational disease be predicated only on some degree of actual contribution (whether demonstrated by evidence or "presumed") to the worker's condition by exposure to the injurious condition in its employ. NOS explains its basis for this proposition only cursorily, claiming without explanation that § 2(2) contains an "unambiguous statutory requirement that liability may be imposed on the employer only if the injury arises out of and in the course of employment." Pet. Br. 18. It then proceeds to the assertion that "a true causal link, whether presumed or proved, is clearly mandatory" under § 2(2), *id*. at 24, and that "the abstract 'potential' [of the employer's working conditions] to cause the employee's disease" is not enough where the employer shows that there was no actual causal contribution by the exposure in its employ, *id*. at 25. The sole authorities NOS cites for the criticality of an actual causal relationship between work and injury, *id*. at 19, 20-21, are early decisions under the Act, nearly all of which had nothing to do with occupational diseases, but concerned traumatic injuries.[4]

[4] NOS adduces seven decisions under the Act, issued between 1932 and 1965, in support of the general proposition that liability cannot be imposed without actual causation. Pet. Br. at 19-21. Of these, only one – an unreviewed district-court decision, *Trudenich v. Marshall*, 34 F. Supp. 486, 488 (W.D. Wash. 1940) – addressed the occupational-disease prong of the definition of a compensable "injury" at all; but that case involved a heart attack at home, days after strenuous work had brought on angina pains, and medical evidence that notwithstanding its effect on the angina, the exertion at work had no role in the occurrence of the disabling heart attack. The case plainly did not consider any aspect of the issue presented by *Cardillo*, and the present case,

whether liability for an occupational disease resulting from the conditions of work for a long series of short-term employers can be attached to the last exposure to those *conditions*, pretermitting inquiry into whether that exposure was too brief or too late to have actually contributed to the disease in the individual case. Some of the authorities upon which NOS relies asserted the "peculiar risk" principle that is long outdated as a matter of general workers'-compensation law, *see generally* 1 Rex Larson & Arthur K. Larson, *Law of Workers' Compensation* § 3.01). Indeed, one of those decisions, *Indemnity Insurance Co. of N. Am. v. Hoage*, 58 F.2d 1074 (D.C. Cir. 1932), which NOS describes as "remain[ing] good law today," Pet. Br. 21, was reversed by the Supreme Court (*Voehl v. Indemnity Ins. Co. of North America***,** 288 U.S. 162 (1933)).

This purported analysis is far off the mark. Again (*see* p. 14-15 *supra*), there are two prongs to the statutory definition of an "injury" – "[1] accidental injury arising out of and in the course of employment, *and* [2] such occupational disease or infection [a] as *arises naturally out of such employment* or [b] as naturally or unavoidably results from such accidental injury[.]" LHWCA § 2(2). Thus, NOS does not even address the part of § 2(2) relevant to occupational-disease cases – not "accidental injury arising out of and in the course of employment," but (so far as here relevant) "such occupational disease as arises naturally out of such employment." LHWCA § 2(2), quoted at pp. 14-15 *supra*. It is not far-fetched in the least to take this phrase to support precisely the analysis warranted by *Cardillo*: sensorineural hearing loss due to cumulative noise exposure above some threshold loudness is an "occupational disease," and that disease can be said to "arise naturally out of" any employment that involves enough exposure to noise loud enough to lead to the disease over time, even if the individual worker whose hearing loss becomes manifest while working for that employer has not worked there for long enough for the conditions actually to have affected the course of development of his or her deafness. Likewise, as demonstrated by the evidence adduced by NOS in this case, mesothelioma "arises naturally out of" any employment – such as Ibos's work for NOS in 1993-95 – that involves exposure to more than extremely low levels of respirable asbestos dust, even though it may not

so arise until many years after such exposure and so may not have been affected in the individual case by that particular exposure if the disease becomes manifest within some period thereafter. CX-31 at 10 (Dr. Martin: "latency period" usually between ten and forty years); CX-15 at 49 (Dr. Sandler: twenty to forty years or more; *but see id*. at 70: "could occur" in as little as two years); R.E. # 4 at 12, *citing* CX-20 at 57-58 (Dr. Caputto: in excess of ten to fifteen years).

NOS simply ignores the relevant statutory terms and their intended reading. The "causation principles embodied in 33 U.S.C. § 902(2)," Pet. Br. 20, with respect to occupational diseases, are readily subject to the longstanding construction that requires only that the conditions of the employment in which such a disease appears be *of a kind* that produces that disease. Repetition of the proposition that the statute "mandates" an actual-causation principle, without attention to the relevant text of the statute, cannot make it so.

B. Post-*Cardillo* Jurisprudence

NOS mischaracterizes not only *Cardillo* but also the subsequent decisions of this and other courts of appeals. It asserts that the Board has "overread" them, Pet. Br. at 26, and that they actually (although covertly) support the idea that proof of the absence of actual causal contribution to the worker's disease, by the exposure with the last employer before manifestation, will absolve that employer and send the claimant, and the other parties, on a search for the last actually contributory exposure, perhaps in the remote past, *id*. at 28-29. The *Cardillo* view that the lack of actual contribution is irrelevant, however, far from being aberrational and contrary to the "clear mandate" of the statutory terms, is standard general workers'-compensation law:

> Traditionally, courts applying the last injurious exposure rule have not gone on past the original finding of some exposure to weigh the relative amount or duration of exposure under various carriers and employers. As long as there was some exposure *of a kind* that could have caused the disease, the last insurer at risk is liable for all disability from that disease.

