Nos. 02-74232 & 02-74309

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RUSSELL EVERITT,
Petitioner/Cross-Respondent

v.

STEVEDORING SERVICES OF AMERICA and
HOMEPORT INSURANCE COMPANY,
Respondents/Cross-Petitioners,

and

MARINE TERMINALS CORPORATION,
HOMEPORT INSURANCE COMPANY,
DIRECTOR, OWCP,
Respondents/Cross-Respondents

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

BRIEF OF RESPONDENT/CROSS-RESPONDENT, DIRECTOR, OWCP, UNITED STATES DEPARTMENT OF LABOR

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Benefits Review Board, United States Department of Labor

BRIEF OF RESPONDENT/CROSS-RESPONDENT, DIRECTOR, OWCP

STATEMENT OF JURISDICTION

This case involves claims for benefits under the Longshore and Harbor Workers' Compensation Act (LHWCA or the Act), 33 U.S.C. § 901 *et seq.*[1] The administrative law judge (ALJ) had jurisdiction to hear and decide the claims pursuant to Section 19(d) of the LHWCA, 33 U.S.C. § 919(d). The Benefits Review Board (the Board) had jurisdiction to hear the timely appeal and cross-appeal of Stevedoring Services of America (SSA) and Russell Everitt (Everitt or the claimant) pursuant to Section 21(b)(3), 33 U.S.C. § 921(b)(3).

Everitt's injuries occurred in Seattle, Washington. The Board's final decision was issued on October 30, 2002, and Everitt's and SSA's petitions for review were filed in this Court on December 9, 2002, and December 16, 2002, respectively, within 60 days of that decision. This Court therefore has jurisdiction pursuant to Section 21(c) of the LHWCA, 33 U.S.C. § 921(c).

ISSUE PRESENTED

Whether the Benefits Review Board properly affirmed the administrative law judge's conclusion that Marine Terminals Corporation (MTC) is no longer liable for payment of permanent partial disability

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[1] Longshore and Harbor Workers' Compensation Act of Mar. 4, 1927, c.
(continued . . .)

benefits under the LHWCA to claimant Russell Everitt for a back injury that he suffered while in MTC's employ.

STATEMENT OF THE CASE

A. Nature of the case, course of proceedings, and disposition below

During the 1990s, Everitt suffered three lower back injuries while working as a longshoreman at maritime sites. Excerpts of Record ("Rec.") at 3. This appeal principally concerns the second and third of these injuries, which occurred on August 5, 1996 and October 14, 1997. Rec. at 3, 36. Everitt's employers at the time of the 1996 and 1997 injuries were MTC and SSA, respectively. Rec. at 36. At issue is whether MTC's liability for permanent partial disability benefits under the LHWCA should continue beyond the date of Everitt's 1997 injury with SSA.

Everitt filed timely claims for LHWCA benefits for the injuries, and an ALJ conducted a hearing on the claims on October 17, 2000. Rec. at 2-3. The ALJ issued a decision and order, as modified by two decisions on reconsideration, ordering payment of benefits by both MTC and SSA. Rec. at 1-56 (April 4, 2001 Decision and Order); *id.* at 59-79 (August 7, 2001 Decision on Motions for Reconsideration); *id.* at 81 (October 12, 2001

(. . . continued)
509, 44 Stat. 1424, *as amended*, 33 U.S.C. §§ 901-950 (2000).

Second Decision on Motion for Reconsideration). The ALJ ordered MTC to pay benefits for periods of temporary total and temporary partial disability, followed by a period of permanent partial disability benefits, to redress Everitt's loss of wage-earning capacity caused by the 1996 injury at MTC. Rec. at 87 . He ordered SSA to pay Everitt temporary total disability benefits, beginning on October 14, 1997, the date of the injury at SSA. *Id.*

As to the question whether MTC must pay permanent partial disability benefits after the October 1997 injury, the ALJ ruled in his first decision on reconsideration that such an award was appropriate in order to ensure that claimant was fully compensated for his loss of wage-earning capacity. Rec. at 70-71. In his final decision on a second motion for reconsideration, however, the ALJ reversed that ruling and concluded that MTC's liability ceased as of the date of the October 1997 injury at SSA. Rec. at 85-86.

SSA and Everitt appealed to the Board, which on October 30, 2002, issued a Decision and Order affirming in part and modifying in part the ALJ's decisions. Rec. at 90-103. The Board modified the amount of total disability benefits payable by SSA, but rejected SSA's arguments that the ALJ erroneously terminated the permanent partial disability award against MTC as of the occurrence of the October 1997 injury. Rec. at 95-98, 103.