9 *Larson*, *supra* at p. 22 n.5, § 153.02(7)(a) (emphasis added).[5] The LHWCA

[5] *See*, *e.g.*, *Royal Globe Ins. Co. v. Collins*, 723 P.2d 731 (Colo. 1986) (recognizing that "[s]ome jurisdictions have developed a 'contribution' test for application of a last injurious exposure standard," but adhering to the standard of the last exposure *of a kind capable* of producing the disease); *Monfort, Inc. v. Rangel*, 867 P.2d 122 (Colo. App. 1993) (adhering to *Royal Globe* after statutory amendment); *Wood v. Harry Harmon Insulation*, 511 So.2d 690 (Fla. App. 1987) (rejecting argument that, to be considered an "injurious" exposure for purposes of determining last employer to have exposed worker to "injurious" conditions, "the exposure must aggravate or

jurisprudence has adhered with general consistency to the principle of the general rule that actual causation is irrelevant so long as the exposure at the last employer was "of a kind" to produce the disease if it had been continued over time.

Thus, for example, the two most directly relevant authorities under the LHWCA each involved imposition of liability under the Act for long-latency asbestos-related cancer on a "last employer" (or insurer) that was responsible only for asbestos exposure well within any arguable "latency period" between the exposures that set the cancer in motion and the appearance of the disease. *Norfolk Shipbuilding & Drydock Co. v. Faulk*, 228 F.3d 378 (4th Cir. 2000); *Lustig v. United*

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cause the disease because such a rule would be contrary to the purpose of the last injurious exposure requirement . . .. We believe the better view is that so long as the exposure in question, independent of other causes, could over extended time lead to development of the disease, then that exposure is "injurious."); *McCormick v. United Nuclear Corp.,* 557 P.2d 589, 594 (N.M. App. 1976) ("[A]ny exposure 'of a kind contributing to the disease' while in the employ of the last employer is sufficient as a matter of law to make the last employer solely liable."); *Meyer v. State Acc. Ins. Fund Corp.*, 692 P.2d 656, 658 (Or. App. 1984) ("That the 1978 exposure was not the actual cause of claimant's present condition does not absolve [the employer] from responsibility, for the appropriate inquiry under the last injurious exposure rule is not whether the conditions of the last employment actually caused the disease, but whether those conditions were of a kind which could have caused the disease over some indefinite period of time. "); *Reese v. CCI Const. Co.*, 514 S.E.2d 144, 146 (S.C. App. 1999) (adopting "of a kind contributing to thedisease" standard described in *Larson*, even where evidence showed no actual contribution by final 24 days' work).

To be sure, this approach is not universal; "[o]ther courts have . . . held that in order to impose liability on the insurer who was last at risk, the exposure during its period of risk must have been of such length or degree that it could have *actually* caused the disease." *Id*. (emphasis in original). But in most instances the courts that have so held were operating under a statutory standard explicitly requiring that liability rest on the last employer with whom exposure was a "substantial contributing cause" of the disability (or some such formulation), which is absent from the LHWCA. *Id*.

States Department of Labor, 881 F.2d 593 (9th Cir. 1989).[6] In each, the court correctly read the *Cardillo* last-employer, last-insurer principle to make that circumstance irrelevant, so long as the exposure was of a kind that could have produced the disease over time.

In *Lustig*, the last insurer for the liable employer was on the risk only for the last seven and a half years of the worker's nearly twenty-three-year tenure with the shipyard employer before he became totally disabled by asbestos-related lung cancer. 881 F.2d at 594. That insurer contended that the relatively light exposures during its time on the risk were too close in time to the appearance of the cancer, said to have at least a ten-year latency period, to have contributed causally to its development., i.e., that those exposures "would not have had any effect on Mr. Lustig's disability." *Id*. at 596. The court readily rejected the contention:

> This argument suggests an unwarranted change of the "last employer rule" set forth in [*Cardillo*], which change we decline to adopt. Aetna provided coverage during the last approximately eight years of Mr. Lustig's employment at Todd. During this period, Mr. Lustig was exposed to asbestos. As the carrier who last insured Todd during Mr. Lustig's tenure of employment, Aetna is liable for the full amount of the claim.

Id.

NOS dismisses *Lustig* as one of the authorities the Board has "overread,"

[6] NOS miscites *Lustig* as a 1983 decision of the Fourth Circuit. Pet. Br. at 26.

simply describing it as having "involved twenty-two years of employment" with the employer held liable. Pet. Br. at 26; *see also id*. at 29. But this account ignores the issue the court addressed. The question presented in *Lustig* was which *insurer* was liable. The carrier challenging the imposition of liability on it under the *Cardillo* rule had been on the risk only for the final third of that period. The carrier disputed its liability based on its showing that the effects of asbestos exposure in producing the kind of lung cancer that afflicted the claimant had a latency period of at least ten years, i.e., that the exposure during its period of insurance coverage *did not actually contribute*.

NOS also suggests that "there is no indication that the ALJ in *Lustig* had any evidence [before him] of the sort presented here," i.e., that there was no evidentiary foundation for the presentation of the no-actual-contribution argument. Pet. Br. at 27 n.5. This is no more than an unreasonable guess. Neither the Board (*see Lustig v. Todd Shipyards Corp.*, 20 B.R.B.S. 207, 212, 1988 WL 232813 (1988)) nor the court mentioned any lack of evidentiary support for the no-contribution argument, but addressed and rejected the argument on its merits for legal insufficiency. *Lustig* is directly on point and stands for the proposition that a demonstration that the exposure to which liability attaches need not have made any actual causal contribution to the development of the disease, so long as it of the kind that can produce the disease in question over time.

Likewise, NOS misreads *Faulk*. NOS describes the employment to which liability for the claimant's mesothelioma was attached in *Faulk* as "eighteen years of employment," Pet. Br. 26, and fails even to mention that the worker's only definitely identifiable exposure to asbestos in those years (unlike the substantial exposure in his previous work for another shipyard) was a single shipboard incident, during most of which the worker wore a protective respirator (228 F.3d at 381-82). NOS also neglects to mention that the single exposure in *Faulk* incident occurred after the onset of the symptoms that were diagnosed as mesothelioma, and only a month or so before his disease became totally disabling (*id*. at 387-88). Then, after quoting *Faulk*'s statement that "[a]n injurious exposure is one which had the potential to cause the disease or harm at issue," 228 F.3d at 385, NOS claims that the "full text" of the decision demonstrates that "potential" means, not the kind or intensity of exposure that can give rise to mesothelioma (if the worker lives long enough after it occurs to develop that disease), but the potential to *have caused* the disease at issue in the claimant. Pet. Br. at 26-27.

On the contrary, the full text of *Faulk* shows precisely the opposite. The court affirmed the imposition of liability on the last employer based on the brief exposure a month before the claimant's mesothelioma became totally disabling (and after the onset of its symptoms). Its statement that that employer's latency-period evidence did not make it "factually impossible for Faulk to have sustained

injury by his exposure at Norfolk," 228 F.3d at 387, cannot reasonably be read as NOS reads it – in effect, taking "for Faulk to have sustained injury by" that exposure to mean "for that exposure to have contributed to the development of the mesothelioma of which he was already suffering the early symptoms." The circumstances of the case make it plain that the court could only have meant what its words more naturally convey: that the exposure was not shown to have been *of a kind* so limited that it could not lead to mesothelioma if given enough time to work within the body.

Although none of this Court's authorities has been as closely on point as *Lustig* or *Faulk*, they have been consistent in approach with the generally uniform understanding of the "injurious exposure" required by the *Cardillo* rule. In *Avondale Industries, Inc. v. Director, OWCP (Cuevas)*, 977 F.2d 186 (5th Cir. 1992), a hearing-loss case, the Court quoted a decision of the Board holding that once the claimant has shown a physical harm and working conditions in the defendant employer's work that could have caused it, a presumption of liability arises, which the employer can rebut by showing either "that exposure to injurious stimuli did not cause the harm . . . [or] that [the] employee was exposed to injurious stimuli while performing work covered under the [LHWCA] for a subsequent employer." *Id*. at 190, *quoting Susoeff v. San Francisco Stevedoring Co.,* 19 B.R.B.S. 149, 1986 WL 66392 at *2 (1986).

NOS describes this discussion as "consistent with the Court's treatment of the LHWCA's section 20(a) type presumption in the eligibility context," Pet. Br. at 22, and thus advances it in support of the proposition that the "*Cardillo* presumption" is "rebuttable." LHWCA § 20(a), 33 U.S.C. § 920(a), creates a presumption, "in the absence of substantial evidence to the contrary, that the claim comes within the provisions of this Act." *Susoeff*, however, did not describe *Cardillo* as creating a "presumption" of the same "type" (rebuttable by evidence) as that expressly created by § 20(a). Rather, it addressed occupational-disease cases in which the *elements of recoverability* against a particular employer are established by *Cardillo*, and described the effect of the § 20(a) presumption itself. The presumption attaches to the requisites of a valid claim, and it is the *Cardillo* rule that defines what those are in occupational-disease cases as against a particular employer: that the "harm" in question arises out of the worker's overall history of employment exposure to some causative working condition, in however long a series of employers; that his or her work for the assertedly liable employer involved exposure to the kind of conditions that caused that harm; and that it was his or her last employment involving such exposure before the manifestation of disability. Of course the employer can rebut the § 20(a) presumption by showing that any of these conditions was not actually satisfied – that the "harm" is not due to occupational exposures (at that employer's workplace or any other), or that the

claimant's work for it did not expose him or her to the "injurious stimuli" relied upon, i.e., to the kind of condition that did give rise to the disease, or that the claimant had further exposure to such conditions in subsequent maritime work before the onset of the resulting disability.

The *Cuevas* Court's very next paragraph, after that on which NOS places its reliance, fully clarifies the critical point: "The Fifth Circuit has further held that, regardless of the brevity of the exposure, if it has the potential to cause disease, it is considered injurious. *Fulks [v. Avondale Shipyards, Inc.]*, 637 F.2d [1008,] 1012 [(5th Cir.)] (refusing to set *de minimis* standards for duration of exposure)[, *cert. denied*, 454 U.S. 1080 (1981)]." 977 F.2d at 190. This statement flatly contradicts NOS's position that an exposure is not considered "injurious," so as to be a basis for the imposition of liability, if it is shown that, more likely than not, that exposure did not actually contribute to the disease for which compensation is claimed, and that it is not enough that it had the potential, given enough time, to do so.