SSA and Everitt then filed these petitions for review.[2]

B. Statement of facts

1. The statutory scheme

The LHWCA requires covered employers to provide compensation for disability arising from injuries suffered in the course of employment. Section 2(10) of the Act defines "disability" in economic terms as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). The Act recognizes four types of disability -- permanent total, temporary total, permanent partial, and temporary partial -- and prescribes rules for determining the amount of compensation due in each instance.[3]

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[2] SSA has also appealed rulings by the Board upholding determinations by the ALJ and by the Director, Office of Worker's Compensation Programs ("Director"), on SSA's liability for claimant's attorney's fees. *See* Rec. at 99-103. This brief does not address the attorney's fee issue.

[3] The terms "total" and "partial" refer to the degree of disability, while the terms "temporary" and "permanent" refer to the nature or duration of the disability. *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir. 1990). A disability is considered temporary until the employee reaches the point of maximum medical improvement, *i.e.*, the point at which his condition appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Louisiana Ins. Guar. Ass'n v. Abbot*, 40 F.3d 122, 126 (5th Cir. 1994); *Stevens*, 909 F.2d at 1257 (maximum medical improvement is "attained when the injury has

(continued . . .)

These rules are generally calculated to compensate an employee according to a formula tied to his actual loss of wage-earning capacity. Thus, an employee who is totally disabled receives two-thirds of his average weekly wage at the time of the injury. 33 U.S.C. § 908(a) (permanent total), (b) (temporary total); *see also id.* § 10 (determination of average weekly wage). An employee who is partially disabled is entitled to two-thirds of the difference between his pre-injury average weekly wage and his earning capacity after the injury. 33 U.S.C. § 908(c)(21), (h).[4]

2. Everitt's injuries

Everitt was diagnosed with degenerative disc disease following a low back strain that he suffered on August 16, 1986, before he became a longshoreman. Rec. at 37. The first of Everitt's three longshoring back injuries occurred on March 25, 1994, when he twisted his lower back during

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(. . . continued)
healed to the full extent possible"). Once he reaches maximum medical improvement, an employee's remaining disability is considered permanent in nature.

[4] Although the LHWCA generally compensates according to the employee's actual loss of wage-earning capacity, an exception exists with respect to permanent partial disabilities resulting from enumerated "scheduled" injuries. 33 U.S.C. § 908(c). For those disabilities, an employee is provided the equivalent of two-thirds of his previous average weekly wage for a specified number of weeks, regardless of his actual loss of wage-earning capacity. This case does not involve a scheduled injury and is governed by
(continued . . .)

the course of an earlier period of employment with SSA. Rec. at 36. At the time of the 1994 injury, Everitt's average weekly wage was $462.86. *See* Rec. at 38. Everitt reached maximum medical improvement on April 28, 1995 and returned to his regular job without suffering a loss of wage-earning capacity. Rec. at 39.

On August 5, 1996, while employed by MTC, Everitt suffered a second injury when the cab of the truck he was driving was lifted into the air by a crane and then dropped. Rec. at 36. At the time of this 1996 injury, Everitt's average weekly wage was significantly higher – $1,955.01 per week – because he was working six days per week and had reached "A" status in the union, which gave him access to a greater range of jobs. Rec. at 38, 47, 87. Everitt was out of work for six weeks after the 1996 injury.

Everitt returned to work on September 20, 1996. Rec. at 97 n.7. After the 1996 injury, he could no longer perform the work of a stevedore and was transferred from the "stevedore dispatch board" to the "bull dispatch board" to find lighter work. (Supplemental Excerpts of Record ("Supp. Rec.") at 89, 91-2, 132). Accordingly, his overall work opportunity

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(. . . continued)
the rules described above.

decreased. Supp. Rec. at 94, 132, 151. Moreover, Everitt was working in "extreme pain and with high dosages of narcotic medications." Rec. at 39.

On October 14, 1997 – while once again working for SSA – Everitt strained his lower back when he jumped to the ground from a cargo board. Rec. at 36. It is undisputed that Everitt has been unable to perform gainful employment since this injury and thus is totally disabled. Rec. at 41. Everitt's wage-earning capacity after his 1996 injury and the amount of his average weekly wage at the time of his 1997 injury have, however, been matters of dispute between the parties.

3. The decisions on Everitt's claims

a. ALJ decisions

After a hearing, the ALJ issued an initial decision, followed by two decisions on reconsideration, that cumulatively determined Everitt's entitlement to various periods of total and partial disability benefits. Rec. at 1, 59, 81.

i. The ultimate result of the ALJ's various rulings

As to the 1996 injury at MTC, the ALJ found that Everitt had an average weekly wage of $1,955.01 at the time of that injury, and that the injury "result[ed] in a demonstrated loss of wage-earning capacity." Rec. at 44. He thus awarded temporary total, temporary partial, and permanent

partial disability benefits, payable by MTC, based on that average weekly wage. *Id.* at 44, 63, 87. The ALJ awarded permanent partial disability benefits for the period from March 18, 1997 (the date of Everitt's maximum medical improvement) to October 13, 1997 (the day before Everitt's injury at SSA). Rec. at 87. He concluded that Everitt had a residual wage-earning capacity during that period of $1,328.51 per week, and therefore awarded those benefits in the amount of 2/3 of the difference ($626.50) between Everitt's 1996 average weekly wage ($1,955.01) and that residual earning capacity. Rec. at 87.