In sum, the decisions of this Court and those of other circuits specifically reject the efficacy of a defense based on a showing that the exposures relied upon were within the "latency period" of the disease for which benefits are claimed, and hence that the claimant's disease could not have been actually attributable to those exposures even in part. These decisions are fully consistent with *Cardillo*'s

reading of the Act in view of its legislative history. The Act's drafters understood and intended the effect of the "arising naturally out of such employment" formulation to allow the placement of full liability for an occupational disease on the last employer to expose the worker to the conditions responsible for the disease – that is, to conditions "capable of" producing it over time – even if the disease in the particular worker's case is shown "not [to] have been attributable *at all* to the employment by the last employer." *1926 Hearings* at 74 (emphasis added).

C. The Suggested Due-Process Problem

Finally, NOS suggests that "[a]ny construction or interpretation of the *Cardillo* rule that precludes the consideration of probative evidence tending to absolve the employer from liability raises serious Due Process concerns." Pet. Br. at 31. Such "concerns" should be "avoided," it contends, by recognizing the efficacy of a defense available to the last employer based on medical evidence that, although the worker was exposed in its employ to potentially harmful levels of the hazard to which the disabling disease is attributable, such exposure made no actual causal contribution to the appearance or course of the disease in the claimant, which were entirely attributable to earlier exposures with other employers. *Id*. It further argues that, even if "an irrebuttable *Cardillo* presumption is simply a rule of law imposing liability invariably on the last employer if there is any exposure [in its employ] to the disease-producing hazard," the considerations supporting

such a rule are "fairly weak," may be based on "assumptions" about the limits of medical science that are "utterly wrong in many situations," and may be insufficient to validate a rule "that prohibits any genuine factual inquiry." *Id*. at 31-32.

As demonstrated above, however, the last-injurious-exposure rule is not in the nature of a "presumption," irrebuttable or otherwise, that the last such exposure was actually causally contributory to the claimant's disabling disease, but an interpretation, understood and intended by the congressional drafters, of when a disease may be said to "arise naturally out of such employment," LHWCA § 2(2). NOS made no attempt to demonstrate that such exposures to respirable asbestos as Ibos experienced in its employ cannot cause mesothelioma, a showing that would indeed have absolved it of liability, *cf. Todd Pacific Shipyards Corp. v. Director, OWCP (Picinich)*, 914 F.2d 1317 (9th Cir. 1990). It is undisputed that Ibos's disease arose out of his overall occupational exposures to asbestos (and hence that it was an "occupational disease"), and that the conditions of work to which he was subject at NOS were those out of which mesothelioma in general arises. It was thus "such occupational disease as arises naturally out of such employment" as Ibos's work for NOS, and NOS is liable under § 2(2), even if it was not *caused by* his employment there.

The rule of law identified in *Cardillo* does not in any way "prohibit any

genuine factual inquiry," but rather imposes liability on the basis of an unsafe working condition of the kind that caused the worker's disease. NOS does not explain why such a rule would be suspect as a matter of due process, or require any special congressional findings that it is "necessary," Pet. Br. at 31.

NOS suggests that the rule was based on the difficulty or impossibility of identifying the employer whose working conditions actually caused a worker's disease (or even the last employer whose working conditions causally contributed to it), and that that basis has become outdated by the advances of medical science in the intervening years. It thus appears to suggest that the reason may have become constitutionally inadequate to justify the rule. Pet. Br. at 32. In fact, NOS's evidence in the present case fully validates the currency of Congress' evaluation 75 years ago. The estimates in the present record of the latency period between the inhalation of asbestos fibers that begin the process that leads to the appearance of mesothelioma ranged from as little as ten years to more than forty years (*see* p. 22 *supra*). Thus the responsible exposure in Ibos's case may have been in the employ of virtually any one of his forty-one longshore employers (including NOS itself, in his four years of work for it in the early to mid-'50s). Further, the medical-opinion evidence concerning the effect on the course of the disease of intervening exposures, causing injury to the immune system and lung function, was somewhat vague, unsupported by reference to scientific studies, and

speculative. It suggested that such effects are dependent on the amount of such exposure, and hence on detailed basic facts with respect to temporally remote conditions of employment that are generally not subject to reconstruction once the disease becomes manifest. *See, e.g.*, CX-31 at 22-23, 30 (Dr. Martin: "would not have changed the course of his disease process, but injured the lung tissue at a cellular level harming immune cells and lung tissue"). It appears to be as reasonable now as it was in 1926 or 1955 to believe that making the identity of the last employer whose conditions of employment actually contributed to a particular worker's disease the critical determinant of the liable employer under the Act would present serious obstacles to the accomplishment of the Act's purposes. Such obstacles, even where not insurmountable, would be at least inimical to the prompt delivery of benefits, and to the relative simplicity and inexpensiveness of the resolution of disputed claims, that are central purposes of the substitution of workers'-compensation liability for tort liability (and, conversely, substitution of workers'-compensation entitlement for the right to eventual recovery of full compensatory damages).

Further, even if the last-employer rule may sometimes produce results that appear to be "arbitrary" in individual cases, "it is fair because 'all [maritime] employers will be the last employer a proportional share of the time.'" *Newport News Shipbuilding and Dry Dock Co. v. Stilley*, 243 F.3d 179, 183 (4th Cir. 2001),

quoting Cordero v. Triple A Machine Shop, 580 F.2d 1331, 1336 (9th Cir. 1978).

At best, it is apparent that making actual causation determinative of the liable employer, even if modified from requiring apportionment of causation among many employers to attaching full liability to the last contributory exposure, would be a game not worth the candle. It would impose potentially enormous burdens of litigation costs on the administrative and adjudicatory facilities of the Department of Labor, and on maritime employers and their insurers, without affecting the amounts of benefits eventually payable by maritime industries as a whole. It would delay the delivery of such benefits to disabled workers and the families of occupational-disease fatalities in substantial numbers of cases, as battles of medical experts, often among large numbers of former employers, stretched out for years. NOS presents no constitutional compulsion for such a rule. Its assertion should be rejected.

II

THE AMOUNTS THAT IBOS RECEIVED IN SETTLEMENTS WITH OTHER EMPLOYERS, BEFORE THE DETERMINATION THAT THE DISABILITY AND DEATH WERE COMPENSABLE AND THAT NOS IS THE LIABLE EMPLOYER, ARE IRRELEVANT TO THE AMOUNT OWED BY NOS AND SHOULD NOT REDUCE ITS LIABILITY.

In affirming the ALJ's holding that NOS is entitled to credit against its liability for the net amounts received by the claimant from the non-liable employers, the

Board relied on its decision in *Alexander v. Triple A Machine Shop*, 32 B.R.B.S. 40, 44-46 (1998), *after remand*, 34 B.R.B.S. 34 (2000), applying a "general credit doctrine, which functions to prevent the double recovery of benefits where the claimant has been previously compensated [in part] for the same disability [*sic*; disability and death]." R.E. # 3 at 7. Although the Board did not mention it in its decision below, its ruling in *Alexander* remains under review by the Ninth Circuit. *Alexander v. Triple A Machine Shop*, 9th Cir. No. 00-70762 (argued November 5, 2001). Peggy Ibos challenges the application of the Board's rule by cross-petition for review herein. The Director agrees (as he has before the court in *Alexander*) that the Board's rule is in error. [7]

Although in *Alexander* the Board also relied in part on two statutory provisions in the Act, §§ 3(e) and 14(j), 33 U.S.C. §§ 903(e), 914(j), in the present case it relied solely on the principal basis of its decision in that case: the proposition that the general purpose of the extrastatutory "credit doctrine" applied in *Strachan Shipping Co. v. Nash*, 782 F.2d 513 (5th Cir. 1986) (*en banc*), warranted its extension from its

[7] Although neither the ALJ nor the Board mentioned it, the settlements at issue in this case included assignments by the employers of any rights those employers might have had against NOS, to reimbursement of the settlement payments, if NOS turned out to be *the* liable employer. Since the Director does not believe that an employer has any right to reimbursement of *settlement* payments (as opposed to those made without an award, in advance of decision, or those made pursuant to an award which is later modified to find a different employer liable, *e.g.*, *Temporary Employment Services, Inc. v. Trinity Marine Group, Inc.*, 261 F.3d 456, 464, 466 (5th Cir. 2001)), his position that the ALJ and the Board erred in granting NOS credit against its liability for the settlement payments is not based on that settlement provision.

original context to a general allowance of credit whenever necessary to avoid (even partial) "double recovery." In any event, both § 3(e) and § 14(j) are plainly inapplicable in terms.

Section 14(j) of the LHWCA provides, "If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due." This provision is plainly inapplicable in terms to the settling employers' payments here. First, payments pursuant to § 8(i) compromise-and-release settlements are not within any reasonable reading of "advance payments of compensation." "Advance payments" must be either those made before liability for them under the Act arises, or those made in advance of an award under the Act; payments in accordance with § 8(i) settlement-approval orders are neither. And further, § 14(j) is not among the Act's "credit" provisions (§§ 3(e), 22, and 33(f)); it provides for "reimbursement" out of unpaid installments. The liable employer, NOS, had paid nothing to be "reimbursed," and the settling employers neither claimed nor could have claimed a right to reimbursement by NOS. Section 14(j) thus neither was applicable nor would have led to the result reached by the Board.

Section 3(e) was enacted in 1984, to allow credit for any prior recovery, even against a different employer, "for the same injury, disability, or death" under "any *other* workers' compensation law" (or the Jones Act). These terms unambiguously

exclude past recoveries under the LHWCA itself. *See also ITO Corp. v. Director, OWCP (Aples)*, 883 F.2d 422, 425 (5th Cir. 1989) (§ 3(e) has no application to prior recoveries under the LHWCA). The sole intended effect of § 3(e) was to allow credit in the unusual situation exemplified by the then recent decision in *United Brands Co. v. Melson*, 594 F.2d 1068 (5th Cir. 1979), where a longshoreman had the onset of symptoms in the course of his longshore work, but went to his moonlighting job at a gas station before it became apparent that he was suffering a heart attack.. *Id*. at 1070. He filed a state-law claim against the gas station as well as a claim under the LHWCA against his maritime employer. *Id*. The court, agreeing with the Director and the Board, held that in the absence of any provision in the LHWCA allowing credit for payments under state law by a different employer than the one liable under the LHWCA, no such credit was available. *Id*. at 1074-75. The new § 3(e), because it applies regardless of the identity of the employer that paid benefits under the other law involved, extended the allowance of credit to such instances; and it was explicitly described as intended to alter the result of *Melson*. *See*, *e.g.*, 130 Cong. Rec. 25905 (Sept. 18, 1984).