As to the 1997 injury at SSA, the ALJ awarded Everitt temporary total disability benefits, payable by SSA, commencing on the date of the injury, October 14. Rec. at 87.[5] Based on his determination that Everitt was a 6-day worker, the ALJ found that Everitt's average weekly wage at the time of the injury was $1,936.04. Rec. at 83. He therefore calculated total disability benefits based on the loss of a wage-earning capacity of that amount. Rec. at 87.

[5] Everitt's total disability is "temporary" because, at the time the hearing record closed in this case, he had not reached maximum medical improvement. Rec. at 41.

ii. The ALJ's rulings on MTC's liability for a concurrent award

The ALJ ultimately held that MTC's liability for permanent partial disability terminated as of the October 14, 1997 injury at SSA. Rec. at 85. In his decision after the first motions for reconsideration, however, he ruled that a continuing award against MTC, to run concurrently with the award against SSA, was appropriate under the rationale of *Hastings* v. *Earth Satellite Corp.*, 628 F.2d 85 (D.C. Cir. 1980). Rec. at 70. The ALJ found that "[i]f Claimant's permanent partial disability award resulting from the . . . [1996] injury is terminated effective the date he became totally disabled from the . . . [1997] injury, he will have an uncompensated wage loss." Rec. at 70. Significantly, at the time the ALJ issued this ruling in favor of a concurrent award, he also concluded that Everitt had an average weekly wage of $1,328.51 at the time of the 1997 injury, Rec. at 78, which is significantly lower than Everitt's average weekly wage at the time of the 1996 injury - $1,955.01.

On MTC's subsequent motion for reconsideration, however, the ALJ reversed this ruling on the ground that he was no longer persuaded that Everitt had suffered a reduction in wage-earning capacity from the 1996 injury. Rec. 84-86. At the time he issued this ruling, the ALJ had also reevaluated Everitt's average weekly wage at the time of the 1997 injury,

concluding that it was $1,936.04, Rec. at 83, or roughly equivalent to Everitt's average weekly wage ($1,955.01) at the time of the 1996 injury. The ALJ thus reasoned that a "comparison of Claimant's wages earned both prior to and after 1996 reveal little difference." Rec. at 86.

The ALJ further stated that claimant's "self-serving testimony" that he worked beyond his capabilities while in great pain during 1996 and 1997 did not suffice to establish a connection between the 1996 injury and a loss of earning capacity. Rec. at 85-86. He concluded as well that no objective medical evidence linked claimant's alleged wage-loss with the August 1996 injury. Rec. at 86. The ALJ did not attempt to reconcile these findings with his award of partial disability benefits for the period from September 1996 to October 13, 1997, which was premised on Everitt's loss of wage-earning capacity attributable to the 1996 injury, or with his prior decision crediting claimant's testimony regarding his inability to work. Rec. at 38, 44.

Finally, the ALJ concluded that under the "last employer rule," only SSA was liable for compensation benefits after the 1997 injury. Rec. at 84-86. He reasoned that because the subsequent 1997 injury "accelerated or deteriorated" claimant's condition, SSA is solely liable as the last responsible employer. *Id.* at 84.

b. The Board's decision

On appeals by Everitt and SSA, the Board affirmed in part and reversed in part. Rec. at 90-104. The Board concluded that the ALJ appropriately utilized Section 10(a) of the LHWCA, 33 U.S.C. § 910(a), rather than Section 10(c), 33 U.S.C. § 910(c), when calculating Everitt's 1997 average weekly wage. Rec. at 94-95. It further ruled, however, that the ALJ erroneously treated Everitt as a six-day, rather than a five-day worker, thereby arriving at an inflated average weekly wage of $1,936.04, instead of the correct figure of $1,677.74. Rec. at 95-96.

The Board upheld the ALJ's conclusion that SSA was solely responsible for benefits payments after October 14, 1997, the date of the SSA injury. Rec. at 96-98. The Board concluded that SSA was fully liable for Everitt's disability after the 1997 injury because it was an aggravation of claimant's pre-existing back condition and the evidence did not show that claimant's post-October 1997 disability was linked to his 1996 injury with MTC. Rec. at 97.

The Board also upheld the ALJ's ruling that it would be inappropriate to provide for concurrent awards of partial and total disability to be paid by MTC and SSA, respectively. Rec. at 97-98. The Board concluded that although such awards are properly ordered "[w]here claimant suffers an

injury which results in partial disability, and subsequently suffers a second injury which results in total disability," such an award should not be made where "the evidence at the time of the second injury indicates that claimant's earnings increased such that he no longer had a loss in wage-earning capacity." Rec. at 98. The Board held that this was true with respect to claimant, noting that Everitt's average weekly wage at the time of the 1997 injury was $1,677.74, compared to Everitt's wage-earning capacity after the 1996 injury of $1,328.51. *Id.* The Board did not compare claimant's average weekly wage at the time of his 1997 injury with his higher average weekly wage ($1955.01) before the 1996 injury.

SUMMARY OF THE ARGUMENT

When a worker loses all of his earning capacity through a succession of two (or more) injuries, the courts have recognized that the LHWCA provides for separate, concurrent awards for the permanent loss of earning capacity resulting from each injury. *Brady-Hamilton Stevedore Co. v. Director, OWCP (Anderson)*, 58 F.3d 419, 421 (9th Cir. 1995); *Hastings v. Earth Satellite Corp.*, 628 F.2d 85, 91 (D.C. Cir. 1980). In this case, the Benefits Review Board appeared to recognize this principle, but failed to require MTC to continue to pay permanent partial disability benefits for claimant's 1996 injury at MTC because it believed that, at the time of his

subsequent injury in 1997 at SSA, claimant no longer suffered a loss of wage-earning capacity from his MTC injury. The Board's decision, however, does not account for the difference between the ALJ's finding that the claimant's average weekly wage before the 1996 injury was $1,955.01 and the Board's ruling that the claimant's average weekly earnings at the time of the 1997 injury were $1,677.74. This disparity indicates that, under the facts as articulated by the Board, claimant continued to suffer a diminished earning capacity as a result of his 1996 injury at MTC. If that is so, the total disability award against SSA, which is based on claimant's already reduced wage-earning capacity at the time of the 1997 injury, will not fully compensate him. A concurrent permanent partial disability award should therefore be entered against MTC. *Hastings,* 628 F.2d at 91.

The Board and ALJ also improperly relied on the "last employer" and "aggravation" rules to extinguish MTC's liability. The Board's decision seems to endorse the theory that because the subsequent 1997 injury at SSA aggravated Everitt's pre-existing condition, SSA is solely liable even though the 1996 and 1997 injuries were the subjects of two separate claims. Neither the last employer rule nor the aggravation rule suggests, however, that where an employee has filed a claim for an injury, his right to relief on a claim is divested by his subsequent filing of another claim regarding a subsequent

injury. Indeed, this Court in *Stevedoring Servs. of America v. Director, OWCP (Benjamin)*, 297 F.3d 797, 802-04 (2002), expressly rejected such a "last employer" argument, holding that the first employer remained liable on a claim for hearing loss chargeable to its employ, even though the claimant also had a claim for additional hearing loss against a subsequent employer. In light of *Benjamin*'s holding that there is no merger of such separate claims for distinct, quantifiable injuries, it is clear that the last employer rule provides no basis for upholding the ALJ's termination of the permanent partial disability award against MTC.

The Board's decision – which on its face fails to fully compensate the claimant for his loss of wage-earning capacity – should therefore not be affirmed. At a minimum, the case should be remanded for reconciliation of the disparity between the pre-injury average weekly wage figures for claimant's 1996 and 1997 injuries and the decision to deny concurrent awards. Then – if claimant is indeed found to have suffered a loss of wage-earning capacity as a result of the 1996 injury – the ALJ should tailor concurrent awards, including a continuing permanent partial disability award payable by MTC, so that claimant is fully compensated.

ARGUMENT

THE BOARD HAS PROVIDED INSUFFICIENT REASONS FOR REFUSING TO REQUIRE MTC TO PAY ONGOING PERMANENT PARTIAL DISABILITY BENEFITS CONCURRENTLY WITH THE TOTAL DISABILITY AWARD ASSESSED AGAINST SSA

A. Standard of Review

This Court reviews decisions of the Board for errors of law and for adherence to the substantial evidence standard of review. *Benjamin*, 297 F.3d at 801; 33 U.S.C. § 921(b)(3). The Court reviews legal conclusions de novo, but "[o]n issues of statutory interpretation [under the LHWCA], the Director's view is to be accorded considerable weight." *Benjamin*, 297 F.3d at 801. Moreover, it is the Director, and not the Board, "to whom . . . [the Court] owe[s] *Chevron* deference." *Id.* at 801-02.

B. Concurrent Awards of Partial Disability Benefits and Total Disability Benefits Should be Assessed Against MTC and SSA Respectively If Necessary To Compensate Claimant for His Overall Loss of Wage-Earning Capacity

Under the LHWCA, benefit awards are designed to compensate employees for their loss of wage-earning capacity due to work injuries. 33 U.S.C. § 908(a), (c)(21). As explained below, where employees have filed claims regarding successive injuries, it is often necessary to provide concurrent awards, so that the reduction of wage-earning capacity attributable to each injury, and hence the employee's overall reduction in

wage-earning capacity, are compensated. *Hastings*, 628 F.2d at 91. Indeed, the Board in this case recognized that "where [a] claimant suffers an injury which results in partial disability and subsequently suffers a second injury which results in total disability, claimant may receive concurrent awards for the two disabilities." Rec. at 98, *citing Hastings*. The Board indicated, however, that it was appropriate to terminate the first award "if, as here, the evidence at the time of the second injury indicates that claimant's earnings increased such that he no longer had a loss in wage-earning capacity." Rec. at 98, *citing Anderson*, 58 F.3d at 421.