Far from suggesting the appropriateness of allowing extrastatutory credit in other situations, the background and enactment of § 3(e), and the reasoning of *Melson* in finding it inappropriate to allow credit in the absence of any statutory predicate simply in order to keep the claimant from recovering more in the

aggregate than the amount for which the Act makes the employer liable, shows that where Congress means credit to be available, it explicitly provides for it. *Cf.*, *e.g.*, *Ceres Gulf v. Cooper*, 957 F.2d 1199 (5th Cir. 1992) (the several provisions of the LHWCA for recoupment of overpayments out of unpaid compensation otherwise payable, without provision for other forms of recoupment, demonstrates that there is no remedy available against the claimant for recoupment of overpayments where no further compensation is due); *Stevedoring Services of America, Inc. v. Eggert*, 953 F.2d 552 (9th Cir.), *cert. denied*, 505 U.S. 1230 (1992) (same). Nowhere in the legislative history of the 1984 amendments, or any previous amendments to the Act, was there any reference to the question whether credit should be allowed to the liable employer for LHWCA settlements with other employers who were not actually liable, even though no such credit had ever been held authorized until the Board's decision in *Alexander*. The Board's result cannot be justified on the basis of § 3(e). Thus the "general credit doctrine" which the Board has purported to create is entirely extrastatutory.

The Board has based its rule on extension of the credit addressed by this Court in *Strachan Shipping Co. v. Nash*. *Alexander*, 32 B.R.B.S. at 45-46. *Nash* concerned successive on-the-job injuries to the same limb, for which the two employers had separate and independent liability under the Act's "schedule" of compensation for permanent impairments of specified limbs and senses,

irrespective of their effect on the worker's earning capacity, LHWCA § 8(c)(1)-(19), 33 U.S.C. § 908(c)(1)-(19); *Potomac Electric Power Co. v. Director, OWCP*, 449 U.S. 268 (1980). *Nash*, 782 F.2d at 516 & n.6. Under the familiar "aggravation rule," when an employment injury aggravates, accelerates, or otherwise combines with a preexisting condition, the employer is liable for the entire resulting disability, not just the part of it that the injury itself caused. *Id*. at 515, 517. The employer responsible for the later on-the-job injury in *Nash* claimed that this rule should not apply where the preexisting condition was itself a consequence of an earlier injury covered by the Act, for which the worker had already received compensation; and it further contended that its liability should be reduced, not just by the amount the claimant had *received*, but by the entire portion of the worsened impairment for which he *should* have been compensated by the earlier employer. The Board applied a rule of its own creation that "where the worker has been actually compensated for disability to the same member at a previous point in time," the liability for the aggravation of that impairment should be reduced by the amount the worker has received for a part of the overall scheduled impairment, but refused to further reduce it by the additional amount that he *should* have received for the earlier injury but did not.[8] *Id*. at 515, 517-18.

[8] The earlier on-the-job injury in *Nash* was itself an aggravation of an impairment of the worker's leg resulting from a high-school accident, increasing it from 20 percent to 30 percent, before the subject injury further increased it to 34 percent. 782 F.2d at 514-15. Although the

The full Court in *Nash* sustained the Board's rejection of the employer's position. 782 F.2d at 518-22. It examined only the *amount* of credit that should be allowed, not the appropriateness of allowing *any* credit, because the claimant had not cross-petitioned for review of such allowance. *Id*. at 518 n.8.[9] In any event,[10] its rule allows credit only for the amount of a prior scheduled award, against a later scheduled award based on a *later injury to the same scheduled member*, which includes the preexisting impairment that was compensated by the earlier award. But the successive-scheduled-injuries context is critically different from the situation of alternatively liable employers for a single injury, presented here, to which the Board extended the doctrine for the first time in *Alexander*. "*Nash* therefore does not

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employer at the time of the first aggravating injury was plainly responsible under the aggravation rule for the resulting 30 percent impairment, it paid only for the 10 percent differential. *Id*. at 515-16.

[9] *Director, OWCP v. Bethlehem Steel Corp. (Brown)*, 868 F.2d 759 (5th Cir. 1989), which clarified how *Nash* was to be applied, likewise involved only the questions how much credit should be allowed and to whom, and did not present the question whether the allowance of credit even in the successive-scheduled-injuries context was legally warranted.

[10] There is no statutory predicate for allowing credit in the *Nash* context of successive scheduled injuries any more than in other contexts outside of §§ 3(e) and 14(j), and the Director therefore argued in *Nash* that no credit should be allowed (though the Court found that the issue was not properly before it because the claimant had not cross-petitioned). *See* 782 F.2d at 518 n.8. Nevertheless, the Director now believes that a strong case can be made for the allowance of credit in that situation, as a limitation on potentially unfair results of the aggravation rule, and supports the *Nash* rule, which has now been applied without challenge for nearly two decades, in its own context. Similar considerations do not, however, support such credit in other contexts.

control this case." *ITO Corp. v. Director, OWCP (Aples)*, 883 F.2d 422, 426 (5th Cir. 1989).