Although the Director takes no position in this brief on the factual question whether claimant Everitt's wage-earning capacity was affected by the 1996 injury, the Board's decision, concluding that his wage-earning capacity was not so affected, is flawed on its face. Accordingly, the Director presents his position that concurrent awards of partial and total disability benefits should be entered where necessary to fully compensate a claimant, and that neither the last employer rule nor aggravation rule bars such awards.

1. The Board's and ALJ's reasons for concluding that Everitt did not suffer a continuing reduction in wage-earning capacity from the 1996 injury are inadequate

The Board's conclusion that the claimant's earnings had increased at the time of the 1997 injury, so that he no longer had a loss in wage-earning

capacity from the 1996 injury, is contradicted by the facts of the case as articulated by the Board. Everitt's average weekly wage at the time of the 1996 injury with MTC was $1,955.01 per week, while, as redetermined by the Board, his average weekly wage at the time of the 1997 injury at SSA was $1,677.74 per week. Thus, Everitt's wage-earning capacity was still lower at the time of the 1997 injury than it had been at the time of the 1996 injury.

The Board failed to recognize the continued effect of the 1996 injury because it erroneously compared Everitt's 1997 average weekly wage ($1,677.74) to his wage-earning capacity ($1,328.51) after the 1996 injury. Rec. at 97-98. Obviously, this is not an apt comparison since the $1,328.51 figure already reflects the wage-earning loss caused by the 1996 injury. Thus, the comparison clearly does not indicate that claimant had regained his pre-1996 injury earning capacity by the time of the 1997 injury at SSA.

Nor does the Board's opinion adequately address the question whether substantial evidence supports the ALJ's finding, rendered in his second decision on reconsideration, that the 1996 injury did not have a continuing effect on claimant's wage-earning capacity. First, the ALJ's conclusion was based, at least in part, on his finding that claimant's average weekly wage at

the time of the 1997 injury was $1,936.04, *see* Rec. at 83, 86 -- a figure that the Board concluded was erroneous and adjusted downward to $1677.74.

Second, the ALJ otherwise inadequately explained the finding that the 1996 injury had no continuing effect on claimant's wage-earning capacity. This finding contradicts his earlier determination awarding Everitt permanent partial disability benefits from March 18, 1997 to October 13, 1997, based upon an actual residual earning capacity of $1,328.51 per week. Rec. at 87. This earlier ruling reflects a finding that the 1996 injury did result in lost earnings of $626.50 per week ($1,955.01-1,328.51=$626.50). *Id.* The ALJ's finding also contradicts his earlier assessment that after claimant reached maximum medical improvement in 1997, "not only did his actual wages go down, his wage earning capacity went down even further." Rec. at 39; *see also id.* ("[c]laimant credibly testified before me that he was able to earn those wages [in March to October 1997] only by working with extreme pain and with high dosages of narcotic medications").[6] Without

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[6] The ALJ also found that:

> While [MTC] contend[s] that the 1996 injury was a temporary aggravation and did not result in any permanent partial disability, I disagree because I find Claimant's thesis and evidence in support thereof to be most probative and persuasive. While [MTC] contend[s] that there is no medical evidence to support such [a] claim, Claimant submits, and I

(continued . . .)

having taken further evidence, the ALJ in his October 12, 2001 decision derided the Claimant's heretofore "credibl[e]," "probative and persuasive" testimony about his post-1996 condition, Rec. at 39, 43, as "self-serving" and uncorroborated by medical evidence. Rec. at 85. In similar circumstances involving a claimant's entitlement to Social Security disability benefits, however, this Court has concluded that an ALJ "must provide 'specific, cogent reasons for [his] disbelief'" of a claimant's testimony regarding pain and its limiting effect on his activities. *Lester v. Chater*, 81 F.3d 821, 834 (1995), *citing Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). The ALJ's conclusory statement regarding the claimant's lack of credibility does not appear to meet this standard.[7]

(. . . continued)

> agree, that *the totality of this closed record* leads to the conclusion that Claimant's low back problems since 1986 were aggravated by his ... 1994 and August 5, 1996 injuries, resulting in a demonstrated loss of wage-earning capacity.

Rec. at 43 (emphasis added).

[7] This Court has recognized that:

> Once the claimant produces medical evidence of an underlying impairment, the [ALJ] may not discredit the claimant's testimony as to subjective symptoms merely because they are unsupported by objective evidence. . . . Unless there is affirmative evidence showing that the claimant is malingering, the [ALJ's] reasons for rejecting the claimant's testimony must

(continued . . .)

2. To the extent Everitt suffered a loss of wage-earning capacity from the 1996 injury, MTC should be required to pay permanent partial disability benefits concurrently with the total disability award against SSA

As noted, under the LHWCA, the compensation for permanent disability caused by a "non-scheduled" injury – such as the back injury here – is determined by calculating two-thirds of the difference between the claimant's "average weekly wage" at the time of the compensable injury and his or her "wage-earning capacity" after the injury. LHWCA § 8(c)(21), (h), 33 U.S.C. § 908(c)(21), (h). When a worker, such as Everitt, loses all of his earning capacity through a succession of two (or more) injuries, the courts have recognized that the Act provides for separate, concurrent awards for the permanent loss of earning capacity resulting from each injury.

In *Hastings*, the court of appeals held that concurrent awards were mandated in a two-claim context similar to that presented here. Hastings initially suffered a work-related stroke in 1971. 628 F.2d at 86. He subsequently returned to part-time work for a period of two years. In 1974,

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> be "clear and convincing.". . . General findings are insufficient; rather, the ALJ must identify what testimony is not credible and what evidence undermines the claimant's complaints.

Lester v. Chater, 81 F.3d 821, 834 (9th Cir. 1995) (citations omitted).

he was diagnosed with pulmonary emboli, aggravated by his intervening work, and ceased all employment. *Id.* at 87.

An ALJ awarded Hastings benefits for: (1) permanent partial disability, beginning in 1972, for his partial loss of wage-earning capacity due to the stroke, based on actual wage loss under § 8(c)(21) of the Act; and (2) permanent total disability, beginning in 1974, for the loss of the remainder of his wage-earning capacity as a result of the emboli. 628 F.2d at 87-88. The ALJ ruled, however, that permanent partial disability benefits should cease upon initiation of the permanent total disability award. *Id.* at 88.

On appeal, the Board reversed, holding that to fully compensate Hastings for his entire wage-loss as a result of both injuries, the permanent partial disability award must continue concurrently with the permanent total disability award. 628 F.2d at 89. The court of appeals affirmed, ruling that the Board's "conclusion [wa]s compelled," because under the Act, compensation for Hastings' permanent total disability was based "on his diminished earning capacity" at the time of the second injury (the emboli), rather than "on [the] . . . earning capacity he possessed before the stroke." *Id.* at 91. Since Hastings' "compensation for his original loss of earning capacity was . . . addressed in the permanent-partial disability award," the

court concluded that "logic and fairness require[d] that the permanent-partial disability award continue concurrently with the permanent-total award." *Id.*

The court illustrated with a hypothetical:

> Consider a worker earning $10,000 per year. An accident permanently reduces his earning capacity to $6,000. He is awarded compensation based on the $4,000 diminution in his earning capacity. A second accident disables him totally. The second compensation award is based on the $6,000 in earning capacity remaining after the first accident. Terminating the first award at the onset of the second would deprive the worker of compensation for the permanent loss of $4,000 in earning capacity.

Id. at 91.

In *Anderson*, this Court concurred with the D.C. Circuit's "methodology," emphasizing that the claimant's "earning capacity at the time of the second injury must be used in computing the total disability award for that injury," so that both the total disability and partial disability awards are necessary in order to compensate the claimant for all of his lost earning capacity. 58 F.3d at 421. Such awards are proper, the court concluded, unless they exceed the measure of compensation provided in Section 8 of the Act and permit "double-dipping," as when the claimant's wage-earning capacity has increased during the period between the initial and subsequent injury. *Id.*; *see also Hastings*, 628 F.2d at 96 n.30 (acknowledging that an increase in a claimant's earning capacity between injuries could result in "double-dipping"

because the "aggregate disability payments would . . . represent[] more earning capacity than he had to begin with"). [8]

These principles, when applied to this case, illustrate that a concurrent award of benefits may be in order. Everitt's total disability award, as determined by the Board, is based on his loss of a wage-earning capacity of $1,677.74, his average weekly wage at the time of the 1997 injury. However, his initial average weekly wage, before the 1996 injury, was $1,955.01. Thus, there appears to remain an uncompensated decrease in wage-earning capacity