The Board distinguished *Aples*, in which this Court agreed with the Director that no credit was due in a situation similar to that of the present case. There, as here, the proceedings against both employers were pending at the same time. Aples injured his back in 1980, while working for a first stevedoring company; although his back remained symptomatic from then on, he was able to continue working most of the time for the next year. 883 F.2d at 423. A year later, on the day following two days of heavy work for a second employer (without any specific traumatic event), his physician found that his condition was substantially worse. *Id*. at 423-34. He worked one more day, for a third company, after which his back pain was severe and never thereafter abated. *Id*. at 424. He sought compensation from the first employer for partial disability from a time of the original injury, and compensation, from any of the three employers, for total disability from either the time the doctor found his condition to have worsened or from the time, after one day's further work, when he stopped working entirely. The claimant then settled with the first employer, and litigated his claim against the other two; the ALJ found that the work for the second employer had indeed worsened the condition, but that the final day of work for the third had not. He therefore awarded compensation for total disability against the

second employer. *Id*. He allowed that employer credit for the settlement with the first employer, but the Board reversed. *Id*.

This Court affirmed the rejection of the liable employer's assertion of a right to credit for the settlement. 883 F.2d at 425-27. It relied in part on the fact that, since the settlement with the other employer had obviated any determination of what, if anything, that employer was actually liable for, and the compensation that had been claimed against that employer – unlike in the present case – was not necessarily entirely duplicative of the disability for which the non-settling employer was held liable, it was impossible to say with any assurance that the settlement was for the "same disability" as the award against the non-settling employer. *Id*. If credit is to be allowed for past recoveries for part of "the same disability" compensable on the current claim, the burden is on the employer seeking that reduction of its liability to demonstrate what part of the past settlement was for an included part of the currently compensable disability.[11] The disentanglement of the possible bases and measures of recovery available on the settled claim from those ultimately found applicable in the claim that is pursued to judgment, if possible, must be the responsibility of the liable employer that seeks credit. *Id*. at 426-27.

[11] This is parallel to the requirement that when an employer seeks credit, under § 33(f), for a tort settlement entered into without explicit allocation between the person entitled to compensation and other family members, it bears the burden of producing convincing evidence of what part of the settlement is attributable to the cause of action whose proceeds are to be credited, and if it

The Board was correct that this case is distinguishable from *Aples* with respect to that part of its reasoning. Everything the claimants in this case sought from all employers was the same, and was subsequently granted against the non-settling employer by the ALJ. But the Board overlooked the fact that *Aples* reached the conclusion that the settlement with the earlier employer represented only non-

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fails to do so it can receive no credit. *E.g.*, *Force v. Director, OWCP*, 938 F.2d 981, 983-85 (9th Cir. 1991).

overlapping compensation on the basis that "[w]e look to the ALJ's findings to determine the extent of Ryan's liability when it settled with Aples." 883 F.2d at 426, *citing* *Leger v. Drilling Well Control, Inc.*, 592 F.2d 1246, 1249-50 (5th Cir.1979). In *Leger*, in the context of a maritime tort case in which the plaintiff settled with some defendants and proceeded to judgment against others, this Court adopted the approach according to which the amount of the judgment against the non-settling defendants was reduced, not by the amounts received from the settling defendants, but the portion of the overall otherwise recoverable damages for which they would have been liable, had they not been released, under the relative-fault findings at trial. *Id*. Since the ALJ in *Aples* had found the non-settling defendant fully liable for the claimant's total disability from the time he stopped work, the settling defendant's actual liability could only have been for such lesser disability as may have preceded the injury found to have occurred in work for the second employer – regardless of the fact that, by settling, it had also purchased its peace from the potential further risk of liability for the ultimate total disability. The *Aples* Court's citation of *Leger* demonstrates that the reason the settlement receipts did not warrant reduction of ITO's liability was that, *under the ALJ's subsequent findings*, ITO would have been fully liable for all the benefits awarded even if the settlement with the other employer had not taken place. The same approach to the present case indicates that

because Anchor and Valor would have borne *no* part of the liability for the benefits awarded if they had not settled, there is no basis for reducing NOS's full liability.

Thus *Aples* actually stands for the proposition that, even where the potential LHWCA liability that has been settled with another employer or employers is precisely the same as that for which a non-settling employer is held liable, no credit should be allowed if the non-settling defendant would have borne the full liability even if the other employer were still in the case. This situation is critically different from the successive-scheduled-injury context in which the extra-statutory *Nash* credit doctrine operates. Unlike the scheduled compensation received for a prior injury in *Nash*, here the receipts in question are from a settlement with an employer that is alternatively liable on the present claim. The claimant has taken a substantial risk in accepting that money, because in doing so he may be releasing the only employer actually liable, and hence is in danger of coming away with nothing but the settlement. *E.g.*, *Kelaita v. Director, OWCP*, 799 F.2d 1308 (9th Cir. 1986). The non-settling employer, if not otherwise liable, cannot be required to make up the difference between the amount of the settlement and the amount for which the settling employer would have been liable in the absence of the settlement. Since the claimant thus will be required to bear the *burden* of that settlement if no other employer is found liable, he should be allowed to keep the *benefit* of the settlement if another employer *is* found liable. If the Board's allowance of credit in this situation is

sustained, claimants could not possibly benefit from entering into such settlements, since it will be their loss if they release the liable employer, but only the liable employer's gain if they are paid a sum to release an employer that would not have been liable anyway. Under such a regime, cases with multiple potentially, but only alternatively, liable employers will no longer benefit from the simplification and relative economy of proceedings on the claim that comes from settling, in advance of adjudication, with the employers less likely to be found liable.