[8] *Anderson*'s reference to Section 8(a) of the Act as a "statutory limit" on compensation is somewhat confusing, because that provision provides for total disability benefits based on the employee's average weekly wage at the time of the totally disabling injury. 33 U.S.C. § 908(a). If this average weekly wage were an absolute limit, then no concurrent partial and total disability awards would be appropriate, a result at odds with *Anderson*'s endorsement of concurrent awards where appropriate. That is because every total disability award is 2/3 of the latest injury's average weekly wage, meaning that in all cases *any* additional award would violate the "limit." Rather, it appears from context that *Anderson* meant to describe situations where concurrent awards would compensate a claimant for more than his overall reduction in wage-earning capacity. *See* 58 F.3d at 422 (noting that "the ALJ did not address whether Anderson's ability to earn a higher wage increased during the period between his injuries"). We note, in this regard, that Section 6(b)(1) of the Act, 33 U.S.C. § 906(b)(1), sets a maximum for an award, but as the D.C. Circuit concluded in *Hastings,* this provision creates a maximum compensation rate applying to a single award, and is therefore not relevant to the combined amount of concurrent awards. *Hastings*, 628 F.2d at 91.

in the amount of $277.27, that will be compensated only if a permanent partial disability award against MTC continues.[9]

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[9] As discussed *supra*, note 8, this Court in *Anderson* cautioned that concurrent awards should not overcompensate a claimant, as where the claimant's wage-earning capacity has increased since the first permanent partial disability award, and there has been no modification of that award to reflect the increase. In this case, claimant's wage-earning capacity after the 1996 injury, as determined under Section 8(h) of the Act, was $1,328.51, while his average weekly wage at the time of the 1997 injury, as calculated under Section 10(a) of the Act, is $1,677.74. The fact, however, that a claimant's Section 10(a) average weekly wage before the second injury is higher than a claimant's Section 8(h) wage-earning capacity after the first injury does not necessarily mean that a claimant's wage-earning capacity has increased in the interim. First, the Section 8(h) wage-earning capacity figure may have been adjusted downward from claimant's actual earnings to reflect its time-of-injury equivalent (in order to account for inflation) or to account for the fact that the claimant was working beyond his medical restrictions. *LaFaille v. Benefits Review Board*, 884 F.2d 54, 61 (2d Cir. 1989) (inflation adjustment); *accord*, *White v. Bath Iron Works Corp.*, 812 F.2d 33, 35 (1st Cir. 1987); *Walker v. Washington Metro. Area Transit Auth.*, 793 F.2d 319, 323 nn.5, 6 (D.C. Cir. 1986); *cf. Haughton Elevator Co. v. Lewis*, 572 F.2d 447, 450-51 (4th Cir. 1978) (Winter, J., concurring) (claimant whose work post-injury is only through "extraordinary effort" or in spite of "excruciating pain" may be totally disabled despite substantial actual earnings). Second, calculating a worker's average weekly wages under the Section 10(a) formula, as explained by this Court in *Matulic v. Director, OWCP*, 154 F.3d 1052, 1057 (1998), may result in a measure of legislatively sanctioned "inaccuracy in the estimation of the worker's earning capacity" that "favor[s] the worker." In any event, questions about whether particular amounts of concurrent awards would overcompensate claimant in this case are best considered in the first instance on remand.

3. The "last employer" and "aggravation" rules do not affect the propriety of concurrent awards

The ALJ relied on the "last employer" rule as a basis for refusing to permit a continuing award against MTC. Rec. at 84-85. Although the Board's decision is not entirely clear in this regard, it also suggests that the "last employer" and "aggravation" rules support the termination of MTC's liability as of the time of the 1997 injury at SSA. *See* Rec. at 96-97; *see also* MTC Br. 16 (arguing that a concurrent award is inappropriate under "last employer" rule). As we explain, however, the last employer rule merely provides that an employer is liable for a worker's injury that occurs in its employ, even though the injury is an aggravation of an earlier workplace injury or the product of the worker's earlier workplace exposures. It does not exonerate an employer from liability on a claim "just because a second employer can also be assigned liability under the same doctrine for a separate, later injury." *Benjamin*, 297 F.3d at 805. Thus, the last employer rule does not absolve MTC from continued liability on Everitt's claim for the portion of disability attributable to his injury at MTC.

As first formulated in *Travelers Ins. Co. v. Cardillo*, 225 F.2d 137, 145 (2d Cir. 1955), the "last employer" rule states that

> the employer during the last employment in which claimant was exposed to injurious stimuli . . . should be liable for the full amount of the award.

Accord Cordero v. Triple A Machine Shop, 580 F.2d 1331, 1337 (9th Cir. 1978). The rule "facilitates administrative convenience by allowing for full recovery in a single action after a disability is discovered, as opposed to piece-meal recovery in a multitude of actions against each contributing employer." *Benjamin*, 297 F.2d at 802; *Cordero*, 580 F.2d at 1336 (rejecting employer's argument that its due process rights are violated by the failure to reduce its liability by apportioning responsibility among employers who contributed to employees' exposure to fumes).

In *Kelaita v. Director, OWCP*, 799 F.2d 1308 (1986), this Court held that with respect to "cumulative trauma" injuries, the last employer rule required that

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

Foundation Constructors, Inc. v. Director, OWCP, 950 F.2d 621, 624 (9th Cir. 1991), *quoting Kelaita,* 799 F.2d at 1311.

In *Kelaita*, a worker suffered cumulative trauma injuries to his rotator cuff while working for two different employers and filed separate claims against each. 799 F.2d at 1309. The Court applied the last employer rule to this "two injury" situation and concluded that during more than a year of employment with the second employer, the claimant aggravated his initial injury. *Id.* at 1311-12. It thus found the second employer liable for the full amount of the award of benefits.

This variant of the last employer rule – which the Court identified as the "two-injury" rule – is simply a restatement of the long-standing aggravation rule, first articulated by this Court in *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812, 814 (1966). It holds that a work-related aggravation of an initial injury is considered a new injury, giving rise to a new cause of action and the imposition of new liabilities on a separate, fully compensable claim. *See Todd Shipyards Corp. v. Director, OWCP*, 139 F.3d 1309, 1312 (9th Cir. 1998); *see also Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (recognizing that "[a]ggravation of a pre-existing condition can be an 'injury' under the Act").

Neither the last employer rule nor the aggravation rule suggests, however, that where an employee has filed a claim for an injury, his right to vindicate that claim is divested by his subsequent filing of another claim

regarding a subsequent injury. Certainly, nothing in the text of the statute supports that result. Rather, the statute imposes liability on an employer for compensation in cases of permanent partial disability, and gives the employee the right to obtain compensation for his loss of wage-earning capacity tied to that injury. 33 U.S.C. §§ 903(a), 904(a), 908(c)(21).

Indeed, in *Benjamin*, 297 F.3d 797, this Court expressly rejected the view that the last employer rule absolves a prior employer against whom a claim has been filed from liability on that claim. In that case, the employee filed two claims on the basis of successive audiograms, one obtained during his employ with a prior employer showing a 28.5% hearing loss, and another from a subsequent employer showing that the hearing loss had worsened to 34%. *Id.* at 799-800. The ALJ treated the two claims as merged, and concluded that the second employer was solely liable under the "last employer" rule. *Id.* at 801, 803. *Benjamin* held that this was error, stating:

> no case holds that two entirely separate injuries are to be treated as one when the first one causes, or is at least partially responsible for, a recognized disability . . . . The *Cardillo* rule allocates liability to one employer, the last employer, after a disability determination has been made with a determinative audiogram. It does not imply that there can be only one last employer for every worker.

Id. at 803-804.

Furthermore, *Benjamin* rejected the notion that liability on an earlier LHWCA claim for a quantifiable injury may be extinguished via the fortuity

"that the case was delayed to the point that the second claim became part of the same dispute." *Id.* at 804. Rather, the Court concluded, each employer remains separately liable on the claim for the impairment caused by the injury incurred in its employ. *Id.* at 805 (first employer is liable for 28.5% hearing loss).

The ALJ and Board cited this Court's decisions in *Kelaita*, 799 F.2d 1308, and *Foundation Constructors*, 950 F.2d at 621, as supporting the termination of MTC's liability. Thus, they appeared to believe that because SSA's liability was premised on an aggravation of Everitt's back condition -- which they likened to the rotator cuff and back injury aggravations experienced by the claimants in *Kelaita* and *Foundation Constructors* -- SSA was solely liable under the rationale of those cases. Rec. at 96. The Board, however, failed to recognize that even if Everitt's work at SSA did aggravate his back condition, any such aggravation did not operate to extinguish MTC's liability because Everitt had suffered a discrete, documented loss of earning capacity as a result of his 1996 injury at MTC. *Benjamin*, 297 F.3d at 805. In contrast, there is no indication in this Court's opinions in *Kelaita* or *Foundation Constructors* that those claimants suffered a similar reduction of wage-earning capacity from the first injury.

Accordingly, the guiding precedent for this case is *Benjamin*. Like the first employer in *Benjamin*, MTC retains responsibility for the claim filed for the injury incurred in its employ, even though Everitt suffered a similar, and further disabling, injury while working for a subsequent employer.

CONCLUSION

For the reasons stated above, the decision of the Benefits Review Board should be reversed. The case should be remanded for a determination whether concurrent awards are needed to compensate the claimant fully for the cumulative loss of his wage-earning capacity caused by the 1996 and 1997 injuries, and, if so, a permanent partial disability award should be entered against MTC that runs concurrently with the total disability award against SSA.

Respectfully submitted,

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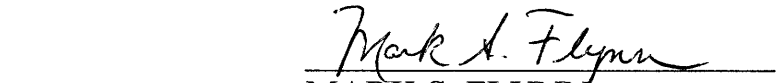

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STATEMENT OF RELATED CASES

The Director is not aware of any pending related cases.

CERTIFICATE OF COMPLIANCE

The text of this brief is double-spaced, with the exception of quotations more than two lines long, headings and footnotes, which are single-spaced. The typeface used is 14 points and is proportionately spaced. The word count according to MS WORD, the processing system used, is 6,888.

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