On the basis of substantially these considerations, *Leger* chose its answer to the then controversial question, in the context of multiple-defendant maritime tort cases, how the recovery from the non-settling defendant should be affected by the settlement receipts from the released defendants. 529 F.2d at 1249-50. Although this Court subsequently abrogated that choice in the belief that it was undermined by intervening Supreme Court authority, *see McDermott, Inc. v. Clyde Iron***,** 979 F.2d 1068 (5th Cir.1992), the Supreme Court reversed, reinstating the rule of *Leger*. *McDermott v. AmClyde*, 511 U.S. 203 (1994). The Supreme Court held that the non-settling defendant should be required to pay just what it would have had to pay if the settling defendants were still in the case; if the settling defendants are determined to have had no liability, the liable non-settling defendant must pay the entire damages, even though the plaintiff has recovered a substantial sum in settlement with the non-liable party. 511 U.S. at 219. Likewise, the non-settling defendant will only have to pay

the part of the damages representing its proportionate fault even if the amount received in settlement from the settling defendant was small in comparison to what that defendant would have had to pay, under the allocation of fault determined at trial, in the absence of the settlement. *Id*. In the former case, in the aggregate, the plaintiff will be overcompensated for his loss; in the latter, he will receive only a part (perhaps small) of the compensation for his loss to which he would have been entitled if he had pursued the case to judgment against all defendants.

Nothing relevant to the Supreme Court's adoption of that approach to a settlement with some potentially liable parties in advance of judgment against a liable party distinguishes federal maritime workers'-compensation cases from federal maritime tort cases. In neither context – contrary to the Board's approach – does the law contain a rigid rule against overcompensation, requiring that the windfall, or "found money," represented by a settling party's payment of more than it would have been liable for, must benefit the liable defendant rather than the party entitled to recover from that defendant. *McDermott*, 511 U.S. at 219. *See also Ingalls Shipbuilding, Inc. v. Director, OWCP (Yates)*, 519 U.S. 248, 261 (1997) (even if wife's lack of status as "person entitled to compensation" within the meaning of LHWCA § 33(f) at time of her joinder, along with worker, in tort settlement releasing potential future right of action for wrongful-death means amount of settlement for that right will not be credited against employer's compensation liability for death once it

occurs, that result is not impermissible); *Todd Shipyards Corp. v. Director, OWCP (Chavez)*, 139 F.3d 1309, 1312-13 (9th Cir. 1998) (employer's liability for disability, which could be based entirely on either of two employment-related conditions, held not subject to reduction under § 33(f) for tort recovery for one of those conditions; allowing such credit would give employer a "windfall" reduction of the liability it would have had to bear in full as a result of other condition); *Taylor v. Director, OWCP*, 201 F.3d 1234 (9th Cir. 2000) (reversing Board which had relied on "strong policy" against over-recovery, held, employer is not entitled to credit against death-benefits liability to widow for her potential-wrongful-death settlement recovery, received while worker was alive and she was therefore not yet "entitled to compensation," as policy of avoiding "double recovery" is "not absolute," nor is result "glaringly unjust" so as to warrant departure from statutory terms).

In sum, there is no reason to transfer from the claimant to the liable employer the windfall of the payment by the settling employers of money for which they are subsequently found not to have been liable. As in *McDermott*, the party seeking relief has taken a risk by settling with some potentially liable parties, and should retain the benefit of a good bargain just as he would have to bear the hardship of incomplete recompense if he had released the only liable party. The non-settling, liable party, who is not required to pay any more than it would have if the other potentially liable parties had been kept in the case to the end, has no reason to complain. There is no

adequate reason to extend the extra-statutory credit doctrine from its successive-scheduled-injuries context to settlements with alternatively-liable employers.

CONCLUSION

For the foregoing reasons, the Board's decision under review should be affirmed insofar as it held that NOS is the liable employer,[12] and the Board's holding that the liable employer is entitled to credit for Peggy Ibos's net settlement receipts from Valor and Anchor should be reversed.

Respectfully submitted,

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[12] In the alternative only, if the Court were to sustain NOS's actual-causation argument, the case should be remanded with instructions to conduct further ALJ proceedings to determine what employer was the last to expose Bertrand Ibos to asbestos that did contribute to the onset and course of his mesothelioma, including the joinder of the much earlier employers that would be liable if NOS is found to have established that only exposures at least ten, or fifteen, or twenty, or forty years before the appearance of the mesothelioma bore the assertedly necessary actual causal relationship to the disease, and entry of an award against the employer at the time of the last such exposure.

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CERTIFICATE OF SERVICE

I hereby certify that on December 11, 2001, two copies of the foregoing Brief and one diskette containing the Brief in MSWord format were served by mail, postage prepaid, on each of the following:

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CERTIFICATE OF COMPLIANCE WITH
5TH CIR. RULE 32.2.7(b)(1)

I hereby certify that the foregoing brief complies with the type-volume limitations of 5th Cir. Rule 32.2.7(b)(1). More particularly, (1) exclusive of exempted portions the brief contains (according to the word-processing program) 13,097 words of text, headings, and footnotes; and (2) it is produced by MS Word, in the fourteen-point Times New Roman proportional font, except for footnotes in twelve-point type of the same face. I understand that any misrepresentation or circumvention in this certificate may result in the brief being stricken and sanctions imposed against me.

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